The local impact of a global court : assessing the impact of the International Criminal Court in situation countries

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Introduction: The Ideal of a Global Court

I. Introduction

A. "The most serious crimes … must not go unpunished"

The adoption of the Rome Statute by some 120 states in 1998 after many years of negotiation defied expectations. The Rome Statute represented the apex in the struggle against impunity, a sign of true human progress, and a measure to reduce conflict and suffering: an ultimate universal standard in the globalization of human rights. The *Zeitgeist* of the ICC's origins should not be underestimated, nor should the strength of its ambition. At the core of the project of the International Criminal Court was an ideal of a "shared heritage", a "delicate mosaic" that may be "shattered at any time" by "unimaginable atrocities" committed against children, women and men. The Statute Preamble pledges, "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."[7]

Supporters viewed the establishment of the ICC as a paradigm-shift in global relations, a pinnacle in the fight for the universality of human rights, a triumph of liberalism, and an equalizer between nations. Former Prosecutor Luis Moreno Ocampo referred to an "empire of the law" replacing the "law of the empire."[8] The Court became a powerful symbol that "law would speak to power". In the words of Alvarez: "International lawyers share an appealing evangelical, even messianic agenda. We are on a mission to improve the human condition … [t]his mission requires preferring the international over the national, integration over sovereignty."[9] Zeal for the Court's mission, often "Kantian" or deontological in nature, has translated into a dearth of assessment of its concrete impact on the ground in the scholarship. Now, a decade and a half after its creation, it is time to take stock of the impact of the ICC in situation-countries.

B. Research Question

The primary research question is: what is the impact of the Rome Statute and the International Criminal Court in situation countries (and how should it be assessed).

1. Knowledge Gap on the Court's Impact on the Local Level

[7] Preamble of the Rome Statute of the ICC.
[8] Interview with Luis Moreno Ocampo, New York, November 2014.
[9] Alvarez, Jose E. *Multilateralism and its Discontents*, 11 Eur. J. Int'l L, 393(2000) p. 218, quoting Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 Australian Yearbook Int'l L, 1 1(1995).

In the first 15 years of its existence, relatively little has been written on the impact of the ICC in situation countries. The literature on the International Criminal Court largely focused on the legal dimensions of the Court's work,[10] rather than on the socio-political dimensions. A more limited body of literature exists on the impact of international criminal courts within the societies they were meant to serve. [11]

The ICC's first decade was beset with anxiety that its trajectory to success would be cut short by premature attacks from unfriendly critics. What the Court lacked were friendly critics. Its "friends" consist largely of a microcosm of dedicated supporters, consisting largely of diplomats, activists, non-governmental organizations, international lawyers and judges, and diplomats.[12] Many of those involved in the creation of the ICC went to work for it. Some individuals have been involved in the project for decades. International NGOs invested heavily in the ICC as a cornerstone in the fight against impunity.[13] Few scholars have addressed the impact of the ICC in situation-countries.[14] Instead, much of the literature addresses the Court's investigations and prosecutions; the politics around its case selection; and the political backlash against the Court in the African continent; as well as the Court's apparent reluctance to take on global powers. [15] What is lacking, however, is a methodological assessment of the Rome Statute and the Court's impact in country situations. Stahn advocates for a greater degree of realism and a more *factual*

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[10] Ainley, Kirsten. *The International Criminal Court on Trial.* Cambridge Review of International Affairs 24 (3) (2011) pp. 309-333: "As a centralized, permanent institution for investigating and prosecuting war crimes, the Court has (or should have) two main structural advantages over ad hoc tribunals: cost and efficiency."

[11] Much of the literature that exists on the four country situations at hand will be cited in this thesis. It is worth mentioning that Diane Orentlicher conducted a groundbreaking study on the impact of the ICTY in Serbia and Bosnia, focuses on the Tribunal's impact on victims; its impact on perpetrators; its impact on doing justice and dispelling impunity; its educative function in "addressing the past" or its impact on "truth and acknowledgement"; its impact on the rule of law and domestic war crimes prosecutions; and finally on its impact on reconciliation. Open Society Initiative: Orentlicher, Diane. *That Someone Guilty be Punished: The Impact of the ICTY in Bosnia,* 2008. Open Society Initiative: Orentlicher Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (2008).

[12] Vinjamuri, Leslie and Jack Snyder. *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice.* Annu. Rev. Polit. Sci. (2004) 7 pp. 345-62. Numerous delegates from the Rome Conference, Preparatory Committee, or Assembly of State Parties joined the Court staff in various capacities, as did representatives of NGOs.

[13] Glasius, Marlies. *The International Criminal Court: A global civil society achievement.* Routledge, London and New York (2006). Hundreds of NGOs form part of the Coalition of the International Criminal Court. Significant lobbies were present at the Rome conference. Dozens of NGOs converge on the Assembly of State Parties each year. NGOs such as Human Rights Watch, Amnesty International and others are fierce court defenders. They have expended considerable resources on support for the Court.

[14] The scholars that have done so, such as Mark Kersten, Phil Clark, Tim Allen and others are cited throughout this thesis. See also Stromseth, Jane. *The International Criminal Court and Justice on the Ground. Ariz. St. L. J.* Vol. 43 (2009), pp. 427.

[15] Robinson, Daryl. *Inescapable Dyads: Why the ICC cannot win.* Leiden Journal of International Law 2015 Vol. 28 (2) pp. 323-347. Cassese, Antonio. *Is the ICC Still Having Teething Problems?* Journal of International Criminal Justice, Volume 4, Issue 3, 1 July 2006, pp. 434-441. Bosco, David. *Rough Justice: The International Criminal Court in a World of Power Politics,* Oxford University Press (2014) p. 181.

understanding of what can be achieved by international justice, while acknowledging the limitations of facts and empirical assessment.[16]

C. Terminology

This thesis forms part of a research project entitled "Post-conflict justice and local ownership", carried out by the Grotius Center for International Legal Studies of Leiden University, and funded by NWO.[17] Impact, defined as a "marked effect or influence", deals with the desired outcomes of the establishment of the Rome Statute and the ICC. While the ICC is not part of the field of development, occasionally it is useful to refer to that field in how it assesses external interventions. The OECD-DAC Glossary of Key Terms in Evaluation and Results-Based Management defines impact as "positive and negative, primary and secondary long-term effects produced by a development intervention, directly or indirectly, intended or unintended."

Scholars and practitioners have tended to focus on a narrower question, which is about the effectiveness of the ICC, which relates to its performance against its mandate. This approach does not question the assumptions underlying the mandate itself. Yuval Shany in his book on the Effectiveness of International Courts argues in favor of a "rational system" or "goal –based approach" to analyzing the effectiveness of international judicial institutions.[18] Shany argues that the mandate providers are key to identifying the overall goals of international courts.[19] Shany suggests that goals can be distinguished between official goals and operative goals.[20] However, Shany cautions "research focusing on mandate providers … cannot ignore the expectations of other constituencies."

This thesis instead will look at the assumptions underlying the mandate of the ICC. Key assumptions are sometimes described in a theory of change, which is defined by the Center of Theory of Change as a "comprehensive description and illustration of how and why a desired change is expected to happen in a particular context". According to the UK development agency DFID, it "is increasingly being used in international development by a wide range of governmental, bilateral and multi-

[16] Stahn, Carsten, Editorial: *Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?* Leiden Journal of International Law, Volume 5, issue 2, (2012) pp. 257-258.
[17] See https://www.nwo.nl/onderzoek-en-resultaten/onderzoeksprojecten/i/23/5023.html. An expert group for the research project was held in 2014: http://www.thehagueinstituteforglobaljustice.org/events/expert-meeting-on-the-impact-and-effectiveness-of-the-international-criminal-court/.
[18] Shany, Yuval. *Assessing the Effectiveness of International Courts,* Oxford University Press 2014 at p. 13.
[19] Ibid. at p. 32.
[20] Ibid. at p. 231.

lateral development agencies, civil society organizations, and research programs intended to support development outcomes."[21]

The core assumptions relate closely to the desired outcomes of an intervention. Impact should go beyond effectiveness to measure a broader range of intended effects. Defining a framework requires first defining the desired outcomes or goals of an intervention, with clear indicators of how to achieve those goals. Impact, can be either direct or indirect and can encompass both intended and unintended effects. The effects explored here are at the country level.

Throughout the Court is referred to as a global justice institution.[22] This is juxtaposed with the local,[23] which is used here mainly refer to the national, rather than the sub-national level, although the impact of the court on victims may be more localized (as was the case in Northern Uganda). At the same time, one must guard against a dichotomy between local and global that is overly simplistic. Donais remarks, "in any post-conflict society, there is never a single coherent set of local owners, and that post-conflict spaces, almost by definition, are characterized far more by diversity and division than by unity."[24] Local ownership is a widely accepted concept in the world of international peace building and development, and is touched on in this thesis.[25]

This thesis will also address various aspects of the global legitimacy of the International Criminal Court, using four types of legitimacy defined by Cassese, i.e. "purposive legitimacy", "universal values legitimacy", "performance legitimacy" and "consent legitimacy."[26] However, the main form of legitimacy that is relevant to this thesis is that linked perceptions of the Court at the local level, meaning its acceptance among victims and affected populations.

II. A Proposed Framework for Assessing the Local Impact of the ICC

A. Methodology: Towards a "Factual Understanding"

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[21] http://www.theoryofchange.org/what-is-theory-of-change/. See Vogel, Isabel. DFID, *Review of the use of "Theory of Change" in International Development*, 2012: http://r4d.dfid.gov.uk/pdf/outputs/mis_spc/DFID_ToC_Review_VogelV7.pdf.

[22] Ocampo, Luis Moreno. *The International Criminal Court: Seeking Global Justice*. 40 Case Western Res. J. International Law 2007-2008, p. 215.

[23] Nesiah, Vasuki. *Local Ownership of Global Governance.* Journal of International Criminal Justice, Volume 14, Issue 4, 1 Sept. (2016) pp. 985-1009. See also Branch, Adam. *International Justice, Local Justice: The International Criminal Court in Northern Uganda.* Dissent (Summer 2004).

[24] Donais, Timothy. *Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peace-building Processes,* Peace & Change, Vol. 34, No. 1 (2009) p. 11.

[25] Ibid. p. 12.

[26] Cassese, Antonio. *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*. Leiden Journal of International Law 25 (2012), p. 492.

The ICC is aware of the importance of assessment, although its focus has been on performance assessment rather than impact assessment.

In 2014, the Assembly of State Parties requested the ICC to "[…] intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court's performance in a more strategic manner".[27] The Court took steps accordingly to identify indicators to assess its performance in four areas, namely whether (1) the Court's proceedings are expeditious, fair and transparent at every stage; (2) the ICC's leadership and management are effective; (c) the ICC ensures adequate security for its work, including protection of those at risk from involvement with the Court; and (4) victims have adequate access to the Court. In November 2016, the Court issued the second of its reports on these performance areas, suggesting specific indicators in each area.[28] All of these indicators are within the span of control of the Court, which is presumably why they were chosen.

Likewise, the Prosecutor has identified indicators related to its performance, which are linked to outputs rather than to its overall impact.[29] These included the numbers of arrest warrants and summons to appear granted, the number of persons with charges confirmed, number of convicted persons, as well as various internal operational and managerial indicators.

However, an attempt to assess the Court's impact mainly according to its performance or efficiency or its internal procedures remains a very narrow exercise, which avoids the larger questions of the Court's effectiveness in relation to broader desired outcomes or its impact. The former focuses on matters within the OTP or the Court's control, thus avoiding "causation complexity."[30] The latter requires the examination of factors external to the Court, as observed by Stahn:

> Performance assessment should not be one-way street or a self-serving exercise of performance validation. It requires a relational account, which takes into account how justice is communicated and perceived. The ICC matters to states or global audiences, but mostly to countries and societies where the crimes are committed.[31]

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[27] ICC-ASP/13/Res.5, 17 December 2014, Annex I, para. 7 (b). This is pursuant to an effort on behalf of the Open Society Justice Initiative to raise attention to the performance indicators of the Court. See OSJI Briefing Paper, Establishing Performance Indicators for the International Criminal Court, Nov. 2015.

[28] ICC, Second Court report on the development of performance indicators for the International Criminal Court, 11 November 2016.

[29] OTP, Strategic Plan 2016-2018, 6 July 2015, para. 104. Kotecha, Birju. *The ICC's Office of the Prosecutor and the Limits of Performance Indicators,* JICL Vol. 15 issue 3 (1July 2007) pp. 543-565.

[30] Kotecha, Birju. *The ICC's Office of the Prosecutor and the Limits of Performance Indicators,* JICL Vol. 15 issue 3 (1July 2007) pp. 543-565.

[31] Stahn Carsten. Human Rights and International Criminal Law Forum: http: //iccforum.com/performance. (2017).

The definition of desired outcomes therefore has to go beyond issues related to performance, to encompass broader goals that the Court was intended to accomplish. These could range from often-cited goals, such as deterrence and prevention, to goals relating to strengthening domestic legal systems, often referred to as complementarity; reducing impunity through more domestic trials or fewer amnesties; and contributing to repairing victims. It is considered increasingly important to be able to demonstrate desired outcomes of international interventions using empirical data. As noted by Scherrer: "An increase in demand for effectiveness and measurable results in the peace-building field has raised awareness of the need to assess impact, but assessing impact in complex post-conflict settings has been considered especially difficult."[32]

This thesis borrows from the fields of transitional justice, rule of law and development, in regard to identifying indicators to assess the impact of the International Criminal Court. In the fields of transitional justice and rule of law, the main sphere of intervention is at the domestic level: therefore, these fields offer valuable tools that can assist in building a framework for assessment. The fields of transitional justice and rule of law have grappled with the empirical standards by which to assess justice interventions.[33] Empirical work seeks to assess the impact of various transitional justice mechanisms against their assumptions or goals.[34] Similarly, in the field of rule of law and development, assessment along pre-defined indicators, using empirical data, is now considered critical to the effectiveness of interventions: as demonstrated by the Sustainable Development Goals of 2015.[35] Likewise, in the human rights and rule of law fields there has been a strong push towards the development of indicators to measure progress, many of which are quantitative in nature.[36]

Formulating "assumptions" is also a crucial element guiding international interventions. As mentioned, sometimes these assumptions are combined in a theory of change.[37] This thesis takes a theory-based approach to impact

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[32] Scherrer, Vincenza. *Measuring the Impact of Peacebuilding Interventions on Rule of Law and Security Institutions*. The Geneva Centre for the Democratic Control of Armed Forces (2012), p. 11.
[33] This debate is driven partially by development actors responsible for providing international aid, and who are used to working with tools for program "design, measurement and evaluation" such as logical frameworks. See for instance Duggan, Colleen. *"Show me your impact": Challenges and Prospects for Evaluating Transitional Justice.* International Development Research Center Evaluation Unit, Paper prepared for the Annual Meeting of the Canadian Political Science Association, Ottawa, ON 29 May 2009.
[34] See for instance Kathryn Sikkink, *The Justice Cascade*, W.W. Norton & Company (2011).
[35] SDG 16 seeks to promote peaceful and inclusive societies for sustainable development, the provision of access to justice for all and building effective, accountable institutions at all levels. SDG 16 seeks to measure complex notions of peace and justice along quantitative indicators such as numbers of intentional homicides (SDG 16.1.1); conflict-related deaths (SDG 16.1.2); victims of violence (16.1.3); under-reporting of violence (SDG 16.3.1) and unsentenced prisoners (SDG 16.3.2).
[36] Rosga, AnnJanette and Margaret Satterthwaie, *The Trust in Indicators: Measuring Human Rights,* Berkeley Journal of International Law Vol. 27 Issue 2 (2009). See also OSJI Briefing Paper, Establishing Performance Indicators for the International Criminal Court, Nov. 2015.
[37] Vogel, Isabel. DFID, *Review of the use of "Theory of Change" in International Development,* 2012: http://r4d.dfid.gov.uk/pdf/outputs/mis_spc/DFID_ToC_Review_VogelV7.pdf.

assessment, testing the assumptions that are explicit (or implicit) in the design of the ICC. By testing the "results-chain" of the ICC, beyond its outputs (investigations and trials) to its outcomes, the thesis seeks to learn whether the ICC is having its intended effects.

In the case of the ICC, the main assumptions that underpin its establishment can be distilled from the Statute itself, but also from examining the resolutions of the Assembly of State Parties, the Court's policy documents, and the statements of senior officials. The baseline for this study is the ICC's establishment in 2002. This thesis seeks to trace developments on the ground since 2002, based largely on long-term observation in the field as a practitioner, combined with research and key stakeholder interviews.

The drive for effectiveness has prompted much debate on what are the empirical standards by which to assess justice interventions.[38] Evaluators bemoan the fact that much of the evidence is anecdotal or inconclusive. A multidisciplinary, qualitative approach is required. Social science methodologies, including key stakeholder interviews or perception surveys, are useful in measuring impact of interventions. Information that can be used for assessments can include literature and publication searches; surveys and opinion polls; quantitative data; and key stakeholder interviews. A combination of these methodologies allows researchers to go beyond the anecdotal, and to start identifying trends.

This thesis seeks to put forward a framework with pre-defined indicators. These can be cast into two categories: normative or societal. First, this thesis will seek to assess the normative impact of the ICC on domestic legal systems, and on political processes such as peace processes. It will also seek to assess the societal impact on the rights of persons who have fallen victim to those crimes and the perceptions of affected populations. In each of these domains, different indicators will be used to measure progress, apart from the last of these, which will be measured by trends.

Measuring the impact of the Court will invariably raise questions of causality, and of attribution. The normative impact of Rome Statute norms on domestic systems or on peace processes may be easier to attribute to the Rome Statute or the Court itself through process tracing. However, attributing impact is more complex when dealing with societal impact in the form of impact on victims or perceptions. Where possible, the latter are supplemented by quantitative data such as opinion polls, but much more quantitative research is needed. On societal experience in particular, this thesis does not go beyond identifying trends or emerging experiences.

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[38]See for instance Duggan, Colleen. *"Show me your impact": Challenges and Prospects for Evaluating Transitional Justice.* International Development Research Center Evaluation Unit, Paper prepared for the Annual Meeting of the Canadian Political Science Association, Ottawa, ON 29 May 2009. See for instance the University of Ottawa Centre for International Policy Studies Working Paper, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, by Oskar Thomas, James Ron and Ronald Paris, April 2008.

Societal impact may influence legitimacy, defined as public support, which is increasingly viewed as important for international criminal justice.[39] Public opinion or support is subjective rather than objective. However, public trust is important to the legitimacy of legal institutions. Different kinds of survey instruments measure trust in public institutions, including courts. Again, more research is needed in this regard, in terms of opinion surveys.

Finally, impact may be generated by the existence of the Rome Statute itself; by the actions of the Office of the Prosecutor, which can be viewed as the engine room of the Court; or by the Court itself, through its decisions and judgments. These will be differentiated in as far as possible throughout the thesis.

1. Comparative analysis of country experiences: country selection

This analysis rests largely on a comparative analysis of country experiences. Much of the current debate on the impact of the ICC has centered on the Court's role in Africa.[40] This thesis seeks to go beyond this debate, and to take a wider view of the Court's impact and performance as a global justice mechanism. Four country experiences form the basis of this work, including two preliminary examination countries (Colombia and Afghanistan) and two investigations, including a Security Council referral and a self-referral (Libya and Uganda). Kenya is also included where appropriate, as one field visit was undertaken there in February 2014.

The country experiences were chosen based on professional experience in those countries, but this diverse selection also serves to give a wider view of the global impact of the ICC than is currently addressed in much of the literature. The contexts are all highly diverse in political, societal, economic and religious terms, and allow for a fuller discussion of the Court's global impact. For example, the World Justice Project's Rule of Law Index seeks to measure rule of law adherence in 113 countries based on 110,000 household and 3000 expert surveys. The countries examined all rank differently on these rule of law indicators. In 2017-2018, Colombia ranked 72 with a score of 0.50, whereas Uganda ranked 104 with a score of 0.40 and Afghanistan 111th with a score of 0.34. Scores on Libya are not available.[41]

This study discusses country experiences on a thematic basis:

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[39] Voeten, Erik. *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries in Law (2013). See also OSJI Briefing Paper, Establishing Performance Indicators for the International Criminal Court, Nov. 2015. OSJI argues in favor of "impact indicators" that seek to assess the Courts' perceived legitimacy and credibility.

[40] Nkansah, Lydia. *International Criminal Court in the Trenches of Africa.* African Journal of International Criminal Justice, Vol. 1 (2014) p. 1.

[41] The World Justice Index uses 8 indicators, including Constraint on Government Powers, Open Government, Order and Security, Civil Justice, Absence of Corruption, Fundamental Rights, Regulatory Enforcement, and Criminal Justice. On criminal justice, Colombia scores 0.34 or 92 out of 113, Uganda scores 0.34 or 94 out of 113, and Afghanistan scores 0.28 or 108 out of 113.

- In the discussions on systemic effect, Colombia, Kenya, Uganda, Libya and Afghanistan are all discussed.
- The chapter on transformative effect focuses mostly on the two countries where negotiations have taken place in the shadow of the Rome Statute: Colombia and Uganda, although the discussion on amnesties includes Afghanistan and Libya.
- The chapter on reparative effect focuses mostly on cases that proceeded to the investigation and victim participation stages, including Uganda and Kenya.
- The Chapter on demonstration effect discusses Uganda, Libya, Afghanistan and Colombia.

2. Data collection

In addition to the long-term observation described in the personal note, two methods of data collection were chosen, including (a) literature and document review; (b) key stakeholder interviews used to verify and supplement the conclusions. The information gathered for this thesis is mainly qualitative in nature.

The thesis draws on a wide range of resources. As a main source, it references academic literature and reports of policy institutions, think tanks, NGOs and media. While the Court's interventions in Uganda and Colombia have generated significant writing and analysis, including by experts with extensive knowledge of the local context, less academic literature exists on the situations in Afghanistan and Libya. As this thesis seeks to follow ground-level impact in recent years, it also draws heavily on the reports of policy institutes and think tanks, as well as NGOS and media reports, as these tend to produce "real-time" information on the situation on the ground.

In order to validate my knowledge gathered as part of my professional background, I conducted study trips to Colombia (November 2013, May 2014 and Nov. 2014) Afghanistan (November 2013 (overlapping with the first ICC OTP visit) and April 2014), and Uganda and Kenya (February 2014), to gather additional data for this thesis. I could not visit Libya since the deterioration of the security situation there although I continued to work for UNSMIL until Feb. 2015. It was not possible to conduct structured and comprehensive interviews with the very limited travel funds available to the project, which in fact only covered my travel to Kenya and Uganda.

I conducted interviews with key stakeholders in three of the four situation-countries (Uganda, Colombia, and Afghanistan) and Kenya, using semi-structured interviews, which were transcribed by hand. I also interviewed the former Prosecutor and some ICC staff. During these interviews I clearly identified myself as a researcher for the Grotius Center for International Legal Studies that I was conducting the

interview for PhD research. In some cases, interviewees asked not to be identified by name, due to the sensitivity of the subject matter. In most cases, they are identified by function and the names have been deleted to allow for personal data protection, except where the interview was with public persons who knew their comments might be attributed to them in the research. Direct quotes are usually avoided, since a number of the interviews took place through translation.

The persons interviewed all fall into the category of informed opinion-makers in that particular context. The interviewees fell into the following categories: Court staff, legal professionals, diplomats, UN officials, NGO staff, civil society leaders, Parliamentarians or other politicians, and victims. A full list of the names of interviewees is on file with the author. A list without names is found in the bibliography. [42] The questioning in the interviews followed a semi-structured format, always focusing on one of the four effects as relevant in that situation. The data gathered through the interviews were used in the following ways:

- Interviews with legal professionals assisted to inform the Chapter on systemic effect, although for its conclusions this Chapter relies mainly on documentary sources.
- Interviews with persons involved in the negotiations in Uganda and Colombia were used in the Chapter on transformative effect, although this Chapter too relies mainly on documentary and academic sources.
- Interviews with NGOs, victims, and Court staff were used to supplement the data on reparative effect in Chapter 5. Again, the conclusions in this Chapter rely mainly on documentary sources.
- Interviews with victims, NGOs and other stakeholders, such as parliamentarians, were instrumental in identifying trends in perceptions and form the basis for some of the conclusions in this Chapter. Nonetheless, the Chapter is clear that this data should not be viewed as representative of the general population, but only as indicative of trends.

The conclusions in this thesis are preliminary, and would benefit from more fieldwork. The case studies are limited and the evidence is not cross-compared with other country situations such as DRC, CAR, Cote d'Ivoire, and Sudan. The Court has

[42] This data collection took place prior to new rules being introduced at Leiden University in 2016. These rules require the formulation of a data management plan, in order to allow for open research data, i.e. data that is FAIR (findable, accessible, interoperable, re-usable). The new rules require that the data could be accessed, in as far as possible, by other researchers. These new rules are intended to phase in by 2020. However, since my data was collected in 2013-2014, it did not yet comply with these guidelines. Most notably, interviewees were not asked whether the data could be shared with other researchers, and this creates an ethical barrier to allowing for data to be shared. For the same reasons, the data could not be uploaded to a university server. At the same time, the handwritten data will be scanned and stored on file with the author in PDF files for safekeeping. Copies of the files will be preserved on a USB for 10 years, with a backup saved on iCloud. Only the author will be able to access these files.

only been functioning for 15 years and is constantly evolving. Nonetheless, some preliminary conclusions on the impact of the Court are contained in the last chapter.

B. Identifying the ICC Impact Assessment Framework (Chapter 1)

The Rome Statute Preamble states that the establishment of the ICC seeks to "contribute to ending impunity by conducting fair investigations and trials for the worst crimes, thereby contributing to their prevention." [43]

The presumed overall goal or desired outcome of the Statute as stated in the Preamble is ending impunity of the world's worst crimes, thus contributing to their prevention. Essentially, "the fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression."[44] At the time of the creation of the Court, this assumption was a matter of "faith" than based on empirical evidence or "fact".[45]

Apart from this overall desired outcome, other goals are more difficult to define and have suffered from inflated expectations. The website of the Coalition for the International Criminal Court identifies the goal of the ICC as "100% of humanity protected by the rule of law. Justice, deterrence of crime and peace."[46] Damaška has noted the discussion on goals of international criminal justice is "in disarray" and hampers the assessment of their performance.[47] The list of goals, he says, suffers from "overabundance" and "tensions" (such as peace versus justice, historical record and collective versus individual responsibility; the rights of the accused versus the rights of victims; prosecuting architects of crimes versus direct perpetrators; etc.).[48] It also suffers from the absence of a ranking order.[49] All this gives credence to the view that the field operates by "more of a faith-based

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[43] Impunity has been defined by the United Nations as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, 2005, E/CN.4/2005/102/Add.1 at Art. 1.

[44] Orentlicher, Diane. *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime.* The Yale Law Journal, Vol. 100, No. 8 (1991) at p.2542.

[45] Alvarez, Jose E. *Multilateralism and its Discontents,* 11 Eur. J. Int'l L, 393(2000) at 218, quoting Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 Australian Yearbook Int'l L, 1 1(1995): "International lawyers share an appealing evangelical, even messianic agenda. We are on a mission to improve the human condition. For many, perhaps most of us, this mission requires preferring the international "over the national, integration over sovereignty." Multilateralism is our shared secular religion.

[46] http://www.coalitionfortheicc.org/fight/global-justice-atrocities.

[47] Damaška, Mirjan. *What is the Point of International Criminal Justice?* Chicago-Kent Law Review, Vol. 83: 239 (2008) p. 330.

[48] Ibid. p. 330-335.

[49] Ibid. p. 339.

conviction than a conclusion based on sober analyses of the legalities of the matter and of the policy dilemmas."[50] Stahn refers to a "fundamental uncertainty about the actual goals and the focus of the Court. The fundamental question what the Court can and should realistically achieved is still unresolved."[51]

Fifteen years after the establishment of the Court, it is worth examining whether violence has reduced in conflicts around the world, including in situation-countries.[52] This question is discussed in Chapter 1. However, there is no broad agreement on other presumed effects of the Rome Statute, or how these ought to be assessed.[53]

Chapter 1 argues that this task is confounded by the fact that uncertainty still prevails about the identity of the Court. Should the Court be primarily considered a criminal court analogous with domestic criminal justice mechanisms; is it a transitional justice instrument; or should it contribute to promoting peace?

While uncertainty persists on some of these questions, in the years since it was established, the Court's founders and supporters increasingly recognize that the main impact of the ICC goes beyond trials in The Hague. Most of the Court's effects are felt on the domestic level, or among the constituencies for which it was ostensibly created. Defining the ICC's underlying assumptions, or intended effects, will therefore assist in developing an assessment framework.

Chapter 1 argues that the main assumption underlying the Court is that it will contribute to ending impunity, through building a culture of accountability for the world's worst crimes which will help to prevent those crimes in the future. Whether this is empirically borne out is not yet certain.

Linked to this main assumption, this thesis identifies four intended effects of the Rome Statute and ICC, including systemic effect on domestic legal systems; transformative effect on peace processes; reparative effect on victims; and demonstration effect, relating to its expressive function. As will be argued in Chapter 1, these areas of impact are reflected in the Rome Statute itself, or in the expressed intentions of the Assembly of States Parties or senior officials of the Court.

C. Applying the ICC Impact Assessment Framework (Chapters 2-6)

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[50] Wiesburd, A. Mark, *International Law and the Problem of Evil,* 34 Vand. J. Transnational Law, Vol. 34 no. 2 (March 2001) p. 230.
[51] Stahn, Carsten. *How is the Water? Light and Shadow in the First Years of the Court,* Criminal Law Forum 22:175-197 (2011), p. 187.
[52] This will be further elaborated in Chapter 1.
[53] Ainley, Kirsten. *The International Criminal Court on Trial*. Cambridge Review of International Affairs 24 (3) (2011) pp. 309-333.

"Systemic effect" refers to the impact of the Rome Statute and the ICC on domestic legal systems. Does the ICC play a role in domestic law reform? The systemic effect of the Rome Statute is presumed to be mainly through the application of the complementarity framework. Chapter 2 will first assess the framework of complementarity, in order to assess its systemic effect.

The Court's approach to complementarity is producing an "unintended effect", in that States take measures mainly to avoid an intervention by the Court. Chapter 3 further expands on this systemic effect, and argues that impact of the Rome Statute on domestic legal systems is best described as "internalization". Internalization is the process whereby states demonstrate compliance with international law.[54] Indicators of systemic effect, in the form of internalization, include:

- Implementation of domestic laws covering the Rome Statute crimes
- Adoption of other legislation that includes Rome Statute norms (such as victim participation)
- The establishment of new institutions to investigate or prosecute Rome Statute crimes
- (Genuine) national proceedings for Rome Statute crimes.

Transformative effect deals with the impact of the Rome Statute and the Court on processes such as peace negotiations, in order to contribute to ending impunity. Chapter 4 will evaluate the impact of the Rome Statute on peace negotiations in Colombia and Uganda. Indicators of transformative effect include:

- Impact on the content of peace negotiations, including the scope of prosecutions or the nature of punishments
- Impact of ICC on the process of peace negotiations, for instance through the inclusion of the views of victims
- Fewer amnesties for Rome Statute crimes in countries under the Court's jurisdiction.

Reparative effect refers to the impact of the Court on making justice available to victims. Chapter 5 will first assess the legal framework for victims and will then assess the reparative effects of the Court in situations that progressed to investigation, Uganda and Kenya. Indicators of reparative effects include:

- Whether victims are able to meaningfully participate in ICC proceedings
- Empowerment of victims as actors that are able to influence the Court's strategy
- Whether victims receive actual assistance or reparations, either

[54] Koh, Harold Hongju. *Why Do Nations Obey International Law?* 106 Yale L. J. (1997) 2599, 2615-34

through the Court or through the Trust Fund for Victims.

Systemic, transformative, and reparative effects are all part of the normative impact of the Rome Statute and the Court. Demonstration effect, in Chapter 6, deals with the societal impact of Court on the affected communities. Different elements are important to demonstration effect, including:

- Whether the Court is perceived as impartial in a specific context
- Whether the ICC's interventions are perceived as relevant or responsive to local communities and their justice struggles
- Whether the Court is viewed as a legitimate justice institution
- Whether it is perceived as independent
- Whether the Court is viewed as prolonging conflict.

In fields such as peace building and development, it is widely recognized that bottom-up approaches are considered a necessary complement to top-down interventions that tend to focus on institutions, [55] and are sometimes deemed as more effective. According to Amartya Sen, the very concept of justice should relate to the lives of ordinary people: "the focus on actual lives in the assessment of justice has many far-reaching implications, for the nature and reach of the idea of justice."[56] Nesiah remarks: "local ownership discourse has had a long shelf life in development, environment and other zones of global governance."[57] In relation to the ICC, which is mostly a top-down institution, the concept of local ownership surfaces most in discussions on outreach, without acknowledging the intricacies of the views of local populations on issues such as impartiality, relevance, and legitimacy. The Chapter on demonstration effect seeks to identify trends across different situations. Negative perceptions of the ICC may be an unintended effect, but can serve to hinder the overall impact of the Court. Finally, a conclusion in Chapter 7 reflects on any general observations that can be drawn from the four areas of effects.

III. Setting the Scene: The Global Context

> *Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must*. - Thucydides
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> *The Court is not perfect, but it is working, is delivering, and has matured*- Silvia Fernandez de Gurmendi[58]

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[55] De Hoon, Marieke. *The Future of the International Criminal Court: On Critique, Legalism, and Strengthening the ICC's Legitimacy*. ICL Rev. Vol. 17 Issue 4 (2017), pp. 591-614.
[56] Sen, Amartya. *The Idea of Justice*, Penguin Books (2009), Introduction.
[57] Nesiah, Vasuki. *Local Ownership of Global Governance.* Journal of International Criminal Justice, Volume 14, Issue 4, 1 Sept. (2016) pp. 985-1009.
[58] Speech by Silvia Fernandez de Gurmendi at Nuremberg Forum 17, *10 Years after the Nuremberg Declaration on Peace and Justice "The Fight Against Impunity at a Crossroad"*, 20-21 October 2017.

These are troubled times for the International Criminal Court. In 2016, three states threatened to withdraw from the Rome Statute, including long-standing supporter South Africa, although ultimately only Burundi has withdrawn. Whiting refers to a legitimacy deficit or "legitimacy drag" of the ICC,[59] and that it is "losing the perceptions game."[60] Nesiah states that the ICC is "facing a crisis of legitimacy in the localities where it was working the most."[61] Mutua says that the international criminal law and human rights communities "are prone to narratives of optimism but blind to sins of conception", pointing to failure of leadership; defects of conception such as the role of the Security Council; and politicization, which led to impunity for Kenyatta.[62]

Many supporters blame the former Prosecutor for the current malaise surrounding the Court. In October 2017, a series of articles appeared about Luis Moreno Ocampo, based on 40,000 documents retrieved from his email. These reports contain various serious allegations including that the former Prosecutor had maintained offshore bank accounts without declaring these; had colluded with a millionaire in Libya to give advice to those loyal to Haftar on how to avoid the ICC; had sought to have the case against Uhuru Kenyatta withdrawn after he left the Court. Court staff members are accused of having shared confidential information with him, [63] including the Prosecutor herself.[64] While these allegations are damaging and likely to affect perceptions of the International Criminal Court, the conduct of the former Prosecutor is mostly beyond the scope of this thesis.

A. The "Purposive" Legitimacy of the ICC

Cassese in his writing referred to "purposive legitimacy", i.e. the fact that an international tribunal pursues general goals that are broadly shared and approved by the institution's constituency."[65] The "purposive" legitimacy of the ICC comes from the fact that it seeks to prohibit the world's worst crimes, namely war crimes, crimes against humanity, and genocide.[66]

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[59] Subrahmanyam, David. *Whiting offers views on the International Criminal Court's Impact, 15* Oct. 2012, Harvard Law Today.
[60] Fisher, Kirsten. *Is the ICC Losing the Perceptions Game?* International Law and Justice Log, 23 May 2013.
[61] Nesiah, Vasuki. *Local Ownership of Global Governance.* Journal of International Criminal Justice, Volume 14, Issue 4, 1 Sept. (2016) pp. 985-1009.
[62] Mutua, Makau. *The International Criminal Court: Promise and Politics*, 109 Am. Soc. Int'l Law roc. 269 (2015).
[63] Bergsmo, Morten, Wolfgang Kaleck, Sam Muller and William Wiley. *A Prosecutor Falls, Time for the Court to Rise.* Torkel Opsahl Academic E-Publisher, FICHL Policy Brief Series No. 86 (2017).
[64] Spiegel Online, Becker, Sven and Dietmar Pieper, *The Ocampo Affair: Current ICC Chief Prosecutor Weighed Down by Predecessor*, 17 Oct. 2017.
[65] Cassese, Antonio. *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*. Leiden Journal of International Law (2012), 25 p. 492.
[66] This thesis will not deal with debates surrounding the crime of aggression, which only came into force in December 2017.

The purposive legitimacy of the ICC is evidenced in many developments since the Second World War, including the conclusion of international treaties prohibiting these crimes in addition to the Rome Statute; in the large number of signatories to the Rome Statute; and the statements of States that are not signatory or that have not ratified;[67] the positions of regional organizations such as the EU or AU;[68] on the prohibition of these crimes, including the rulings of regional human rights courts; and the increased measures taken for victims of these crimes, including truth-seeking and reparations. Throughout the thesis, this purposive legitimacy is presumed due to an increased acceptance of the norms in the Rome Statute, i.e. that the world's worst crimes should be prohibited.

On the other hand, the general "purposive" legitimacy of the Court is questioned much more in the specifics of particular country situations. This is particularly the case if the Court's actions seem inconsistent with or do not overlap with local justice priorities. This is particularly the case because the ICC does not have one "defined community" to which it is responsible.[69]

B. The "Universal Values" Legitimacy of the ICC

The International Criminal Court is based on the notion of one identity shared amongst all of humanity.[70] It is a universal project, based on what Cassese termed "universal values legitimacy", peremptory norms of international law (*jus cogens*) that are shared by the international community as a whole.[71] The violation of the rights of one part of this corpus is seen as the violation against all. The rights of one become the rights of all (the *civitas maxima*) and those who commit the violations are *hostis humanis* or enemies of humankind. The Court appropriates the plight of the "voiceless" victims, no matter which conflict is under scrutiny. At the same time, the interests of the international community and those of the immediate victims of the Court can, and do come into conflict in concrete situations, as will be discussed further in Chapters 4 and 5.

This decontextualized, abstract approach is further reflected in forms of legalism often displayed by supporters of the Court. Shklar defines legalism as "the ethnical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of rights and duties determined by rules."[72] Legalism is

[67] See for instance the recent statement by Russia, which states that it "consistently advocates that people guilty of grave offences must be held accountable": Dearden, Lizzie. *Russia to Withdraw from ICC amid calls for Syrian air strikes investigation,* The Independent, 16 Nov. 2016.
[68] For instance, the AU Constitutive Act rejects impunity in Article 4.
[69] DeGuzman, Margaret. *Choosing to Prosecute: Expressive Selection at the International Criminal Court*. 33 Michigan Journal of International Law (2012) p. 276/
[70] Koller, David. *The Faith of the International Criminal Lawyer*. International Law and Politics, Vol. 40 (2008) 1019 p. 1050.
[71] Cassese, Antonio. *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*. Leiden Journal of International Law (2012), 25 p. 492.
[72] Shklar, Judith. *Legalism: Law, Morals and Political Trials.* Harvard University Press (1964) p. 1.

reflected in the assertion that the ICC is an entirely apolitical institution that simply "follows the evidence", as a forensic and non-political exercise, leading to inevitable and indisputable conclusions based on the law.[73] According to Shklar, "The urge to draw a clear line between law and non-law has led to the constructing of ever more refined and rigid systems of formal definitions. This procedure has served to isolate law from the political, social and historical context in which it exists."[74] It ignores the fact that law itself is a product of political processes.[75] Nonetheless, many supporters of the Court seek its legitimacy through legalism.[76] This is in spite of the fact that the basic goals of the Court are not agreed.

The elevation of the Court as an institution above all forms of political considerations does not encourage a "consequentialist" assessment of its impact, or it may not encourage assessment at all.[77] Scholars writing about the Court often are remote from the communities where the Court is the most active. While a few scholars conducted empirical studies in situation-countries, but these dealt mainly with attitudinal responses to the Court.[78]

C. The "Performance" Legitimacy of the ICC: Facts and Figures

Discussions on the impact of the ICC often center on what Cassese has called "performance" legitimacy, i.e. the Court's record on its core mandate of investigations and prosecutions.[79] However, assessing the impact of the Court

[73] Some scholars call the Court a project of "constructivism", i.e. "efforts to change the prevailing pattern of social behavior should begin with forceful advocacy for generalized rules embodied in principled institutions such as courts." Snyder, Jack and Leslie Vinjamuri. *Principle and Pragmatism in Strategies of International Justice,* International Security, Vol. 28 No. 3 (Winter 2003/04), p. 10.
[74] Shklar, Judith. *Legalism: Law, Morals and Political Trials*. Harvard University Press (1964) p. 2-3.
[75] De Hoon, Marieke. *The Future of the International Criminal Court: On Critique, Legalism, and Strengthening the ICC's Legitimacy*. ICL Rev. Vol. 17 Issue 4 (2017), pp. 591-614: "Law reflects the outcome of a political struggle and thus is the product of power, and as such may embody and therefore reinforce structural inequalities, power relations and interests."
[76] Hansen, Thomas Obel. *The International Criminal Court and Legitimacy of Exercise* in Law and Legitimacy (Per Andersen et al. (eds)), DJOEF Publishers (2015).
[77] Koller, David. *The Faith of the International Criminal Lawyer*, International Law and Politics, Vol 40 (2008) p. 1019.
[78] See for instance Human Rights Center, University of California at Berkeley, Payson Center for International Development, Tulane University, International Center for Transitional Justice, *Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Republic of Congo*, August 2008; "Human Rights Center, University of California at Berkeley. *Building Peace Seeking Justice: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Central African Republic,* August 2010. A number of other surveys are discussed in detail in Chapter 6.
[79] Cassese, Antonio. The *Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*. Leiden Journal of International Law (2012), 25 p. 493. This concept borrows from an article that I wrote on the Special Tribunal for Lebanon: M. Wierda, H. Nassar, and L. Maalouf, *Early Reflections on Local perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, (2007) 5 JICJ p. 1065.

merely in terms of "facts and figures" is misleading, as it does not take into account impact in situation-countries.[80]

The OTP Strategic Plans submitted over the years accurately predicted a low number of investigations and trials, to offset expectations that its performance in this regard would be compared to other Tribunals. In terms of numbers of investigations and prosecutions, the ICC indeed has a poorer record than any of the other *ad hoc* Tribunals.[81] As of February 2018, the Court had opened 11 investigations, conducted 25 cases, issued 9 convictions (including contempt cases) and 1 acquittal, reparation orders, and has 4 ongoing trials. Some 14,000 victims had participated in the proceedings.[82]

In its first sixteen years, the ICC brought charges against 40 persons. Thirty-two are under arrest warrants, and 8 under summonses to appear. By way of contrast, in roughly twenty years, ICTY concluded proceedings against 141 accused and 20 are still pending. Eighteen were acquitted. ICTR completed 75 cases with 12 acquitted. The Special Court for Sierra Leone, which was created at the same time as the ICC, completed cases against 9 individuals over the same time span, including appeals. None was acquitted.

As of May 2018, the ICC had issued four convictions: Thomas Lubanga Diyolo, convicted on 14 March 2012 for the very narrow charges of child recruitment; Germain Katanga, convicted on 7 March 2014; Jean-Pierre Bemba, convicted on 21 March 2016 for war crimes and crimes against humanity, including sexual violence committed in CAR; and Ahmed al-Farqi al-Mahdi, convicted on 27 September 2016, pursuant to a guilty plea, for the war crime of attacking religious and historical buildings in Timbuktu. The Court faced many problems during these trials. In *Lubanga,* the first witness famously recanted his testimony, and the Trial Chamber heavily criticized the Prosecution for its reliance on intermediaries.[83] *Katanga* was acquitted of all the original charges leveled against him, and was only convicted because a majority of the Trial Chamber re-characterized the crime.[84] Four other accused from DRC were convicted for offences against the administration of justice. On 8 June 2018, in an epic setback, the Appeals Chamber acquitted Jean-Pierre Bemba, deciding that the Trial Chamber had "failed to appreciate limitations" that

[80] Interview with Luis Moreno Ocampo, New York, November 2013.
[81] Davenport, David. *International Criminal Court: 12 Years, $1 Billion, 2 Convictions.* Forbes 21 March 2014: "You don't have t o be a legal expert to figure that the preventive effect of convicting 2 warlords in 12 years doesn't exactly leave international war criminals shaking in their boots."
[82] Secretary General, Message for the Event Marking the 20th Year Anniversary of the International Criminal Court, 15 Feb. 2018.
[83] *Prosecutor versus Thomas Lubanga Dyilo*, Redacted Decision on the Defence Application Seeking a Permanent Stay of the Proceedings", Case No. ICC-01/04-01/06, 7 March 2011.
[84] *Prosecutor versus Germain Katanga,* Judgement, Minority Opinion of Judge Christine van den Wyngaert, ICC-01/04-01/07-3436-AnxI , 7 March 2014, paras. 138-139, 140.

Bemba faced in his role as remote commander to MLC troops deployed to the Central African Republic, in the investigation and prosecution of their crimes.[85]

The high-profile actions of the Court against African heads of state, including Omar Al-Bashir, Qadhafi, Gbagbo and Kenyatta, have given rise to more difficulties for the Court. First, a Pre-Trial Chamber dismissed genocide charges against Sudanese President Omar Al-Bashir, even though ICC Prosecutor compared the situation in the camps in Darfur to the concentration camps of Nazi Germany.[86] Charges against Qadhafi were brought within 3 months, but Qadhafi was killed shortly afterwards. In the case of Laurent Gbagbo, the confirmation of charges was delayed so that the Prosecutor could expand the charges against him, which were underpinned by "apparently insufficient" evidence.[87] In the Court's most high-profile setback, on 5 Dec. 2014, the Prosecutor announced the withdrawal of charges against Uhuru Kenyatta.[88] One witness had to be withdrawn from the case after admitting that he had provided false evidence, and another had indicated he was no longer willing to testify, so that there was insufficient evidence to proceed to trial. This development raises the difficult question of why the Prosecution chose to proceed on thin evidence in such a high profile case.[89] Witness interference has accompanied almost every case brought at the ICC.[90]

If the Court is to be judged solely by facts and figures relating to its investigations and prosecutions, its record is poor. For instance, the OTP has a poor general record

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[85] Wakabi, Wairagala. *Bemba Acquitted of War Crimes at the ICC.* International Justice Monitor, 8 June 2018.

[86] Mamdani, Mahmood. *Beware Human Rights Fundamentalism*, Mail and Guardian Opinion, 20 March 2009.

[87] The Trial Chamber observed that of 45 incidents with which Gbagbo was charged, "the majority of them are proven solely with anonymous hearsay from NGO Reports, United Nations reports and press articles. As explained above, the Chamber is unable to attribute much probative value to these materials." *Prosecutor vs Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02-11-01/11m 3 June 2013 at para 36.

[88] Simmons, Marlies and Jeffrey Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest: Uhuru Kenyatta Faced Allegations of Crimes Against Humanity*, International New York Times, 5 Dec. 2014.

[89] The withdrawal also came at a very unfortunate time for the Court in terms of the immediate aftermath of the 12th ASP in which supporters of the Court, both States and NGOs, fought hard to preserve the ability of the Court to proceed against Kenyatta. While an amendment to Article 27, which allows the ICC to prosecute sitting government officials, was averted because it was raised too late, amendments were made to the Rules of Procedure and Evidence to as to excuse the accused from attending trial. These included Rules 100 (place of proceedings); Rule 68 (prior recorded testimony); and Rules 134*bis* (presence through the use of video technology and Rule 134*ter* (excusal from presence at trial), and Rule 34*quarter* (excusal from presence at trail due to extraordinary public duties).

[90] For a narrative and journalistic account of many of the trials, see Lingsma, Tjitske, *All Rise: The High Ambitions of the ICC and the Harsh Reality.* Ipso Facto, Utrecht (2017). The ICC ha faced major challenges in providing adequate protection and support to witnesses. Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3 (1 July 2017) pp. 567–591.

on confirmation of charges.[91] Human Rights Watch has argued, "the ICC's investigations and prosecutions have failed to demonstrate coherent and effective strategies for delivering meaningful justice to affected communities."[92]

One factor that accounts for these low numbers is the Court's approach to "focused investigations", under which investigative teams were kept small and rotated between different situations and cases.[93] The number of incidents investigated per case was kept purposely small.[94] However, the investigative teams of the ICC were criticized for lack of seniority and experience.[95] This resulted in "active investigations which are understaffed and investigations in hibernation where the capacity is lacking to maintain contact with the witnesses and preserve their cooperation."[96] During the early phases of the investigation, time in the field was often minimized.[97] Decisions on how to structure investigations sought to conserve resources but led to poor results in court.[98]

Certainly, compared to other tribunals, the Court faces the challenge of investigating during ongoing conflicts. Proponents of real-time prosecutions argue that "memories fade over time, witnesses move or pass away, documentary or physical evidence can be lost, and suspects may no longer be available for prosecution."[99] Conversely, Whiting argues: "in war crimes cases delay can often be essential for allowing the truth to emerge, which means that a rush to prosecute may result in incomplete justice."[100] The case of Kenya certainly comes to mind.[101]

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[91]The Pre-Trial Chamber failed to confirm charges against Callixte Mbarushimana; Abu Garda (who successfully brought evidence of an alibi, almost unheard of in international criminal proceedings); Henry Kosgey; and Muhammed Hussein Ali. Charges against another Kenyan accused, Francis Muthaura, were withdrawn after the Prosecutor admitted, "several people who may have provided important evidence regarding Mr. Muthaura's actions, have died, while others are too afraid to testify for the Prosecution." Statement by ICC Prosecutor on the Notice to withdraw charges against Mr. Muthaura, 11 March 2013.

[92] Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, Sept. 2011.

[93] De Vos, Christian. *Investigating from Afar: The ICC's Evidence Problem*. Leiden Journal of International Law, Volume 26, Issue 4, Dec. 2013 pp. 1009-1024.

[94] OTP Strategic Plan June 2012-2015 para. 48.

[95] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* (2010) p. 47. Many senior investigators left the court since 2005, alleging that the input of investigators is not sufficiently valued within the OTP.

[96] OTP Strategic Plan June 2012-2015 para. 17.

[97] Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* (2010) p. 47.

[98] Alex Whiting. *Guest Post: ICC Prosecutor Announces Important Changes in New Strategic Plan*, 24 Oct. 2013, Just Security Blog.

[99] Human Rights Watch. *Seductions of "Sequencing": The Risks of Putting Justice Aside for Peace,* December 2010 p. 3-4.

[100] Whiting, Alex. *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered.* Harvard International Law Journal, Volume 50, Number 2 (Summer 2009) p. 326.

[101] Interview with Kenyan civil society members, 2 Feb. 2014.

A third factor that contributes to low numbers is the focus on those of the highest levels of responsibility. [102] Investigating only small numbers those at the top, does not necessarily require building an investigative pyramid, but can be pursued through a suspect-based approach. The Appeals Chamber in *Ntaganda* found that the focus on those bearing the greatest responsibility is a policy, but not a legal requirement.[103] In 2012, the Prosecutor changed her approach to investigations to replace focused investigations with "the principle of in-depth, open-ended investigations while maintaining focus"[104] and said that in some cases she will focus on lower and mid-level perpetrators in order to build better cases.[105]

In any case, the Court's performance in terms of numbers of investigations and prosecutions should be assessed against limitations on its resources.[106] This is largely in the domain of the Assembly of States Parties. As described by Whiting, "the ICC cannot focus on just one conflict or set of conflicts for a prolonged period. Rather, it must, with roughly the same resources, investigate and prosecute cases across a range of situations around the world."[107]

The Court itself has adhered to a "limited growth" model encouraged by the ASP. With a current budget in 2017 of around 145 million euros,[108] the Court's annual budget that is roughly equal to that the ICTY at the height of its operations and a staff roughly the same size, if not smaller. The opening of 10 investigations in highly varied situations has created an enormous workload for the Court. The ICTY, like its predecessors, the International Military Tribunals at Nuremberg and Tokyo, could rely on significant support from IFOR and SFOR, international forces deployed to the former Yugoslavia, particularly in conducting arrests. In addition, the Court is following a number of situations through preliminary examinations, which seek also to contribute to encouraging domestic proceedings and to preventing, thus contributing to cost savings.[109] The Court has no such assistance, and since the economic downturn, for years it continuously faced a zero-growth budget, forcing it to do more with less.

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[102] Seils, Paul. *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court,* Case Selection and Prioritization, ed. Morten Bergsmo, FICHL, Publication Series No. 4 (2010) p. 69.

[103] Seils, Paul. *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court,* Case Selection and Prioritization, ed. Morten Bergsmo, FICHL, Publication Series No. 4 (2010) p. 69.

[104] OTP Strategic Plan June 2012-2015 para. 6.

[105] Ibid., para. 4.

[106] A 2003 Paper on some policy issues before the Office of the Prosecutor states that "the Office should endeavor to maximize its impact while operating a system of low costs."

[107] Whiting, Alex. *Guest Post: ICC Prosecutor Announces Important Changes in New Strategic Plan*, 24 Oct. 2013, at Just Security blog.

[108] ICC ASP, Proposed Programme Budget for 2017 of the International Criminal Court, ICC-ASP/15/10.

[109] OTP Report on Preliminary Examinations 2017. In 2017 this included Gabonese Republic, Palestine, Ukraine, Colombia, Guinea, Iraq/ UK and Nigeria. Philippines and Venezuela were added in 2018. Afghanistan, Burundi, and the Registered Vessels of Comoros, Greece and Cambodia were completed in 2017. OTP Report on Preliminary Examinations, 2017.

Due to the difference in the situations under its purview, the Court does not necessarily benefit from an "economy of scales" in its additional investigations. In this respect, it can be argued that the global nature of the ICC is not a merit, but a flaw. The fact that the Court is global may cause the international community to *underinvest* in in responses to mass atrocity. In the opening of the Kenya investigation, Judge Hans-Peter Kaul of Germany warned that if the scope of ICC interventions were stretched out this far, it would result in a "hopelessly overstretched, inefficient international court, with related risks for its standing and credibility."[110] One wonders whether this is not already the case. The Court has available to it less than 15 million Euros to spend annually on any situation, about 10% of the budget of ICTY and around half of that of the hybrid tribunals in Sierra Leone. Considering the scope of the conflicts that the Court is dealing with, and the complexity of the situations, this narrow approach calls into question whether the impact of the Court in any given situation can reach beyond the symbolic.

D. "Consent" Legitimacy: Global Acceptance as a Measure of Impact

1. Impact of Self- and Security Council referrals on Global Acceptance

The legitimacy of international criminal justice institutions is often weak at birth, and they must battle to gain acceptance, support, and credibility with time.[111] It may be no surprise that, fifteen years into its life span, the Court still falls short of global acceptance, otherwise termed "consent" legitimacy. The strongest support for the Court continues to come from the EU, Latin America and certain African states, and not from the great powers. Nonetheless, a clause on cooperation with the ICC was removed from the EU's neighborhood policy in 2011.[112] While a certain block of States, the "like-minded" group has generally sought to protect the Court, their support is inconsistent when it comes to dealing with "hard cases" in a post 9/11 context, such as Afghanistan and Palestine.

Out of ten investigations pending before the ICC at the time of writing, six are African self-referrals (Uganda, DRC, Cote d'Ivoire, Mali, and two from CAR). Supporters of the Court argue that the fact that so many situations before the Court

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[110] Dissenting Opinion of Judge Hans-Peter Kaul in Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr 01-04-2010 (31 March 2010).

[111] Stahn, Carsten. *Between "Faith" and "Facts": By What Standards Should We Assess International Criminal justice*? Leiden Journal of International Law, Volume 5, issue 2 (2012) pp. 258. Klarin refers to "four battles" as including the battle for survival, the battle for respect, the battle for hearts and minds, and the battle for time. Klarin, Mirko. *The Tribunal's Four Battles*, Journal of International Criminal Justice (2004), pp. 546-557.

[112] Davis, Laura. *EU Foreign Policy, Transitional Justice and Mediation: Principles, Policy and Practice,* Routledge (2014) p. 90 (Chapter on the EU and the ICC).

were triggered by self-referrals is evidence of the legitimacy of the Court.[113] Instead, the Court's reliance on self-referrals in Africa has contributed to a perception that it is opportunistic and politicized.[114] The Court's practice on accepting referrals has made it appear that the Court was intent on picking low-hanging fruits, while avoiding situations that would aggravate powerful states, which has in fact eroded "consent legitimacy".[115] In the words of Schabas: "Africa is increasingly disheartened, while the United States had become one of the Court's keenest promoters. Could it be that this change accounts for the malaise that today seems to afflict international justice?"[116]

Initially, it seemed as if Security Council referrals might serve to further legitimize the Court.[117] The second Security Council referral on Libya Resolution 1970 (2011), was discussed only for a day before the Security Council adopted it unanimously in March 2011. [118] The former Prosecutor argued that the relationship between the ICC and the Security Council in the Libyan case should be viewed as a new paradigm for international relations, one of a global acceptance of the ICC.[119] However, former ICTY Prosecutor Arbour instead concluded that: "two referrals by the Security Council to the ICC, in the cases of Darfur and Libya, have done little to enhance the standing and credibility of the ICC, let alone to contribute to peace and reconciliation in their respective regions."[120] The Libyan referral, originally mandated to protect civilians, effectively led to an overthrow of the regime.[121]

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[113] Shany, Yuval. *Assessing the Effectiveness of International Courts,* Oxford University Press 2014 p.244. See also Avocats Sans Frontieres, *Africa and the International Criminal Court: Mending Fences*, July (2012) p. 8.

[114] See Chapter 6 on perceptions. Max du Plessis*, Universalising International Criminal Law: The ICC, Africa and the Problem of Political Perceptions*, ISS, 6 Dec. 2013. See also Alana Tiemessen, *The International Criminal Court and the politics of prosecutions*, International Journal of Human Rights, Volume 18 (2014) pp. 444-461.

[115] Nouwen, Sara and Wouter Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, EJIL Vol. 21 No. 4. See also Alana Tiemessen, *The International Criminal Court and the politics of prosecutions*, International Journal of Human Rights, Volume 18 (2014) pp. 444-461.

[116] Schabas, William A. *The Banality of International Justice*, Journal of International Criminal Justice 11(2013), pp.545-551.

[117] On 31 March, the Security Council adopted Resolution 1593, referring Darfur to the ICC, with 11 votes in favor (9 of which were State Parties) and four abstentions, including Algeria, Brazil, China and the US.

[118] The link between this referral and the concept of "Responsibility to Protect" is examined by other scholars but will not be discussed here. See Stahn, Carsten. *Libya, the International Criminal Court and Complementarity: A Test for "Shared Responsibility*, Journal of International Criminal Justice Volume 10, Issue 2 (2012) pp. 325-349.

[119] Ocampo, Luis Moreno. *Gruber Distinguished Lecture in Global Justice*, at Yale (unpublished, on file with author). Ocampo, Luis Moreno, *The Gaddafi case,* NYU School of Law's Hauser Colloquium on International Law, September 2013.

[120] Arbour, Louise. *Doctrines Derailed? Internationalism's Uncertain Future*, International Crisis Group's Global Briefing, 28 Oct. 2013.

[121] Security Council Resolution 1970 exempted non-ICC states parties from any liability. The Resolution states in para. 6: "nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal

Immediately afterwards, even the states who promoted the referral considered brokering a political deal in contradiction to the Security Council referral.[122] Attempts at a Security Council referral to the ICC of the Syrian situation have proved impossible, resulting in vetoes exercised by Russia and China.[123] The fact that the ICC was unable to act on the situation in Syria, one of the largest-scale conflicts since WWII, diminishes its relevance.

2. The "Less Than Universal" Status of the Project

The global acceptance of the Court is currently endangered by the "less-than-universal" status of the project. Supporters of the Court continue to insist that universality is the ultimate aim, but it is an aim that may never be realized. The current situation is that "powerful actors in the international arena are in position to ignore the demands of international courts, and the sword of justice tends to be used most against individuals from states that occupy a lowly place in the *de facto* existing hierarchy of states."[124] In the words of Jean Ping, Chairman of the African Union: "The law should apply to everyone and not only the weak."[125]

This perception has also been strengthened by the Court's inactions in "hard cases", including Iraq, Afghanistan and Palestine. On 9 February 2006, the OTP published a letter to state he had decided not to open an investigation into communications dealing with war crimes committed during military operations by UK soldiers in Iraq between March and May 2003. This was because the number of willful killings (less than 20 in all), did not meet the required level of gravity because these crimes did not appear to be committed "as part of a plan or policy." On 14 January 2014, the German-based European Center for Constitutional and Human Rights and a UK law firm, Public Interest Lawyers, announced it had filed with the Court a 250-page document, detailing 412 cases of grave mistreatment against detainees, including

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Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya, established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State."

[122] William Hague, less than one month after the Court issued arrest warrants, said that a deal may be possible allowing Qadhafi to stay in Libya- while evading questions on whether he should be given immunity. Nicholas Watt and Richard Norton Taylor, *Muammar Qadhafi could stay in Libya, William Hague concedes,* The Guardian, 25 July 2011. The suggestion of a deal was supported by the US and Italy: Borger, Julian and Richard Norton-Taylor. *Diplomats discuss Libya's future as Italy plots Gaddafi's escape route,* The Guardian, 29 March 2011.

[123] UN News Center, Russia, *China block Security Council referral of Syria to the International Criminal Court*, 22 May 2014.

[124] Damaška, Mirjan. *What is the Point of International Criminal Justice?* Chicago-Kent Law Review, Vol. 83: 239 (2008) at p. 330.

[125] Sudan Tribune, *AU Backs Sudan President in ICC Row*, February 3, 2009. As stated by Mamdani: "the fact that the court is answerable to the Security Council means that it will create a regime for impunity for its permanent members and their close allies or clients. Anyone following the practice of the court since its creation will find these fears warranted." Guernica, The Genocide Myth: Joel Whitney interviews Mahmood Mamdani, 12 May 2009.

200 unlawful killings, 11 deaths in custody, and many cases of torture. [126] It since gave additional information on a total of 1071 cases of ill treatment of detainees, 319 alleged unlawful killings (including 52 in detentions), and 21 rapes of male victims.[127] The OTP has concluded that there is a reasonable basis to believe that UK nationals committed Rome Statute crimes in the context of Iraq, but it is still considering whether these crimes meet the gravity threshold and whether the admissibility criteria are met.

Another hard case is Afghanistan. According to the United Nations Assistance Mission in Afghanistan, over 23,000 civilians were killed in the conflict in Afghanistan between January 2007 and June 2015. A further 11,000 casualties were recorded by UNAMA in 2015.[128] In 2017 and 2018, civilian casualties continued to rise.[129] Furthermore, UNAMA has stated that 1820 civilians have been killed by international military forces since 2009.[130] The Taliban Code of Conduct, the *Layha*, allows for attacks on civilians, as reaffirmed in statements by Taliban leaders.

Members of the Taliban have been tried in Afghanistan for crimes against the state as contained in the 1976 Penal Code, the 1987 Penal Law on Crimes against Internal and External Security, and the 2008 Law on Combat against Terrorist Offences. A few government officials have been prosecuted, including two NDS officials, as well as two senior members of the notorious Haqqani Network, but little information exists on these cases.[131] These trials are conducted in secrecy and little information exists on them. Some defendants were executed, leading to retaliatory attacks by Taliban on the judiciary.[132] Nonetheless, several NATO powers, including Germany, expressed concern when the Court opened a preliminary examination.[133]

While US enhanced interrogation policies are well documented, the OTP was slow to conclude that there was a reasonable basis to believe that international forces may be responsible for violations. The OTP first said in 2013 that the torture allegations under its purview had an insufficient nexus to the conflict in Afghanistan.[134] The OTP held while there cases of torture between 2002 and 2003, but it was unsure

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[126] European Center for Constitutional and Human Rights/ Public Interest Lawyers, The Responsibility of UK Officials for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008, p. 6.
[127] OTP Report on Preliminary Examination Activities, 2016 at para. 87.
[128] See https://unama.unmissions.org/civilian-casualties-hit-new-high-2015.
[129] UNAMA, Latest UN Update Records Continuing Record High Levels of Civilian Casualties in 2018, 12 April 2018 . http://unama.unmissions.org/protection-of-civiilians-reports.
[130] OTP Report on Preliminary Examination Activities, 2017 para. 242.
[131] OTP Report on Preliminary Examination Activities 2016 para. 215.
[132] Qaane, Ehsan. *Nuremberg Academy Afghanistan Complementarity Study* (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/
[133] Bosco, David. *Rough Justice: The International Criminal Court in a World of Power Politics*, OUP 2014 at p. 181.
[134] OTP Report on Preliminary Examinations 2013, paras. 49-50.

that these "were committed as part of a policy."[135] In the aftermath of the US Senate Armed Services Committee Report, in 2014 the OTP went into more detail on US interrogation practices in Afghanistan.[136] However, it did not yet make any findings on whether there was a reasonable basis to believe international forces had committed international crimes, although it had information that at least 88 persons held in US custody were allegedly tortured.[137] Only in 2016 did the OTP find that there is a "reasonable basis to believe that, in the course of the interrogating these detainees, and in the conduct supporting those interrogations, members of the US armed forces and the US CIA resorted to techniques" amounting to war crimes (including rape) as part of approved interrogation techniques.[138] She also found that the US Attorney General did not investigate those most responsible for the alleged crimes.

Also relevant is the question of "complicity" of international forces through aiding and abetting torture by handing detainees over to Afghan authorities, with a high likelihood that they will be tortured. UNAMA documented a 35- 51% torture rate in detention facilities. [139] ISAF rules dictate that detainees cannot be transferred under any circumstances where there is a risk that they will be subjected to torture and ill treatment. Yet in 2013 UNAMA still uncovered reports of transfers to such facilities not by ISAF but by the "other government agency", which is taken to be a reference to the US intelligence agencies active in those areas.[140]

In late October 2016, the Prosecutor announced she was about to open an investigation in Afghanistan, as reported in an exclusive interview Foreign Policy.[141] Afghanistan allegedly was unhappy with the Prosecutor's unilateral initiative and allegedly threatened to withdraw from the Court.[142] It submitted new information

[135]Ibid., para. 51-52.
[136] OTP Report on Preliminary Examinations 2014 at para. 94: "In this context, the information available suggests that between May 2003 and June 2004, members of the US military in Afghanistan used so-called "enhanced interrogation techniques" against conflict-related detainees in an effort to improve the level of actionable intelligence obtained from interrogations. The development and implementation of such techniques is documented *inter alia* in declassified US Government documents released to the public, including Department of Defense reports as well as the US Senate Armed Services Committee's inquiry. These reports describe interrogation techniques approved for use as including food deprivation, deprivation of clothing, environmental manipulation, sleep adjustment, use of individual fears, use of stress positions, sensory deprivation (deprivation of light and sound), and sensory overstimulation."
[137] OTP Report on Preliminary Examination Activities 2016, at para. 224.
[138] OTP Report on Preliminary Examination Activities 2016 para. 211.
[139] OTP Report on Preliminary Examination Activities 2016 para. 217.
[140] UNAMA and OHCHR, *Treatment of Conflict-Related Detainees in Afghan Custody One Year On*, January 2013, Kabul, Afghanistan p. 64.
141 Bosco, David. *Exclusive: ICC Poised to open investigation into war crimes in Afghanistan.* Foreign Policy, 31 Oct. 2016.
[142] Anonymous source.

relevant to an admissibility assessment, sending information of 15 cases, including those of Anas Haqqani and Hafiz ul-Rashid.[143]

On 20 November 2017, the Prosecutor filed a request for authorization to open an investigation on crimes committed in the territory of Afghanistan since 1 May 2003 or crimes committed in State Parties with a nexus to the Afghanistan conflict since July 2002. These crimes included: crimes against humanity and war crimes by the Taliban and their affiliated Haqqani Network; War crimes by the Afghan National Security Forces ("ANSF"), in particular, members of the National Directorate for Security ("NDS'") and the Afghan National Police ("ANP"), and war crimes such as torture by members of the United States armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency ("CIA") in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004.[144] The OTP mentioned Poland, Lithuania and Romania as such other State Parties. In May 2018, the Pre-Trial Chamber had yet to decide on the opening of an investigation and faced further delay due to a changeover after the election of new judges.

Cooperation between the Afghan government and the OTP has improved, with the conclusion of a Road Map of cooperation and the appointment of an inter-ministerial commission, consisting of Foreign Affairs and Interior, a Special Representative of the President for the ICC, the AG's office, the National Directorate for Security as well as expert in international criminal law. However, Afghanistan takes the position that it should fulfill its own role under that state, "consistent with the Statutes key principles of "national ownership and complementarity."[145]

Afghanistan stated that it would have preferred the OTP "to have held off on its request for an authorization for a full investigation."[146] It has taken several anti-torture measures, including a new (anti-) torture law. It is not clear whether these measures have had impact: a UNAMA report from 2017 indicated that the situation has gotten worse rather than better.[147] Furthermore, the amnesty law discussed in Chapter 4 remains in place. On the other hand, the Afghan Independent Human Rights Commission and civil society welcomed the OTP's request. The OTP

[143] Kate Clark and Ehsan Qaane, AAN, *One Step Closer to War Crimes Trials (2): ICC Prosecutor requests authorization to investigate*, 5 Nov. 2017.
[144] ICC Statement, *The Prosecutor of the ICC Fatou Bensouda Requests Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, 20 Nov. 2017.
[145] Statement by H.E. Mahmoud Saikal, Permanent Representative of the Islamic Republic of Afghanistan to the United Nations, delivered at the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, 7 Dec. 2017.
[146] Ibid.
[147] UNAMA, Treatment of Conflict-Related Detainees: Implementation of Afghanistan's National Plan on Elimination of Torture, April 2017. UNAMA concluded that 39% of those interviewed gave credible accounts of torture as opposed to 35% in 2015. This torture happened in NDS or ANP custody.

concluded that no investigations or prosecutions against Taliban, NDS or ANP had taken place by Nov. 2017.[148]

Much anticipation also accompanies the US response under the Trump administration. The OTP has said that even though the alleged acts of torture are a small percentage of the total of those detained, they can still be considered "serious both in their number and in their effect."[149] For these cases too, the ICC has said that at this stage no relevant investigations or prosecutions have been concluded that would prevent admissibility in these cases.[150] Bosco has argued that a US response to the opening of an ICC investigation could take one of three options: (1) to delay and defer, trusting that US officials would not be prosecuted; (2) a "positive red line" which "vigorously defends its position while also preserving a positive relationship" with the ICC by arguing that the Prosecutor should use her discretion not to prosecute a non-member; and (3) a "negative red line", which would adopt a more confrontational line against the Court. Bosco concludes optimistically: "Even an energetic and multifaceted US campaign against the court would most certainly fail to cripple it."[151]

Perhaps the hardest case of all is that of Palestine. The Israeli incursion into Gaza in 2009, Operation Cast Lead, resulted in over 1200 Palestinian deaths, many of them civilians, as documented in the Human Rights Council's "Goldstone Report".[152] On 22 January 2009, Ali Kashan, then Minister of Justice of the Government of Palestine, filed an Article 12 (3) declaration for "acts committed on the territory of Palestine since 1 July 2002." Reportedly, members of the OTP encouraged the Palestinian Authority to file the declaration, in order to gain credibility with the Arab street to counter criticism over the arrest warrant against Omar Al-Bashir.[153]

Over the next three years, the OTP solicited views on whether it should accept the declaration, but finally issued a decision on 3 April 2012 of only 2 pages. It concluded, "It is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purposes of acceding to the Rome Statute and thereby enabling the exercise of the jurisdiction of the Court under article 12 (1)."[154]

In 2013, the OTP argued that the United Nations General Assembly Resolution (67/19), adopted on 29 November 2012, recognizing Palestine as a non-member

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[148] OTP Report on Preliminary Examinations, 2017.
[149] OTP Report on Preliminary Examination Activities, 2017 para. 273.
[150] Ibid.
[151] Bosco, David. *US Options for Responding to ICC Scrutiny in Afghanistan*. Lawfare Blog, 23 Feb. 2017.
[152] Report of the United Nations Fact Finding Mission on the Gaza Conflict ("Goldstone Report"), A/HRC/12/48, 25 September 2009.
[153] Bergsmo, Morten, Wolfgang Kaleck, Sam Muller and William Wiley. *A Prosecutor Falls, Time for the Court to Rise.* Torkel Opsahl Academic E-Publisher, FICHL Policy Brief Series No. 86 (2017).
[154] ICC-OTP, "Situation in Palestine," 3 April 2012.

observer State to the United Nations did not does not "cure the legal invalidity" of the 2009 declaration, since Palestine had not acceded to the Rome Statute.[155] Several states including the United States, UK, Canada, Germany and The Netherlands, voted against, or abstained from a General Assembly Resolution recognizing Palestine as a state, arguing that statehood could result in an ICC prosecution, and that this would hinder the pursuit of peace.[156] Israel threatened to abandon peace negotiations if Palestine initiated any action at the Court.[157]

In July 2014, widespread conflict broke out once more in Gaza, under operation "Protective Edge". In the aftermath, the Guardian newspaper alleged that that the decision of the Prosecutor not to open an investigation on Palestine was the result of political pressure,[158] but this was denied by the Prosecutor.[159] On 2 January 2015, Palestine acceded to the Rome Statute of the International Criminal Court, and it accepted the ICC jurisdiction since 13 June 2014, through an Art. 12(3) declaration. On 16 January 2015, the Prosecutor opened a preliminary examination on the situation in Palestine. Israel immediately responded by lobbying Canada, Germany and Australia to cut funding to the ICC – to no avail.[160] The OTP is still in the process of gathering relevant submissions and available information. It has also paid visits to Palestine and Israel but has not yet opened an investigation.[161] The situation involves many complex legal and factual questions, but the OTP has stated it will reach conclusions within a "reasonable time frame."[162]

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[155] The comments were an answer to a legal opinion filed by two well-respected human rights organizations, Al-Haq and the Palestinian Center for Human Rights, in October 2013 arguing that if the goal of the Statute is to end impunity, the Court should accept jurisdiction on the basis of the Article 12(3) declaration, in spite of the fact that Palestine has not yet acceded to the treaty. Harriet Sherwood, *ICC urged to investigate 'commission of crimes' in Palestinian territories*, The Guardian, 4 October 2013: ttp://www.theguardian.com/world/2013/oct/04/icc-urged-investigate-commission-of-crimes-palestinian.

[156] Dworkin, Anthony. *Case Study: Goldstone and After- Judicial Intervention and the Quest for Peace in the Middle East,* European Council on Foreign Relations, 5 Nov. 2013.

[157] Sherwood, Harriet. *ICC urged to investigate 'commission of crimes' in Palestinian territories,* The Guardian, 4 October 2013: http://www.theguardian.com/world/2013/oct/04/icc-urged-investigate-commission-of-crimes-palestinian.

[158] Berger, Julian. *Hague Court under Western Pressure not to Open Gaza War Crimes Inquiry*. The Guardian, 18 August 2014.

[159] Bensouda, Fatou. *The truth about the ICC and Gaza,* The Guardian, 29 August 2014. See also Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine", 2 September 2014: "The simple truth is that the Office of the Prosecutor has never bee in a position to open such an investigation for lack of jurisdiction. We have always, clearly and publicly, stated the reasons why this is so."

[160] See http://www.jpost.com/Arab-Israeli-Conflict/Liberman-We-will-lobby-Canada-Australia-and-Germany-to-cut-ICC-funding-388099.

[161] ICC Report on Preliminary Examination Activities 2016 at paras. 140-143.

[162] OTP Report on Preliminary Examinations, 2017.

On 15 May 2018, the State of Palestine itself made a referral to the ICC pursuant to Articles 13(a) and 14 of the Rome Statute.[163] The scope of the referral encompasses Israel's settlement policy, arguing that it constitutes both a wide variety of war crimes and a crime against humanity. Palestine in its referral argues, "Ensuring justice and accountability is crucial to achieving peace, to deterring the commission of crimes, and to the integrity and credibility of the ICC itself."[164]

The case of Palestine remains highly controversial. The legitimacy of the Court depends on its ability to try such "hard cases". Some however argue that this case is a bridge too far for the Court, and that "the Court's long-term legitimacy is more important than any individual investigation, no matter how deserving of investigation a situation might be."[165] The question is whether the Court's legitimacy can survive by sidestepping the case of Palestine, as this would certainly be seen as a political decision.

In late 2016, a number of countries announced that they were seeking to withdraw from the Rome Statute.[166] The first was Burundi, where the Court had announced it was to open an investigation. It was soon followed by South Arica, a country that had long been supportive of the ICC.[167] South Africa issued a letter on 19 Oct. signed by the Minister for International Relations and Cooperation, to state that its obligations under the Rome Statute may be inconsistent with its Diplomatic Immunity and Privileges Act of 2001. Previously, South Africa was criticized for ignoring an ICC order to arrest Sudanese President Omar Al-Bashir during his visit in 2016. Shortly thereafter, the Gambia also announced it was withdrawing from the Rome Statute, President Jammeh arguing that the court was ignoring war crimes committed by Western countries and that it constituted an "International Caucasian Court".[168]

In November, Russia announced that it would seek to "un-sign" the Rome Statute, which it had signed in 2000, because "[t]he ICC has not justified hopes placed upon it and did not become a truly independent and authoritative judicial body."[169] This took place against a backdrop of calls for an investigation into an air strike on a humanitarian convoy in Syria. However, Russia stated that it "consistently advocated that people guilty of grave offences must be held accountable" and that it had developed laws on genocide, crimes against humanity and war crimes.[170]

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[163] Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf.
[164] Referral, para. 7.
[165] See Kevin Heller. *Britain to Support Palestine's GA Resolution?* 12 Nov. 2012, http://opiniojuris.org/2012/11/26/britain-to-support-palestines-unga-resolution/#comments.
[166] A mass withdrawal had long been referred to in AU meetings but had not yet occurred.
[167] The Guardian, *South Africa to quit the ICC,* 21 Oct. 2016.
[168] Reuters, *Burundi notifies UN of ICC withdrawal*, 26 Oct. 2016.
[169] Dearden, Lizzie. *Independent, Russia to Withdraw from ICC amid calls for Syrian air strikes investigation,* 16 Nov. 2016.
[170] Dearden, Lizzie. *Independent, Russia to Withdraw from ICC amid calls for Syrian air strikes investigation,* 16 Nov. 2016.

Fortune for the ICC reversed itself when President Jammeh was overthrown in The Gambia, and his successor, Adama Barrow, announced in early 2017 that it would not withdraw from the ICC.[171] Not long thereafter, South Africa announced in a letter to the UN Secretary General that its High Court had ruled that the letter of withdrawal was "unconstitutional and invalid", considering that Parliament had not been consulted.[172] This is not to say the Court's troubles are permanently abated. At the Assembly of States Parties in December 2017, South Africa's Justice and Correctional Services Minister, Michael Masutha, announced that he would file a new notice of withdrawal from the Rome Statute with the South African Parliament.[173] He stated that he would also introduce an International Crimes Bill, which "repeals the current Rome Statute Implementation Act (which makes the Rome Statute domestic law) and enacts international crimes similar to those in the Rome Statute. The new legislation will grant extra-territorial jurisdiction to our courts and proposes continued co-operation with other States and international bodies, including the ICC."[174] On 14 March 2018, President Duterte of the Philippines announced it would withdraw from the Rome Statute, after the OTP opened a preliminary examination into his war on drugs.[175]

On the other hand, the OTP itself took an innovative and bold step in requesting a ruling on jurisdiction in the context of the intentional deportation of more than 670,000 Rohingya from Myanmar into neighboring Bangladesh, based on the reasoning that an essential legal element of the crime, the crossing of an international border, occurred on the territory of a State Party to the Rome Statute.[176]

These developments raise the fundamental question of long the Court will be able to continue as a less-than- universal project. At some point in the future, states will no longer want to subject themselves to a legal regime that does not bind the powerful.[177]

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[171] See http://www.africanews.com/2017/02/09/the-gambia-will-remain-in-the-icc-president-barrow-confirms/.
[172] Onishi, Norimitsu. *South Africa reverses withdrawal from ICC*, New York Times, 8 March 2017.
[173] Fabricuis, Peter. *South Africa confirms withdrawal from the ICC,* Daily Maverick, 7 Dec. 2017.
[174] Ibid.
[175] The Guardian, *Rodrigo Duterte to pull Philippines out of the International Criminal Court,* 14 March 2018.
[176] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, ICC-RoC 44 (3)-01/18-1.
[177] This has long been the argument of Third World Approaches to International Law scholars such as Antony Anghie. Anghie argues that the conventional history of international law is based on three premises: (1) international law is created through the history and experience of the West, and in particular Europe; (2) the non-European world is peripheral to the making of international law; and (3) the major issue confronting the discipline of international law is how law can be created among equal and sovereign states. Anghie rejects these propositions and argues that international law was an imperialist creation to empower the West and disempower the non-West. The sovereignty doctrine was used to strip non-European peoples of their sovereignty. The sovereignty doctrine is based on identity. The Westphalia experience, Anghie argues, is not universal. He argues that

IV. Conclusion

The ultimate goal of the Rome Statute and the ICC, to end impunity for the world's worst crimes, is widely shared amongst the world's nations, as evidenced in different treaties and instruments, both at the international and national levels. The International Criminal Court represents an important tool through which to reach this goal, and the Rome Statute has important normative value, reflected in its purpose and universal values legitimacy. However, the impact must be sought in actual situations, in countries where the world's most serious crimes are occurring. For this reason, it is important to define a framework that can assess this impact at the country-level over the last 15 years.

It is essential to go beyond an assessment of the Court's performance legitimacy, through facts and figures. It is the Court's tactical decisions that have led to criticisms about its decisions on situation-selection, including its focus on Africa; its relatively low number of successful investigations and prosecutions; and its inability to engage in "hard cases". Assessing the Court based on these factors is difficult, because it is an ever-changing picture. After all, the Court is now investigating outside of Africa, and is conducting a number of important cases. The Prosecutor has applied to open an investigation in Afghanistan and is investigating in Georgia. On the other hand, some of these tactical decisions have decreased "consent legitimacy" and some countries are now pulling out of the Rome Statute.

Instead, the following Chapters will seek to go beyond the tactical, to assess whether the Rome Statute and Court system have normative or societal impact at a national level, on legal systems, political processes, and on the lives victims of Rome Statute crimes. These effects are referred to as systemic, transformative, reparative and demonstration effect, and will be defined further in the next Chapter. Such impact may be more profound than that of trials in The Hague, and may ultimately contribute to the prevention of such crimes, one of the core assumptions of the Rome Statute.

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sovereignty should not be seen as a doctrine of empowerment but of exclusion. Anghie suggests that TWAIL needs to make the experience of the disadvantaged the basis of an inquiry about what should constitute international law. Anghie, Antony. LatCrit and Twail, 42 Cal. W. Int'l L. J. 311 (2012).