

Legal and Political Limitations of the ICC Enforcement System: Blurring the Distinctive Features of the Criminal Court¹

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I. Introduction

At the end of 2015, 13 International Criminal Court's (ICC) suspects remained at large despite outstanding ICC arrest warrants, some issued even 8 or 10 years ago.³ The president of Sudan, *Omar al-Bashir*, charged by the ICC in 2009 with crimes against humanity, war crimes and genocide committed in Darfur, is travelling freely and frequently to many countries, some of them non-party states, but also states parties, without being arrested and surrendered to the ICC.⁴ Due to a lack of any reaction from the UN Security Council to numerous ICC notifications on non-cooperation regarding the execution of arrest warrants against Omar al-Bashir, the ICC prosecutor decided in December 2014 to suspend its investigation into Darfur.⁵ That same year, the ICC prosecutor withdrew the charges against Uhuru Kenyatta, the president of

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³ See e. g. Report on the activities of the International Criminal Court, ICC-ASP/14/29, 13 November 2015.

⁴ The states parties are Chad, Kenya, Djibouty, Malawi, Nigeria, South Africa; the non-party states are Kuwait, Ethiopia, Qatar, Saudi Arabia, Egypt, Mauritania, China, Algeria, India, Indonesia

⁵ Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court, 12 December 2014, § 4.

Kenya,⁶ on the basis of insufficient evidence due to the bribery and intimidation of key witnesses and the lack of cooperation from the Kenyan government,⁷ and the same prospects of failure exist for the proceedings against Kenyan vice-president William Ruto. In November 2015, Namibia, one of the ICC's founding members, became the first African country to decide to withdraw from the ICC.⁸ In the 13 years of its existence, the ICC has rendered three final judgments, two convictions and one acquittal. Have we arrived at the point, prophetically admonished by Mirjan Damaška, where the gap between aspiration and achievement⁹ of the ICC has become so wide and so harmful to its legitimacy¹⁰ that its future is at stake?

Judging by continuous harsh political and academic criticism of the ICC, ranging from selection of situations and cases, content of charges, the application of complementarity, judicial decision-making, cost-benefit analysis, case management etc., maybe we have. However, despite its internal weaknesses, flaws and missteps, the breakdown of the ICC will not be the failure of the Court, its prosecutorial decisions or case law. It will be the failure of its current 124 states parties and the international community represented by the UN Security Council which did not establish an effective enforcement mechanism of the Court's procedural decisions. The brief history of the ICC shows that its weak enforcement powers and the lack of cooperation from the national governments and the UN Security Council are the decisive reasons for the defeat of ICC prosecutions of top governmental officials.

The results of the research in this paper are found in Chapters II. and III. Chapter II. explores the institutional and legal framework of the ICC enforcement system, first, by exposing the ICC's total operational dependence on cooperation, and its lack of basic criminal judicial powers; second, by outlining several models of international cooperation in criminal matters such as horizontal and vertical, or governmental and judicial; and third, by displaying the signs of the ICC's regressive development of vertical international cooperation and reaction to states' non-compliance. Chapter III. elaborates on the reality of the complex and difficult relationship between the African Union and the ICC. The support and cooperation of the African states is contrasted with the African Union's implementation of an anti-ICC policy which it justifies by the ICC's inherent double standards, inequality of political power, and international law on immunity.

⁶ Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09–02/11, 5 December 2014. On 13 March 2015, Trial Chamber V(B) terminated the proceedings in this case.

⁷ Statement of the ICC Prosecutor on the withdrawal of charges against Uhuru Muigai Kenyatta, <https://www.youtube.com/watch?v=s3HORJn15Mg> (visited December 15, 2015)

⁸ www.herald.co.zw/namibia-pulls-out-of-icc/ (visited December 15, 2015); www.namibian.com.na/index.php?page=archive-read&id=144660 (visited December 15, 2015)

⁹ Damaška, Mirjan (2009) *The International Criminal Court Between Aspiration and Achievement*, 14 *UCLA Journal of International Law and Foreign Affairs* 19–35.

¹⁰ Damaška, Mirjan (2008) *What is the Point of International Criminal Justice?*, 83 *Chicago-Kent Law Review* 329–365, 365.

II. International Cooperation as the Court's Enforcement Mechanism

1. The Vital Importance of International Cooperation with the ICC

In contrast to states' criminal courts, which operate within their own jurisdictions and are armed with authoritative orders supporting a government's executive branch, principally the police (general, judicial, prison), international criminal courts operate in other jurisdictions without any power to enforce their decisions outside their courtroom walls. International criminal courts do not have their own police and army,¹¹ and their prosecutors have very limited or no investigative powers on states' territories. They are displaced courts, established at the site, which satisfies the international community requirements, but far removed from places where crimes are committed, where defendants, witnesses, victims and material evidence are located and where investigation must be conducted. All persons, objects and information necessary for criminal proceedings are under state jurisdiction, and international criminal courts have no possibilities to reach them, investigate them, or to enforce any decisions concerning them without the state's help, and particularly the state of *delicti commissi*. The image of international criminal courts as dismembered giants drawn by the first President of the ICTY, Antonio Cassese,¹² is brutally true.

The legal mechanism of international law that enables the enforcement of the international criminal courts' decisions is cooperation. It creates the link that should unite ordering and enforcement of procedural acts pertaining to one criminal proceeding but split in different jurisdictions, with the ordering part taking place in an international jurisdiction, and the enforcement part in a national jurisdiction. Types and forms of state cooperation with the international criminal courts are defined in international treaties and can be pre-trial (investigative), trial (procedural) and post-trial, as well as mandatory or voluntary. The ICC's cooperation with states is absolutely crucial¹³ for its functioning at all stages of the proceedings: before and during the investigation into a situation and into a case, for gathering and producing evidence at the trial, as well as for enforcing judgments. However, while ICC's prosecutors, defense lawyers and judges have sufficient capabilities to conduct the trial stage of criminal proceedings, their investigative and coercive powers are weak or

¹¹ Army in the case of war conflicts could be crucial for apprehending suspects and ensuring the collection of evidence.

¹² "Notwithstanding this development, the ICTY remains very much like a giant without arms and legs — it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfill its functions." Cassese, Antonio (1998) On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian, *European Journal of International Law* 9, 2–17, 13.

¹³ Kirsch, Philippe (2007) The Role of the International Criminal Court in Enforcing International Criminal Law, *American University International Law Review*, Volume 22, Issue 4, 539–547, 546.

absent, so the investigative stage of criminal proceedings is entirely dependent on the cooperation of states and other actors. Therefore, the forms of cooperation listed in Part 9 of the Rome statute¹⁴ reflect primarily the ICC's deficiencies in enforcing investigative and coercive criminal procedural measures, such as arrest and surrender, access to crime scenes and evidence, taking witness testimony, questioning suspects, search and seizures, tracing, freezing or seizing proceeds and instrumentalities of crimes, protecting witnesses and investigators, information-sharing from national intelligence agencies, sharing DNA data, providing forensic assistance, taking other evidence and any other type of assistance. Arrest and surrender to the ICC and protecting witnesses are the most important, and at the same time most resisted cooperative measures in the international justice system.¹⁵ This reality has already been proven in the ICC criminal proceedings which have collapsed against the president of Sudan, Omar al-Bashir and the president of Kenya, Uhuru Kenyatta due to the state's non-enforcement of these measures.

While procedural cooperation, which serves to support the ICC's prosecutorial and judicial functions, is mandatory for the states, post-trial cooperation, although also indispensable for the Court's proper functioning, is voluntary even for the states parties. It is regulated in Part 10 of the Rome Statute and relates to the enforcement of the sentence, receiving detainees, relocation of witnesses, victims and acquitted indictees. Until the end of 2015 there were 15 relocation agreements, eight agreements on the enforcement of sentences (none since 2012), one agreement on interim release, and the draft of an agreement on the release in a case of acquittal, which has not yet been concluded.¹⁶

2. States' Cooperation with the ICC: Criminal Procedural Law Perspective

a) External Criminal Procedural Powers of National and International Courts

Ordering, coercive and enforcement powers are three pillars of external criminal procedure that enable criminal courts and prosecutors to execute criminal procedure activities outside the courtroom. Firstly, criminal courts and prosecutors have the ordering power to decide on various investigative measures towards individuals, legal persons, including state authorities. Secondly, criminal courts and prosecutors have repressive powers: they can decide to apply coercive measures in case of non-com-

¹⁴ Article 89 and 93 of the Rome Statute

¹⁵ The ICTY, although considered as a very successful court as concerns the enforcement of its arrest warrants, as none of its fugitives remained at large, the non-execution of its arrest warrants postponed the respective criminal proceedings for years and resulted in prolonging the Court's mandate from its initial goal of 2010 to 2017. E.g. the ICTY defendant Radovan Karadžić was indicted in 1995 and arrested in 2008 and Ratko Mladić was indicted also in 1995 and arrested in 2011.

¹⁶ Report of the Bureau on cooperation, ICC-ASP/14/26/Rev.1, 17 November 2015, 4.

pliance or for other procedural purposes. Thirdly, criminal courts and prosecutors have enforcement powers: their decisions are orders which must be abided by. The notions of external and internal procedure describe the distinction between criminal court activities outside and inside the courtroom or judicial power over persons, objects and information in the external world and in the physical possession of the court. However, these notions are rarely found in literature on national criminal procedural law and belong to the international criminal law terminology.¹⁷ The reason is that from a national point of view, this is a technical distinction without a difference because activities of external and internal domestic criminal procedure do not differ with regard to its existence, scope, content or enforceability. The ordering, coercive and enforcement powers of the court in the external world are an inherent and inalienable part of every domestic criminal procedure, and therefore, such distinction from a national perspective is unnecessary and seems like a hollow theoretical concept.

The situation is reversed at the international level, where the difference between external and internal criminal procedure is acute and essential. The ordering, coercive and enforcement powers of external criminal procedure of the international criminal courts are highly limited or non-existent.¹⁸ As a rule, the ICC external procedural measures are undertaken by the national authorities and in accordance with national law. The exception that confirms the rule exists when the state has broken down and is clearly unable to cooperate,¹⁹ in which case the ICC Prosecutor alone can order and enforce directly specific investigative measures within the state's territory.

Aside from lacking enforcement powers, there are both cases when the ICC does not have ordering powers either. These cases are related to on-site investigations²⁰ and to competing witnesses witnesses to give testimony. The ICC prosecutor is permitted to undertake an on-site investigation on the state's territory, but this original supranational power is carefully delineated in the Rome Statute so as not to trample on state sovereignty. Contrary to *ad hoc* Tribunals, the ICC cannot order or perform, any compulsory measures on the territory of states parties,²¹ and its power to undertake on-site investigations can be limited in the mandatory process of consultation by a *locus delicti* state and by any reasonable conditions or concerns determined by other

¹⁷ Claus Kreß / Kimberly Prost / Peter Wilkitzki (2008) Part 9. International Cooperation and Judicial Assistance, in: Triffterer, Otto (ed) Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article, 2nd ed. München, Germany: Beck, Hart, Nomos, 1506.

¹⁸ The first international criminal tribunals, International Military Tribunals in Nuremberg and Tokyo, had enforcement powers that were executed by the military forces of the Allies of World War II.

¹⁹ Article 57(3)(d) of the Rome Statute

²⁰ See 3.2.2.2 On-site investigations, in Kaul, Hans-Peter / Kreß, Claus (1999) Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, Yearbook of International Humanitarian Law, Volume 2, 143–175, 168.

²¹ See Crayer, Robert / Friman, Håkan / Robinson, Darryl / Wilmshurst, Elizabeth (2014) An Introduction to International Criminal Law and Procedure, Cambridge University Press, 531.

states parties (Article 99 (4)). As concerns compelling a witness to testify, it should be stressed that despite the increasing importance of electronic evidence, witness testimony remains the most significant evidence in the criminal proceedings. Therefore, citizens have a legal duty to testify truthfully and a national criminal court has the power, in cases of non-compliance with a court order to appear, to fine and imprison a witness; and in many national jurisdictions a disobedient witness is committing the offense of contempt of court. The ICC, on the one hand, has supranational power to directly summon the witness²² and the suspect, but on the other hand, while it is empowered to order an arrest warrant for a suspect, it cannot order any coercive measure to compel a witness to testify. The ICC can interview or take evidence from a person only on a voluntary basis²³ and the state has the duty to facilitate the voluntary appearance²⁴ but not to compel the witness to appear before the ICC. As maintained by the ICTY Trial Chamber in Blaškić case, the compulsory attendance of witnesses is a power “as necessary for the proper functioning of the International Tribunal as it is for domestic criminal courts”.²⁵ By stripping the ICC of the power to order the compulsory appearance of a witness and the state of its duty to enforce the Court’s summons to witness, the ICC has become more like a fact-finding commission than a criminal court. These two deficiencies in conducting on-site investigations and compelling the appearance of witnesses are considered to be greatest weakness of the ICC system,²⁶ not only from the point of effective but also fair criminal proceedings which requires the court’s and state’s help in gathering evidence for the defense.

Therefore, the transfer of criminal proceedings from a national to an international level has resulted in a tectonic shift. The powers that belong to external criminal procedure, and are critical for conducting effective and fair criminal proceedings, were taken away from the (international) criminal court and prosecutor and given to states. The construction of the ICC legal edifice did not, as feared by the ICTY Appeal Chamber in the Blaškić case, “end up blurring the distinctive features of international court”,²⁷ but it did result in blurring the distinctive features of criminal courts.

²² Article 64(6)(b) of the Rome Statute

²³ Article 99(4) of the Rome Statute

²⁴ Article 93(1)(e) of the Rome Statute

²⁵ ICTY, Prosecutor v. Tihomir Blaškić (IT-95–14) Trial Chamber Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, 18 July 1997, § 59. (further: Blaškić, ICTY, Trial Chamber, 18 July 1997)

²⁶ Kreß / Prost / Wilkitzki, 2008, 1509.

²⁷ ICTY, Prosecutor v. Tihomir Blaškić, Appellate Chamber Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, § 40. (further: Blaškić, ICTY, Appellate Chamber, 29 October 1997)

*b) Enforceability of Criminal Court and Prosecutor Decisions
in National and International Environments*

The actors relevant for enforcing a judicial decision are a criminal court or prosecutor, addressees of decisions, and the law enforcement authority. When they are located within the state, and pertain to the same jurisdiction, the enforcement procedure is, from a legal point of view, smooth and simple. In national criminal justice systems the enforceability of prosecutorial and court decisions is implicit and self-explanatory, as they ought to be obeyed by legal and physical persons under the threat of penalty or force and are *per se* enforceable by law enforcement. The courts and prosecutors are hierarchically above law enforcement who are not allowed to postpone, modify or refuse the enforcement of judicial decisions, unless they are ordered to commit an offense. This is the basic principle of the rule of law embedded in the functioning of every national criminal proceeding.

However, if the court, addressees of decisions, or law enforcement belong to different jurisdictions, national or international, the enforceability of criminal courts' decisions fundamentally changes. In such a case, it is no longer implicit, but depends on the other state's international law obligations to cooperate in enforcing foreign or international court decisions. The legal nature of national enforceability, in the world of independent sovereign states, is essentially different from transnational or international enforceability of court decisions. The criminal procedural law obligation to enforce is replaced by the international law obligation to cooperate. The legal difference between two obligations is that the obligation to enforce a criminal court decision is strict and final, while the obligation to cooperate is subject to state power to postpone, modify or refuse the execution of the criminal court decision.

The situation is the same in the case when a decision is rendered by an international criminal court. International law, founded on national sovereignty and state jurisdiction as its basic principle, does not establish the national authorities as law enforcement bodies of the international criminal courts, but also provides for the state obligation to cooperate with them. As was established by the ICTY in the Blaškić subpoena appeal judgment, the obligation to cooperate with the international criminal courts is an international obligation only incumbent upon states.²⁸ Therefore, the state obligation to enforce the ICC decisions is not primarily an obligation to enforce but an obligation to cooperate. The international criminal courts' enforcement is construed as a relationship between the two international sovereign subjects and not, as in criminal procedure, the hierarchical relationship between a court and its law enforcement bodies. International law inserts between a criminal court and a law enforcement authority, a state and its international obligation to cooperate which is susceptible to exceptions, discretion and interpretation, thus tearing apart the tissue of criminal procedural powers and endangering the very function to conduct criminal proceedings.

²⁸ Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 42.

c) *Horizontal and Vertical International Cooperation in Criminal Matters*

International cooperation in criminal matters has two models – horizontal and vertical, depending on the national or international ranking of the subjects of cooperation.²⁹ The horizontal model describes transnational cooperation between states, while the vertical model is used for international cooperation between states and international courts. Since the ICTY in the Blaškić appeal judgment twenty years ago identified the horizontal and vertical models of cooperation in criminal matters,³⁰ new forms have been developed. Within a horizontal model, aside from longstanding inter-governmental cooperation, the European Union member states created more stringent judicial cooperation. Within the vertical model, in addition to mandatory cooperation with the UN Tribunals, the ICC states moved backwards, developing more loose vertical cooperation.

aa) Horizontal Intergovernmental Cooperation

The traditional horizontal cooperation between states whose purpose is transnational enforcement of judicial decisions is preformed through extradition and mutual legal assistance treaties. Inter-state cooperation is an intergovernmental, consensual and reciprocal relationship between equals (*par in parem non habet imperium*).³¹ As a rule, the individuals, state officials or authorities, including competent judicial authorities, cannot be directly addressed by a state's request for assistance, since they are not addressees or actors of cooperation. Also, the foreign judicial decision cannot be directly enforced in another state, but has to be transposed in the legal system of a requested state and replaced by the corresponding domestic judicial decision in the so-called *exequatur* procedure. The procedure in a requested state consists of two stages: judicial and governmental. In the former stage, the court in the review procedure has to establish the existence of substantive and procedural legal requirements, including a check on evidentiary requirements, and to exclude the many grounds of refusal (nationals, double criminality requirement, political offenses, *lis pendens* for the same or other offense, a lack or reciprocity, etc.). In the latter stage, after the court has approved a request, the government has discretion in executing the request for assistance depending on the state's interests.³² The affording of mutual legal assistance between states in criminal matters in *ultima linea* depends on the discretionary power and the political will of the requested state. Therefore, the

²⁹ Detail analysis of horizontal and vertical legal assistance models see Sluiter, Göran (2002) *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Intersentia, 81–89.

³⁰ Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 47.

³¹ Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 42.

³² E.g. European Convention of 20 April 1959 on mutual assistance in criminal matters, Article 2. Assistance may be refused: b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

enforcement powers of a criminal court in the requesting state are significantly limited by the sovereign powers of the requested state.

bb) Horizontal Judicial Cooperation

In criminal matters, the European Union has fundamentally reformed from states the system of cooperation between its member states. The partial deferral of sovereignty to the European Union in the field of judicial cooperation in criminal matters has enabled the establishment of a regional cooperation regime that strengthens the state obligation to enforce foreign judicial decisions and diminishes the possibility of refusal. In the area of extradition and mutual legal assistance in criminal matters, the European Union, based on the principle of mutual recognition of judicial decisions, established in 2002, direct enforcement of decisions between national judicial authorities.³³ The states involved are no longer the requesting and the requested state, but the issuing and the executing state. Two accomplishments are crucial for the direct enforcement of foreign judicial decisions: the depoliticization of cooperation by the elimination of executive involvement and the reduction of grounds for refusal. The European Union member states' cooperation in criminal matters is judicial cooperation performed directly between member states' courts and prosecutors. Unlike intergovernmental cooperation, judicial cooperation allows for direct enforcement of foreign judicial decisions by national judicial authorities without the approval or control of a government. Supranational bodies, such as the European Commission and the European Court, having powers to monitor and sanction an uncooperative state, oversee whether the enforcement of foreign judicial decisions is in line with European Union law. So, contrary to the Blaškić subpoena appeal judgment, if a judge or a chamber of one European Union member state "order(s) the production of documents, the seizure of evidence, the arrest of the suspect (...) they must" *not* "turn to the relevant State"³⁴ but to the competent judicial authority of the relevant state.

cc) Vertical Mandatory Cooperation

The vertical model of cooperation establishes mandatory, hierarchical and a one-way relationship between states and international criminal courts. The major im-

³³ The principle of mutual recognition in the area of criminal law was for the first time envisaged at the Tampere European Council in 1999 whose Presidency Conclusions claimed that it "should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union" (§ 33). The first instrument implementing the principle of mutual recognition was the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States in 2002, which was followed with dozens of other instruments related to decisions on criminal sanctions, coercive measures, gathering of evidence and other criminal procedural measures. The Treaty on the Functioning of the European Union prescribes that "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments" (Article 82).

³⁴ Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 43.

provement from horizontal inter-governmental cooperation on the normative level is the exclusion of governmental discretion, making cooperation mandatory. A state has the legal obligation to cooperate and enforce the international criminal court's decisions, and it cannot adopt implementing legislation which can serve as a basis on which to avoid this obligation.³⁵ The model of hierarchical vertical cooperation was developed in the case of the UN *ad hoc* Tribunals (ICTY and ICTR). Since they were United Nation Charter's Chapter VII entities, their relationship with states was not one between equals.³⁶ These Tribunals had the power to issue binding orders to the states for cooperation.³⁷ No grounds for refusal of cooperation were permitted, which highly strengthened the states' legal obligation to enforce Tribunals' decisions. The only ground which could have led to the non-enforcement of the Tribunal's request, was the protection of national security interests; but the final decision on that issue was also made by the Tribunal and not by a state.³⁸ Such a strict enforcement regime was possible due to the principle of primacy of the Tribunal's jurisdiction over national courts,³⁹ which implies the strong hierarchical relationship between national and international criminal jurisdiction. Concerning primary jurisdiction, it is irrelevant whether or not the national judiciary is capable or willing to conduct criminal proceedings or whether an accused is already *sub judice*. Despite the elimination of governmental discretion and the introduction of mandatory enforcement, the channels of vertical cooperation have remained the same as in the horizontal cooperation model. Namely, although the ICTY Statute granted the ICTY prosecutor express authority to interact directly with state authorities,⁴⁰ the Appeals Chamber in the Blašk-

³⁵ See art. 27 of the Vienna Convention of 1969 on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." States are thus required to create internal legislation that would enable them to fulfill their duty to comply with orders of the International Tribunal." Blaškić, ICTY, Trial Chamber, 18 July 1997, § 48.

³⁶ Blaškić, ICTY, Trial Chamber, 18 July 1997, § 77.

³⁷ § 26 "The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies). " III. Disposition: (...) "the International Tribunal is empowered to issue binding orders and requests to States, which are obliged to comply with them pursuant to Article 29 of the Statute." Blaškić, ICTY, Appellate Chamber, 29 October 1997.

³⁸ Blaškić, ICTY, Trial Chamber, 18 July 1997, §§ 67–69.

³⁹ Article 9(2) of the ICTY Statute: The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

⁴⁰ Article 18(2) of the ICTY Statute: The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

ic judgment, ensured that the government strongly hold the position of the state representative and that it is the only addressee of the Tribunal's requests or orders.⁴¹

*d) Vertical Cooperation with the ICC:
Regression in International Law Enforcement*

One of the major concessions to state sovereignty at the (1998) Rome conference was made in the field of cooperation. The battle was between the horizontal approach aimed at transposing the intergovernmental law of extradition and mutual assistance,⁴² and the vertical approach aimed at transposing the hierarchical cooperation with UN *ad hoc* Tribunals. The regime of horizontal cooperation between national judicial authorities, at that time conceptualized, but not yet enforced in the European Union, was not an object of negotiations. Challenging the existing strict vertical cooperation with International Criminal Tribunals was possible since the ICC is not a UN Court but an independent treaty-based international organization. The adopted ICC cooperation regime, compared to the cooperation regime of the *ad hoc* Tribunals, is described in the literature as not being strong enough and suffering from a considerable number of imperfections;⁴³ less vertical or weak vertical cooperation;⁴⁴ a middle ground between a vertical and a horizontal model;⁴⁵ or a regime closer to inter-State cooperation.⁴⁶ Statutorily, the ICC possesses all three standard features detected by Sluiter,⁴⁷ which categorize the vertical cooperation regime: a) Contracting parties are under a general and binding legal obligation prescribed by the Rome Statute to cooperate with the ICC,⁴⁸ b) It has the power to settle authoritatively the disputes on cooperation with the states;⁴⁹ and c) The absence of strict reciprocity⁵⁰ results from the ICC's lack of statutory obligation to provide assistance to states parties.⁵¹ However, all three elements are subject to modifications and exceptions which

⁴¹ "The State cannot prevent the Prosecutor from seeking the assistance of a particular State official. This, however, does not mean that the particular State official has an international obligation to provide assistance. This obligation is only incumbent upon the State." Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 42.

⁴² On horizontal and vertical approach see Kaul, Hans-Peter / Kreß, Claus (1999) Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, Yearbook of International Humanitarian Law, Volume 2, 143–175, 158.

⁴³ Kaul / Kreß, 1999, 175, 171.

⁴⁴ Sluiter, 2002, 84, 88, 344–345; Kreß / Prost / Wilkitzki, 2008, 1507.

⁴⁵ Crayer / Friman / Robinson / Wilmshurst, 2014, 518.

⁴⁶ Ibid.

⁴⁷ Sluiter, 2002, 82–83.

⁴⁸ The States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court (Article 86 of the Rome Statute).

⁴⁹ Articles 87(7) and 119(1) of the Rome Statute.

⁵⁰ Kreß / Prost / Wilkitzki, 2008, 1508.

⁵¹ Sluiter, 2002, 85.

defer to state sovereignty, and a horizontal intergovernmental cooperation approach is apparent both from d) procedural perspective, and e) ineffectiveness of measures for non-cooperation.

aa) The many National Legal Exceptions to Mandatory Cooperation

Substantively, the main reasons for a weakening of the state legal obligation to cooperate with the ICC were the introduction of complementarity jurisdiction and reintroduction of grounds for refusal. The limitation of the ICC's jurisdiction by the principle of complementarity⁵² opened the path to different admissibility challenges related to the exercise of jurisdiction by the state, such as the national prosecution, or decision not to prosecute.⁵³ The logic of the principle of complementarity has also influenced the transplantation of the principle of specialty from horizontal cooperation, forbidding the ICC to prosecute a person for crimes committed prior to surrender, and before getting a waiver from the state which surrendered him or her (Article 101).

The states participating in the Rome Conference were aware of the dangers of the primary jurisdiction concept to the Court's effectiveness, but the protection of national sovereignty prevailed. Thus, Cassese in 1998 claimed that "excessive restrictions on the jurisdiction of international criminal courts can only result in the creation of ineffective institutions,"⁵⁴ and Kaul and Kreß in 1999 anticipated that in the future it will be revealed that "the complementarity regime of the Statute puts too much emphasis on the priority of national criminal justice systems" and "*per se* prohibits its further strengthening".⁵⁵ In contrast to the ICTY and ICTR, the ICC's abandonment of the principle of primacy allows for the conclusion that such dominance of international over national jurisdiction was possible only when applied to politically weaker states such as the ex-Yugoslav states and Rwanda.

Aside from the protection of national security interests, which is expressly mentioned as a ground of refusal,⁵⁶ the Rome Statute, like the ICTY and ICTR Statutes, does not contain other traditional grounds for refusal of horizontal cooperation.⁵⁷ However, authors agree that the Rome Statute has reintroduced the new grounds for refusal in vertical international cooperation.⁵⁸ The state can refuse the ICC's re-

⁵² Preamble (10), Article 1,

⁵³ Article 17(1) of the Rome Statute.

⁵⁴ Cassese, 1998, 16.

⁵⁵ Kaul / Kreß, 1999, 175.

⁵⁶ See Articles 72(7)(a) and 72(7)(a)(ii) and 93(4) of the Rome Statute.

⁵⁷ See Kreß / Prost / Wilkitzki, 2008, 1508.

⁵⁸ "With respect to forms of cooperation other than surrender, however, some of these clauses come close to a ground for refusal." Kaul / Kreß, 1999, 170; "Part 9, on a closer look, does not categorically reject all grounds for refusal of cooperation that one may find in a horizontal setting." Kreß / Prost / Wilkitzki, 2008, 1508; "...certain grounds for postponement or refusal exist," Crayer / Friman / Robinson / Wilmshurst, 2014, 518.

quest for all forms of cooperation, except surrender, on the basis of an existing fundamental legal principle of general application (Article 93 (3)), interpreted as a constitutional impediment of a general nature.⁵⁹ Then, a state can postpone the execution of a request due to interference with a national investigation or prosecution of another offense (Article 94). The evidentiary review of the grounds of suspicion in executing the ICC's arrest warrant can also be reintroduced, since it depends on the national law of extradition,⁶⁰ which usually involves such a review.

In addition to the conflict with national norms, the state's obligation to cooperate with the ICC may conflict with other international norms, such as respecting state or diplomatic immunity (Article 98); competing requests for surrender (Article 90); or another international obligation, whereby the ICC's request does not have priority, but the conflict has to be resolved by consultation (Article 93(9)).

bb) The ICC's Power to Settle Disputes: Enforcement through Consultation

The ICC is endowed with vertical authority to settle disputes on cooperation with states. This power ensues from the statutory provision that any dispute concerning the judicial function of the Court shall be settled by the decision of the Court (Article 119 (1)). The mechanism for dispute resolution is consultations between a state and the Court (Article 97). After consultations have been exhausted, the state may apply for a ruling regarding the legality of a request for cooperation from a competent ICC Chamber.⁶¹ Consultation is possible in the following cases: an admissibility challenge (Article 89(2) and 95), if the person sought by the Court is *sub judice* or serving a sentence for a different crime (Article 89(4)); if the requirements under national law are not fulfilled (Articles 91(2)(c) and (4) and 96(3)); of a conflict with an existing fundamental legal principle of general application (Article 93(3)); of the protection of national security interests (Articles 72 and 93(4)); of the request for a type of assistance which is prohibited by national law (Article 93(1)(l) and (5)); of the competing request from another State (Article 93(9)); of insufficient or erroneous information in a request, inability to execute a request for surrender, the breach of a pre-existing treaty obligation, or any problem identified by a state which may impede or prevent the execution of the request for cooperation (Article 97).

Apart from the legal inability of the Court to protect the integrity of its decision within a nationally conditioned framework of consultation, the Court's authority to settle disputes is completely compromised in the event of a conflict with a fundamen-

⁵⁹ See Crayer / Friman / Robinson / Wilmshurst, 2014, 530.

⁶⁰ Article 91(2)(c) of the Rome Statute prescribes that a ICC's request for arrest and surrender shall contain (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to request for extradition treaties.

⁶¹ Regulation 108 of the Regulations of the Court, ICC-BD/01-01-04

tal legal principle. According to Article 93 (3) of the Rome Statute, if such a dispute cannot be resolved by consultation, “the Court has to modify the request as necessary”, meaning that it is expressly recognized that the state has the last word.

Consultations involve the participation of a government which has broad and multiple grounds for denying or postponing the enforcement,⁶² and possibly modifying and not executing the criminal court’s decisions. From a criminal procedural law perspective, the process of consultation between a state party and the Court is incompatible and irreconcilable with the enforcement of criminal court decisions and the rule of law. Once a criminal court has rendered its decision, it is final and enforceable, and can be reversed only in the appellate or review judicial proceedings by another court. Consultations with a government’s executive branch on the content and enforceability of the Court’s decision mean the politicization of criminal proceedings, and undermines its lawfulness and legitimacy. There is also a legal reason against the consultation procedure with governments. If governmental discretion in executing the request for cooperation has no place in the ICC’s cooperation regime, as opposed to in the case of horizontal intergovernmental cooperation, then the government should not have any role in executing the request. Both the determination of the legal requirements for legality of the ICC’s request for cooperation and the application of national law on cooperation are the responsibility of the courts. Therefore, the consultation process can not only disrupt and delay⁶³ the criminal proceedings, but as we have seen in case of the ICC’s request to South Africa for the arrest of al-Bashir, can also be misused by an uncooperative government.⁶⁴

⁶² In the case of an admissibility challenge (Article 89(2) and 95) or an ongoing investigation or prosecution (Article 94) it is expressly prescribed that the state may postpone the execution of the request for cooperation until a determination by the Court.

⁶³ Crayer / Friman / Robinson / Wilmshurst, 2014, 530.

⁶⁴ Knowing that president al-Bashir might notified attend the 25th Summit of the African Union in Johannesburg from 7 to 15 June 2015, the ICC Registry on 28 May 2015 notified the South Africa of its obligation to arrest and surrender him to the ICC and to commence consultations with the ICC only if any difficulties were expected. However, South Africa initiated consultations with the ICC on 12 June 2015, more than two weeks after the ICC’s reminder, and one day before President al-Bashir arrived in South Africa. After the ICC ended consultation declaring that “there exist no issue which remained unclear or had not already been explicitly discussed and settled”, South Africa on 12 and 13 June required another consultation; and on 15 June 2015 claimed that consultation had not taken place. See Manuel J. Ventura (2015) *Escape from Johannesburg?: Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of Al-Jedda*, *Journal of International Criminal Justice* 13 (5): 995–1025, 997–1000; Erika de Wet (2015) *The Implications of President Al-Bashir’s Visit to South Africa for International and Domestic Law*, *Journal of International Criminal Justice* 13 (5): 1049–1071, 1069; Johan D van der Vyver (2015) *The Al Bashir debacle*, *African Human Rights Law Journal* vol.15 n.2, 561–579, 562.

cc) The ICC's Obligation to Afford Assistance
to National Primary Jurisdiction

The principle of complementarity was also key to transforming the vertical one-way cooperation into a reciprocal one between the states and the ICC. The Court is not strictly obligated to cooperate with the states parties, but has discretionary powers⁶⁵ to grant a request for assistance. However the respect for the principle of complementarity creates a legal duty for the court to transfer evidence in its possession for the purpose of national prosecution and investigation. The Rome Statute contains several provisions for affording the ICC's assistance to states, including: the limitation of the Court's assistance only for crimes within its jurisdiction, the forms of assistance, and the assurance of confidentiality and personal protection of witnesses and experts (Article 93(10)).

dd) Procedural perspective

From a procedural perspective, the Rome Statute has adopted solutions from the Blaškić subpoena appeal judgment⁶⁶ that are rooted in the horizontal approach to international cooperation. Unlike the ICTY, the ICC does not have the power to give orders to states but can only make a request for cooperation (Article 87(1)). However, the Blaškić appeal decision, although not denying the ICTY's statutory power to issue mandatory or binding orders on a state, deriving from its position as a Chapter VII enforcement mechanism, has nullified their mandatory nature and reduced their effect to a request for cooperation.⁶⁷

The ICC's requests for cooperation are transmitted, as a rule, through diplomatic channels (Art. 87(1)(a)), and not directly to the competent national judicial authorities. Unlike the ICTY Statute, there is no rule in the Rome Statute that state officials or any state authority can be addressees of the ICC's request for cooperation. However, as was mentioned, according to the Blaškić appeal decision, even in the case of the ICTY, a direct channel of communication with judicial authorities was merely a technical possibility and did not legally obligate the national authority or official to enforce the Court's decision.⁶⁸ Similarly, the obligation to cooperate with the ICC is

⁶⁵ Claus Kreß / Kimberly Prost (2008) Commentary in: Triffterer, Otto (ed) Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article, 2nd ed. München, Germany: Beck, Hart, Nomos, 1586.

⁶⁶ Jacob Katz Cogan (2000) The Problem of Obtaining Evidence for International Criminal Courts, *Human Rights Quarterly*, 52 22(2): 404–427, 424.

⁶⁷ Blaškić, ICTY, Appellate Chamber, 29 October 1997: "The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies)" (§ 26). "In the final analysis, the International Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign States" (§ 31).

⁶⁸ See *supra* II.2.c)cc) Vertical mandatory cooperation.

only on the State,⁶⁹ meaning that in most of states, their government or governmental office for communicating with the Court.

The enforcement procedures of the Court's decisions depends on national law. According to the Rome Statute, surrender (Article 89(1)), as well as other forms of assistance (Article 93(1)) that shall be performed "in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law" (Article 99(1)).

ee) Non-compliance with the ICC's Requests

The failure of a state party to comply with the Court's request for cooperation contrary to the provisions of the Rome Statute constitutes a breach of an international obligation, or under customary international law, an internationally wrongful act.⁷⁰ In such a case, after completion of the consultations or resolution of a dispute regarding the legality of a request for cooperation, the competent ICC Chamber may make a judicial finding.⁷¹ Such as a decision on non-cooperation and referral to the Assembly of States Parties (ASP), or where the Security Council referred the matter to the Court, to the Security Council (Article 87(5)(b) and (7)). Like the *ad hoc* Tribunals, the ICC is not vested with any sanctionary powers vis-à-vis states,⁷² and in order not to encroach upon their sanctionary powers, the ICC's finding must not include any recommendations or suggestions as to the course of action the ASP or the Security Council may wish to take as a consequence of that finding.⁷³

(1) *The Powers of the Assembly of States Parties*

Aside from asking or demanding that a state respect its international obligation to cooperate with the ICC, the ASP may engage in diplomatic activities and apply measures of political, economic and financial pressure. These have already been applied by the regional organizations and other states, and have proven to be effective instruments in enforcement of international criminal courts' decisions. A paradigmatic example of regional enforcement was the successful policy of pressure exercised by the European Union on the ex-Yugoslav states.⁷⁴ The European Union's leverage was

⁶⁹ Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 42.

⁷⁰ Kreß / Prost, 2008, 1528; Blaškić, ICTY, Appellate Chamber, 29 October 1997, §§ 35 and 39.

⁷¹ Regulation 109 of the Regulations of the Court, ICC-BD/01-01-04

⁷² Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 33.

⁷³ Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 36 as regards the Security Council. Kreß and Prost are of the opinion that the Blaškić appeal decision should apply *mutatis mutandis* with respect to the ICC finding from Article 87(7) of the Rome Statute. Kreß / Prost, 2008, 1530.

⁷⁴ See e.g. Pauković, Davor / Raos, Višeslav (2015) *Democratic Deficits, Delayed Democratization and Prolonged EU Accession*, in Pero Maldini and Davor Pauković (ur) *Croatia and the European Union: Changes and Development*, Ashgate Publishing, Ltd., 42-46;

based on the political will of the respective state to accede to its membership. The absolute precondition for even becoming a candidate country was full cooperation with the ICTY.⁷⁵ The European Union has continued this policy with regard to the ICC's adopting in 2011 the Action Plan which envisages the mainstreaming the ICC in EU external relation and addressing the ICC's membership and cooperation with the ICC in negotiations with third countries.⁷⁶

In order to address the increasing number of cases of non-cooperation with regard to numerous states' refusal to enforce the ICC arrest warrants,⁷⁷ the ASP has established the Bureau on non-cooperation as its subsidiary organ, the procedures relating to non-cooperation, and five focal points on non-cooperation. The Bureau on non-cooperation has made annual reports to the ASP since 2012,⁷⁸ carries out the non-cooperation procedures in concrete cases, and has become the driving force in designing solutions and strategies related to non-cooperation. The ASP procedures relating to non-cooperation from December 2011⁷⁹ differ between formal and informal response procedures. The formal response procedure, initiated when the Court has decided to refer the matter of non-cooperation to the ASP, includes measures such as: an emergency Bureau meeting, an open letter from the President of the ASP, open dialogue with the State concerned, a Bureau report on the outcome and recommendations which could be included in the ASP resolution.⁸⁰ Informal response procedures include deploying political and diplomatic efforts in the case when the matter has not yet been referred to the ASP, but there is reason to believe that urgent action by the ASP may prevent the occurrence of a serious incident of non-cooperation.⁸¹ In recent years the Bureau on non-cooperation has undertaken actions towards the states that did not cooperate with the Court in relation to the arrest of al-Bashir, and while in some cases the non-cooperative states have engaged in dialog, although they did not arrest al-Bashir, in other cases there have been no indications that the application of the Assembly procedures on non-cooperation has had any effect.⁸²

Report of the Bureau on cooperation, Addendum, ICC-ASP/13/29/Add.1, 21 November 2014, §§ 34–44.

⁷⁵ E.g. The anticipated start date of accession negotiations between Croatia and the European Union on 16 March 2005 was postponed due to the lack of cooperation with the ICTY. Accession negotiation started on 3 October 2005, the same day that the chief prosecutor Carla del Ponte confirmed that Croatia is now fully cooperating with the ICTY.

⁷⁶ Action Plan to follow on the Decision on the International Criminal Court, Council of the European Union, Brussels, 12 July 2011, 12080/11,

⁷⁷ The ICC decisions on the non-compliance and decisions informing the United Nations Security Council and the Assembly of the States Parties see https://asp.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx (visited 5.6.2015.)

⁷⁸ https://asp.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx, 3.26.2015.

⁷⁹ Resolution ICC-ASP/10/Res.5, Annex

⁸⁰ *Ibid.*, Assembly procedures relating to non-cooperation, § 7(a) and § 12(1).

⁸¹ *Ibid.*, § 7(b)

⁸² Report of the Bureau on non-cooperation, ICC-ASP/11/29, 1 November 2012, § 17.

An important policy in achieving implementation of the ICC's decisions is the application of the principle of non-essential contacts with an indicted person. The avoidance of non-essential contact, which has to be balanced mostly with the interest of peace and security,⁸³ was accepted and implemented by the United Nations,⁸⁴ the European Union⁸⁵ and particular states. The recommendation of the Bureau on non-cooperation from 2014 to the ASP to implement the policies of marginalization of fugitives includes the caution to preserve the interests of not disclosing the existence of the arrest warrant.⁸⁶

Since the ASP non-cooperation procedures have proven to be mostly ineffective and the problem of non-cooperation with the ICC has been amplified, the next phase of the ASP action from 2014 has been marked by the development of an action plan on arrest strategies. In November 2015 the Rapporteur of the Bureau on non-cooperation has submitted to the ASP draft Action Plan on arrest strategies⁸⁷ elaborated extensively in the annexed Report. It provides for a diverse and complex set of political and operational measures such as conditionality policies, positive and negative incentives, sanctions, marginalization and political isolation of fugitives, establishment of a professional Tracking Unit, etc. Despite its comprehensiveness and analytical strength,⁸⁸ the reaction of the ASP to non-cooperation with the ICC stayed a non-judicial response, limited to political and diplomatic activities.

(2) The UN Security Council's Powers

Another option for strengthening the enforcement of international criminal courts decisions is to use the UN Security Council system. As the ICTY and ICTR were established by the mandatory Security Council resolutions as its subsidiary organs, all UN member states have a duty to cooperate with them, and the UN enforcement mechanisms are applicable to their decisions. The UN Security Council can use its powers under Chapter VII of the UN Charter against an uncooperative state, applying measures such as isolation, economic sanctions,⁸⁹ freezing of assets, travel

⁸³ Report of the Bureau on cooperation, Addendum, Annex VII, Report on arrest strategies by the Rapporteur, ICC-ASP/13/29/Add.1, 21 November 2014, § 61.

⁸⁴ UNSG, A/67/828-S/2013/210, Annex, Guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court and UNSG, Guidance for Effective Mediation, September 2012.

⁸⁵ EU Action plan to follow-up on the Decision on the International Criminal Court, 12 July 2011, § D.2.c)

⁸⁶ Report of the Bureau on cooperation, Addendum, Annex VII, Report on arrest strategies by the Rapporteur, ICC-ASP/13/29/Add.1, 21 November 2014, Recommendation 3, page 2.

⁸⁷ [Draft] Action Plan on arrest strategies submitted by the Rapporteur, Report of the Bureau on cooperation, ICC-ASP/14/26/Add.1, 16 November 2015, Annex IV, 10–20.

⁸⁸ See Report of the Bureau on cooperation, Addendum, ICC-ASP/13/29/Add.1, 21 November 2014.

⁸⁹ See UNSC resolution 757 (1992) on economic sanctions and political, diplomatic, scientific, cultural, sport isolation against the Federal Republic of Yugoslavia (Serbia and

ban, etc., including military intervention. The UN enforcement powers have been until now to very limited extent applied to the ICC.⁹⁰ The Security Council is not considering the ICC as its subsidiary organ even when it uses its power of referral to the Court under Chapter VII of the UN Charter. This conclusion follows from the provision of the Security Council referral resolutions that expressly stipulate that other non-states parties have no obligation to cooperate.⁹¹ Furthermore, until now in cases of the Security Council referrals there was a complete absence of any follow-up by that body. The ICC prosecutor in 2013 said that each of seventeenth briefing of her Office that was presented to the Security Council on the situation in Darfur, Sudan, has been followed by inaction and paralysis within the Council.⁹² In 2014, the ICC prosecutor, explaining her decision to put the investigation in Darfur on hold, said that in the almost 10 years that her Office has been reporting to the Council, no strategic recommendation has ever been provided to her Office, and neither have there been any discussions resulting in concrete solutions to the problems they face in the Darfur situation.⁹³

3. Other ICC enforcement actors

a) Non-party states

The actors who have legal obligations or are willing to enforce the ICC decisions are not only states parties, but also non-party states, international organizations and civil society. The non-party states, which did not ratify the Rome Statute may also, voluntarily or mandatorily, cooperate with the ICC. Any non-party state can, on a voluntary basis, cooperate with the ICC; and the Court is entitled to invite any state to provide assistance based on an agreement, an *ad hoc* arrangement, or on any other appropriate basis.⁹⁴ However, there are three cases where the non-party state will be obliged to cooperate. Firstly, the state, which has accepted the jurisdiction of the ICC by declaration, like Côte d'Ivoire, has also assumed the obligation to cooperate with the Court without any delay or exception.⁹⁵ The second case, according to the ICC case law, arises when the Security Council has referred the situation to

Montenegro). The UN resolution is applied by all UN states but the UN called upon non-member States of the UN, and all international organization, to act strictly in accordance with its provisions (§ 11).

⁹⁰ „UNSC sanctions regimes currently include ICC fugitives in the situations of the Democratic Republic of the Congo, Côte d'Ivoire, and the Central African Republic, but not in others and, notably, not for Darfur/Sudan.“ Report of the Bureau on cooperation, Addendum, Annex VII, Report on arrest strategies by the Rapporteur, ICC-ASP/13/29/Add.1, 21 November 2014, § 47.

⁹¹ See UN Security Council Resolution 1593 (2005), § 2; UN Security Council Resolution 1970 (2011), § 5.

⁹² UN Security Council, 6974th meeting, 5 June 2013, S/PV.6974, page 2.

⁹³ UN Security Council, 7337th meeting, 12 December 2014, S/PV.7337, page 2.

⁹⁴ Article 87 § 5(a) of the Rome Statute

⁹⁵ Article 12 § 3 of the Rome Statute

the ICC Prosecutor under Chapter VII of the UN Charter.⁹⁶ Thirdly, the customary international law obligation of states to respect and ensure respect of international humanitarian law which was established by Article 1 of the four Geneva Conventions on international humanitarian law of 12 August 1949 requires the cooperation with the ICC in prosecution of related crimes.⁹⁷ Since the Geneva Conventions have been ratified by 196 states and all UN member states,⁹⁸ this should have been a strong mechanism for the ICC to ensure cooperation.

b) Intergovernmental Organizations

The Rome Statute authorizes the Court and the Prosecutor to seek the cooperation and assistance from intergovernmental organizations (Article 87(6) and 54(3)(c)(d)). The ICC established institutional relationships with some intergovernmental organizations by concluding international agreements. Other international organizations adopted the declaration of support to encourage their members to ratify and implement the Rome Statute and to cooperate with the Court.⁹⁹ Essential for the Court is its cooperation with the UN, based on the Relationship Agreement between the ICC and the United Nations from 2004,¹⁰⁰ which is applicable to all UN agencies and programs. The UN is providing administrative, logistical, personal and investigative help to the ICC, but only on a reimbursable basis,¹⁰¹ since the General Assembly decided that the UN Organization will not bear any expenses resulting from the Relationship Agreement with the ICC.¹⁰² This condition has not been overcome even concerning expenses incurred due to referrals by the Security Council,¹⁰³ despite the pro-

⁹⁶ Article 13(b) of the Rome Statute. See *infra* III.3.e) Diplomatic immunity: international law limit to cooperation with the ICC.

⁹⁷ Kreß / Prost, 2008, 1523; Wenqi, Zhu (2006) On cooperation by states not party to the International Criminal Court, *International Review of the Red Cross*, No. 861, 87–110, 92–94.

⁹⁸ See Treaties, States Parties and Commentaries on www.icrc.org

⁹⁹ In the second group includes e.g. The Organization of American States (“OAS”) and The full list of Regional and International Organizations that promote and support the ICC see on the Coalition for the International Criminal Court web page www.iccnw.org/?mod=rio (visited December 19, 2015)

¹⁰⁰ Relationship Agreement between the United Nations and the International Criminal Court. New York, 4 October 2004, No. 1272

¹⁰¹ See § 65 Report of the International Criminal Court A/70/350, 28 August 2015

¹⁰² General Assembly decided that all expenses resulting from the provision of services, facilities, cooperation and any other support rendered to the ICC or the Assembly of States Parties or the implementation of the Relationship Agreement shall be paid in full to the UN. Resolution A/Res/58/318, 20 September 2004

¹⁰³ Security Council Resolution 1593 (2005), 31 March 2005 in § 8 and Resolution 1970 (2011), 26 February 2011 in § 7 lay expressly down “that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily”.

vision of the Rome Statute that envisaged the UN funding particularly in such cases (Article 115). This *pro future* unsustainable financial arrangement reveals the lack of UN support for the ICC and creates a large financial burden which has to be borne entirely and unjustly by the states parties to the Rome Statute.

The ICC has interacted with numerous UN entities,¹⁰⁴ but the one most useful for executing its field activities has proven to be the UN peacekeeping missions affording security, logistical, operational and intelligence assistance to the ICC. The successful cooperation between the UN Peace keeping mission in Congo and the ICC¹⁰⁵ resulted in the UN forces' involvement in the arrest of Thomas Lubanga Dyilo¹⁰⁶ and Germain Katanga;¹⁰⁷ their providing the crucial information for the prosecution; and their testimony before the ICC.¹⁰⁸ Conversely, as was mentioned, the cooperation has not been established between the ICC and the Security Council aimed at fulfilling the Court's mandate concerning referred situations in Darfur, Sudan and in Libya.

The ICC has also concluded agreements on cooperation with regional organizations such as the International Criminal Police Organization (Interpol),¹⁰⁹ the International Committee of the Red Cross,¹¹⁰ the European Union,¹¹¹ the Asian-African Legal Consultative Organization,¹¹² the Commonwealth,¹¹³ and recently the Inter-American Court of Human Rights.¹¹⁴ Cooperation has also been established with the other international criminal courts, such as the ICTR), and the Special Court

¹⁰⁴ See § 68 Report of the International Criminal Court A/70/350, 28 August 2015

¹⁰⁵ The Memorandum of understanding (MOU) between the ICC and the UN Organization Mission in the Democratic Republic of the Congo (MONUSCO).

¹⁰⁶ Case ICC-01/04-01/06

¹⁰⁷ Case ICC-01/04-01/07

¹⁰⁸ Melillo, Margherita (2013) Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo, *Journal of International Criminal Justice* 11 (4), 763–782, 772, 774, 776

¹⁰⁹ Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization-Interpol, Entry into force 22 March 2005

¹¹⁰ Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, Entry into Force: 13.04.2006

¹¹¹ Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, ICC-PRES/01-01-06, Entry into Force: 01.05.2006

¹¹² Memorandum of Understanding between the International Criminal Court and the Asian-African Legal Consultative Organization, ICC-PRES/05-01-08, Entry into Force: 05.02.2008

¹¹³ Memorandum of Understanding between the International Criminal Court and the Commonwealth on Cooperation, ICC-PRES/10-04-11, Entry into Force: 13.07.2011

¹¹⁴ Memorandum of Understanding between the International Criminal Court and the Inter-American Court of Human Rights, Entry into Force: 15.02.2016

for Sierra Leone (SCSL).¹¹⁵ However, the Relationship agreement between the African Union and the ICC drafted in 2005 was never signed.¹¹⁶

c) Non-governmental Organizations

Because of the political environment in which the Court operates, the support of human rights non-governmental organizations (NGO) and civil society is as important, if not more, than support from states or international organizations. The NGOs, as devoted human rights advocates and watchdogs tirelessly exposing systemic violations of individual rights and seeking peace, justice and support for victims, perceive the ICC as their judicial partner on the international scene. Indeed, the ICC, as an international human rights agency without enforcement power is the counterpart of the NGOs, the non-state human rights agencies without any executive power. The Coalition for the International Criminal Court (CICC)¹¹⁷ founded in 1995, which today gathers 2500 civil society organizations from 150 countries, is continuously fighting for the integrity, credibility and effectiveness of the ICC. It played a key role in establishing and organizing the ICC; in widening its jurisdiction by launching the national pro-ICC campaigns; in supervising the implementation of the Rome Statute, influencing the ASP to set up the Advisory Committee on nominations of the ICC judges;¹¹⁸ and by educating and disseminating information through outreach activities that raise awareness about the work and significance of the ICC, etc.

The NGOs are involved both indirectly, but also directly in the enforcement of the ICC's decisions. Indirectly, the international (INGO) and national NGO are scrupulously promoting and monitoring state cooperation at the national level, publicly and globally condemning the cases of non-cooperation, and exerting lobbying activities in order to diplomatically and politically force states to cooperate. The local human rights NGOs are also cooperating directly with ICC prosecutors. As in the case of the Iraq pre-investigation,¹¹⁹ they are initiating the ICC proceedings, and have proven to be indispensable in collecting evidence, particularly as concerns finding victims and witnesses.

¹¹⁵ So-called Inter-Tribunal Cooperation Projects

¹¹⁶ See *infra* chapter III.2. The African Union: Implementing the policy of non-cooperation with the ICC.

¹¹⁷ www.iccnw.org

¹¹⁸ Article 36(4)(c) of the Rome Statute that envisage the establishment of an Advisory Committee on nominations by the ASP was not implemented until 2012. However, the CICC established in 2010 an independent expert panel in order to strengthen the competency verification of the state's candidates for the ICC judges and recommended the ASP to proceed in the same way. [www.iccnw.org/documents/Judicial_Criteria_-_December_2011_Election_\(10th_ASP\).pdf](http://www.iccnw.org/documents/Judicial_Criteria_-_December_2011_Election_(10th_ASP).pdf)

¹¹⁹ See *infra* chapter III.3.a) Double standards of the ICC prosecution.

III. Uncooperative Relationship between the African Union and the ICC

1. African States and the ICC: Africa the most Cooperative Continent

Although insufficiently acknowledged, the African states are the greatest proponents and supporters of the ICC. They made major contributions to the ICC's conception, establishment and particularly cooperation, enabling it to function as a criminal court. The 34 African States are parties to the Rome Statute, thereby making Africa the largest regional group. Senegal was the first state to ratify the ICC Statute and 18 African states were among the first 60 to ratify, bringing the Rome Statute into force. As was acknowledged in 1999 by William Pace, the Convenor of the CICC, throughout the four years preceding the Rome Conference, "the courageous and principled support of African nations was exemplary."¹²⁰ During negotiations, the African diplomats were already aware that "there was a good chance that major powers would restrict the ICC to small and failed States;"¹²¹ but "even if it would be unfairly applied only to them, many Africans affirmed, still the ICC is needed."¹²² They pushed for its creation and were opposed to "tremendous United States pressure."¹²³ The Rome Statute "would not have come into being without the solid overwhelming support of sub-Saharan Africa."¹²⁴

That African states parties are sharing and promoting the values and principles of international law, such as respect for human rights and the fight against impunity and are resolute to close the impunity gap in Africa, was proven after the ICC was established. From 2004 until 2014 the African states continuously referred situations to the Court, or demanded its intervention, and have arrested and surrendered several suspects to the Court. Even today, all ICC cases¹²⁵ are related to crimes committed in Africa against Africans, and the cooperation with the African countries is critical for the completion of the ongoing proceedings and for the success of the Court's mandate. Without the African referrals and cooperation, the Court would have had no work and become insignificant. One should recognize that on the one hand there is state support of international criminal justice in general, or in relation to prosecutions in other states; and on the other hand is support of international criminal justice

¹²⁰ William R. Pace (1999) *The Relationship Between the International Criminal Court and Non-Governmental Organizations*, in Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking (eds.) *Reflections on the International Criminal Court*, 189–211, 199.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ On 27 January 2016, an investigation *proprio moto* was opened for the crimes committed in and around South Ossetia, Georgia in 2008, but still there is no case.

by giving up sovereignty and lifting “the veil of impunity”¹²⁶ in one’s own state, which until now has been accomplished only in Africa. The discussion in the literature whether or not so-called self-referral is appropriate¹²⁷ proves that seeking the jurisdiction of the ICC is an extraordinary state decision. This discussion reveals the underlying presumption that the ICC acts against the *delicti commissi* state.

The African states exert a strong influence in the ASP, due to the large number of African states parties and the ICC’s functional dependency on them. This is reflected also in the large number of Africans among ICC officials and staff. These officials include the ICC Prosecutor since 2012, President of the ASP since 2014, and four ICC’s judges who are all African. A considerable number of ICC staff is also African. Despite all these facts, the focus recently has not been on African countries’ cooperation and support of the ICC, but rather their non-cooperation and opposition under the African Union umbrella.

2. The African Union: Implementing the Policy of Non-cooperation with the ICC

The African Union, the strongest regional organization in Africa, encompassing all African states except two,¹²⁸ has been used successfully by some African states as an anti-ICC platform recently, promoting non-cooperation with the ICC among African states. The turning point from an affirmative to antagonistic stance toward the ICC was the indictment of Sudanese president Omar al-Bashir in 2008.¹²⁹ Since then, the African Union has adopted a range of uncooperative measures towards the ICC, and has been exerting political influence on its stakeholders in order to undermine the ICC. It has been putting pressure on the African states parties to limit or suspend cooperation with the ICC, on the Security Council to defer the ICC proceedings, on the ASP to change legislation in order to affect ongoing proceedings, and on the ICC judges’ decision-making in the ongoing proceedings.

Open hostilities included the rejection of the ICC request to set up a Liaison officer to the African Union,¹³⁰ and decisions that its member states shall not cooperate with

¹²⁶ Dapo Akande, Max du Plessis and Charles Chernor Jalloh (2010) Position Paper: An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC, Institute for Security Studies, South Africa, 7.

¹²⁷ E. g. Müller, Andreas Th / Stegmiller, Ignaz (2010) Self-Referrals on Trial, *Journal of International Criminal Justice* 8, 1267–1294; Robinson, Darryl (2011) The Controversy over Territorial State Referrals and Reflections on ICL Discourse, *Journal of International Criminal Justice* 9, 355–384.

¹²⁸ Marocco (left the AU’s predecessor (OAU) in 1984) and the Central African Republic (suspended in 2013 until constitutional order is re-established). www.au.int/en/AU_Member_States#sthash.QtU0jNVb.dpuf

¹²⁹ On 14 July 2008, the ICC prosecutor, presented to ICC judges an application for a warrant of arrest against al-Bashir, and on 4 March 2009, the ICC issued an arrest warrant for al-Bashir.

¹³⁰ 25–27 July 2010 Decision no. Assembly/AU/Dec.296(XV) § 8.

the ICC in the arrest and surrender of the ICC indictees al-Bashir¹³¹ and Libyan Colonel Qadhafi.¹³² From an international law perspective, decisions of the African Union related to members' cooperation are potentially very harmful for the ICC. Since both the African Union and the ICC are international organizations, the African Union can establish conflicting international obligations of the African ICC parties and make them choose between the African Union and the ICC.^{133,134} Therefore, the African Union claimed that states that did not arrest and surrender al-Bashir are not violating their international obligation but only discharging their obligations under Article 23 of the Constitutive Act of the African Union.¹³⁵

Since 2008, the African Union has been clearly implementing the policy of non-cooperation with the ICC with the final aim of removing Africa from the Court's jurisdiction. The African Union repeatedly requested the UN Security Council to defer the proceedings initiated by the ICC against the President of Sudan al-Bashir¹³⁶ and later, the President and Deputy President of Kenya Kenyatta and Ruto,¹³⁷ in accordance with Article 16 of the Rome Statute. Both requests were unsuccessful, since the Security Council never formally decided on deferring proceedings against al-Bashir; and in 2013 the UN resolution on deferral of cases against Kenyan leaders was not adopted by failing to obtain the required number of nine votes in the Security Council.¹³⁸ The decision that any African Union member state which wants to refer a case to the ICC should inform and seek the advice of the African Union¹³⁹ was aimed at preventing further referrals to the ICC. The principle of complementarity was used in order to suspend the ongoing proceedings in the Libyan and Kenyan situations.¹⁴⁰ The

¹³¹ 1–3 July 2009 Decision no. Assembly/AU/Dec.245(XIII) Rev.1, § 10; 25–27 July 2010 Decision no. Assembly/AU/Dec.296(XV), § 5

¹³² 30 June – 1 July 2011 Decision no. Assembly/AU/Dec.366(XVII) § 6.

¹³³ “The Assembly, 6. Requests Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC” 25–27 July 2010 Decision no. Assembly/AU/Dec.296(XV), § 6

¹³⁴ Schabas, William A, paper on the ICC forum, Invited experts on Darfur question, <http://iccforum.com/darfur> (visited 5. 4. 2015)

¹³⁵ 30–31 January 2011, Decision no. Assembly/AU/ Dec.334(XVI) § 5; 30 June – 1 July 2011 Decision no. Assembly/AU/Dec.366(XVII), § 5; 29–30 January 2012 Decision no. Assembly/AU/Dec.397(XVIII) § 3.

¹³⁶ Communique of the Peace and Security Council of the African Union at its 142nd meeting, 21 July 2008, PSC/MIN/Comm(CXLII), § 11.i. Request was repeated in the decisions of the assemblies of the African Union from 2009 onwards. See: The African Union, Decisions & Declarations of the Assembly, www.au.int/en/decisions/assembly

¹³⁷ 30–31 January 2011 Decision no. Assembly/AU/ Dec.334(XVI) § 6; 26–27 May 2013 Assembly/AU/Dec.482(XXI) § 3; 12 October 2013, Ext/Assembly/AU/Dec.1, § 10(iii); United Nations Security Council S/2013/624.

¹³⁸ <http://www.un.org/press/en/2013/sc11176.doc.htm>

¹³⁹ Assembly/AU/Dec.547(XXIV), 30–31 January 2015, § 10(viii).

¹⁴⁰ The African Union endorses Libya's request to put on trial in Libya its own citizens charged with committing international crimes, 15–16 July 2012 Decision no. Assembly/AU/Dec.419(XIX) § 6; It deeply regrets the Decisions of the Pre-trial Chamber II and the appeals

African Union attempted to intervene in the ongoing proceedings in order to defer or terminate criminal proceedings against African high officials by adopting a range of quasi-procedural decisions that only judges and judicial bodies are competent to make. These were calls for postponement or suspension of the trial until the accused completes his/her term of office and the decision on non-appearance of the accused who was summoned by the ICC.¹⁴¹ In 2015, the ICC permitted the African Union to take part as *amicus curiae*, filing submission in case against Deputy President of Kenya Ruto and Mr. Sang pledging against the admission of the recanted prosecution witness testimonies that were previously recorded.¹⁴² The most critical decisions were demands of the African Union for absolute immunity for the head of state or government during his/her term of office.¹⁴³ In 2014 and 2015 a group of African states used the African Union forum to persuade the 34 African states parties to withdraw *en masse* from the Rome Statute.¹⁴⁴ In 2015 the African Union established an Open-Ended Committee of African Ministers to follow up on the African Union's requests related to the ICC, including a road map on possible withdrawal.

In June 2014, the African Union adopted a protocol extending the jurisdiction of the African Court of Justice and Human Rights to try crimes committed in violation of international law, including the subject-matter jurisdiction of the ICC. The entire process of establishing the African criminal court was fast-tracked, competing with the ongoing ICC criminal proceedings. Although the obvious aim was to exclude the ICC's jurisdiction over African countries, it is certainly a praiseworthy attempt of the African states to fight impunity on the continent where serious violations are widespread, continuous and without any justice or redress for victims. However, this honorable aim is tarnished by the Protocol's provision to give absolute immunity to sitting high level officials,¹⁴⁵ which is contrary to the statutes of all international criminal

Chamber of the ICC on the admissibility of the cases dated 30 May and 30 August 2011 respectively, which denied the right of Kenya to prosecute and try alleged perpetrators of crimes committed on its territory in relation to the 2007 post-election violence 26–27 May 2013 Assembly/AU/Dec.482(XXI) § 6.

¹⁴¹ Decision on Africa's Relationship with the International Criminal Court (ICC), 12 October 2013, Ext/Assembly/AU/Dec.1, § 10(ii,x,xi) relating to proceedings against Kenyatta and Ruto. In 2015 relating to proceedings against Ruto and al-Bashir. Assembly/AU/Dec.547 (XXIV), 30–31 January 2015, § 17 d) and e)

¹⁴² ICC-01/09–01/11–1988 from 19 October 2015

¹⁴³ Decision on Africa's Relationship with the International Criminal Court (ICC), 12 October 2013, Ext/Assembly/AU/Dec.1, § 10(i); "Reaffirms the principles deriving from national and International Customary Law by which sitting Heads of State and other senior officials are granted immunities during their tenure in office" Assembly/AU/Dec.547(XXIV), 30–31 January 2015, § 7.

¹⁴⁴ See Tommy, Ibrahim, 2014, 3.

¹⁴⁵ Article 46 A bis Immunities "No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office." Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 15 May 2014.

tribunals created after World War II, none of which prescribes the immunity of high state officials as a bar to international criminal prosecution.¹⁴⁶

3. The African Union: Delegitimizing the ICC by International Double Standards, Political Power Inequality and International Law on Immunity

The paradox of the African relationship with the ICC is that most African states support the ICC, while their association is treading the path to their withdrawal from the ICC and the exclusion of the ICC's jurisdiction over them. The reasons for such a cleavage are many. The straightforward reason is that the African Union, embodied by African leaders, is protecting one of its own,¹⁴⁷ and that indicted African heads of state are using this organization to shield themselves from international criminal justice. Further, aside from the general proclamations that the African Union is dedicated to the fight against impunity, none of its decisions is supporting the African victims from ICC-related cases or ICC proceedings dealing with the mass atrocity in Africa. The other reason for anti-ICC sentiment among African states can be that the African Union has exposed and used the ICC's inherent flaws created by political compromises. Therefore, states' global inequality and the double standards embedded in the ICC system have succeeded in reducing its credibility and moral authority among African states.

a) Double Standards of the Security Council's Referrals

NGOs, academia and other authors share the African Union's political arguments related to the Security Council's deferral mechanism and its practice.¹⁴⁸ Namely, one of the most peculiar features of the ICC, taking into account that it is a consent-based court and not an UN organ, is the Security Council ability to refer to the ICC situations outside its territorial or personal jurisdiction (Article 13.b) and thereby to establish the ICC jurisdiction over non-party states. As three out of five permanent members of the Security Council (USA, China and Russia) have not become ICC states parties, the Rome Statute envisages that the states which have refused to accept the ICC's jurisdiction have power to force other non-party state to accept it. This compromise, adopted in the diplomatic conference in Rome in 1998, resulted, on the one hand, from the inequality of the UN system based on the Security Council having five permanent members with veto powers, and on the other hand, from the need to establish the ICC as a court of global jurisdiction, even dependent on

¹⁴⁶ See Plessis, Max du (2014) Shambolic, shameful and symbolic: Implication of the African Union's immunity for African leaders, ISS paper 278, November.

¹⁴⁷ Mutua, Makau W, paper on the ICC forum, Invited experts on Darfur question, <http://iccforum.com/darfur> (visited 5.4.2015)

¹⁴⁸ See Meeting Summary: The UN Security Council and the International Criminal Court, Chatham house, 16 March 2012, 3.

the Security Council's political referral, which can realize its ultimate goal "to put an end to impunity for the perpetrators" of the most serious international crimes.¹⁴⁹

However, it has been perceived *inter alius* by the African Union¹⁵⁰ that the Security Council has exacerbated double standards beyond inequalities already incorporated in the Rome Statute in two ways. Firstly, among many places where international crimes have been occurring, only African situations (Darfur, Sudan and Libya) were referred. The cases of gross violation of human rights outside Africa have either not succeeded to be proposed for referrals by the Security Council (Sri Lanka,¹⁵¹ Zimbabwe,¹⁵² North Korea¹⁵³), or the referral was vetoed by one of the five permanent members. Thus, the referral of Syria situation to the ICC was vetoed by China and Russia in 2014. Secondly, the Security Council has in both cases of referral introduced personal limitations on the exercise of ICC jurisdiction by expressly excluding nationals or officials from the non-party state from ICC jurisdiction for crimes committed in the referred situations.¹⁵⁴ Shielding perpetrators of atrocities on the basis of citizenship in territories under ICC jurisdiction runs counter to "the spirit of the Rome Statute".¹⁵⁵ Such a provision is particularly unacceptable and demeaning for the ICC system, considering that the ICC is complementary to national criminal jurisdictions, and that credible domestic prosecutions prevent its proceedings. These hypocritical arrangements are evident in Damaška's statement that powerful actors in the international arena are in the position to ignore international justice, and that the sword of justice is used against individuals from states that occupy a lowly place in the *de facto* existing hierarchy of states.¹⁵⁶

¹⁴⁹ Preamble of the Rome Statute.

¹⁵⁰ PRESS RELEASE N°037/2012. www.au.int/en/newsevents/13140/meeting-government-experts-and-ministers-justiceattorneys-general#sthash.yXoEMcmn.dpuf (visited February 2, 2016)

¹⁵¹ www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx

¹⁵² www.genocidewatch.org/images/Zimbabwe_2013_08_13_UN_Urged_to_refer_Mugabe_to_ICC.pdf

¹⁵³ The UN Commission on Inquiry on Human Rights in the Democratic People's Republic of Korea and the UN General Assembly in 2014 urged the UN Security Council to refer the situation in North Korea to the ICC. The China is opposing to referral and is believed that it would veto it.

¹⁵⁴ UNSC Resolutions 1593 (2005) and 1970 (2011) prescribe in paragraphs 6 that „nationals, current or former officials or personnel from a State outside Sudan (the Libyan Arab Jamahiriya) which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in Sudan (the Libyan Arab Jamahiriya) established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;”

¹⁵⁵ International Criminal Court (ICC), Global Governance Institute, University College London, 30 April 2015, 4.

¹⁵⁶ Damaška, 2008, 330.

b) Double Standards of the ICC Prosecution

Furthermore, there are claims that in 2006 even the ICC prosecutor, Luis Moreno Ocampo, deferred to world powers and applied double prosecutorial standards when he decided in 2006 not to investigate war crimes committed by British soldiers in Iraq although the ICC had jurisdiction and there was enough evidence to start an investigation. He established that the gravity threshold required by the Article 17(1)(d) of the Rome Statute was not met as the number of 20 Iraqi victims of willful killing and inhumane treatment was not as grave compared to situations in Africa which the ICC was then investigating.¹⁵⁷ This decision sent a message that the criminal responsibility for commission of war crimes by the international, U.S. or other intervention forces is not within the mandate of the ICC, despite the existence of territorial or personal jurisdiction.¹⁵⁸ This assertion was strengthened by the prosecutorial application of an admissibility requirement of gravity which refers expressly to ICC cases,¹⁵⁹ incorrectly to ICC situations, and by comparing the gravity of the specific offenses that should have been the object of investigation of situations in Africa.¹⁶⁰ The reopening of the case in 2014,¹⁶¹ after the ICC prosecutor Fatou Bensouda received additional materials from the British law firm Public Interest Lawyers and the European Centre for Constitutional and Human Rights documenting 1268 cases of ill-treatment and unlawful killings, gives a basis to conclude that the 2006 prosecutorial decision to terminate further proceedings was wrong and that the investigative job done by the British law firm and European NGO, could have been done by the ICC.

c) Peace v. Justice Conflict

The African Union took the correct stance that in situations of conflicts between peace and justice, which are not always possible to avoid, priority should be given to

¹⁵⁷ OTP response to communications received concerning Iraq, 09/02/2006, www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/

OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

¹⁵⁸ Kheiltash, Golzar (2006) Ocampo Turns Down Iraq Case: Implications for the US Citizens for Global Solutions, www.globalpolicy.org/component/content/article/164/28546.html (visited December 20, 2015)

¹⁵⁹ Article 17(1)(d) of the Rome Statute: The *case* is not of sufficient gravity to justify further action by the Court.

¹⁶⁰ The relevance of “a situation” to the admissibility and selection of cases before the International Criminal Court (2009) War Crimes Research Office American University Washington College of Law, United States of America, 4; William A. Schabas (2010) Victor’s Justice: Selecting “Situations” at the International Criminal Court, 43 J. Marshall L. Rev. 535–552, 546;

¹⁶¹ Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq, Statement: 13/05/2014. OTP Report on Preliminary Examination Activities, 12 November 2015, § 23 and 33.

peace and prevention of further destruction of human lives.¹⁶² The right to justice should not endanger the prospect of achieving peace; and it is rare that justice can be achieved during ongoing conflict. In 2008, the African Union warned that the ICC proceedings would seriously undermine the peace process and conflict resolution in Darfur and Sudan.¹⁶³ The facts are that after the ICC issued an arrest warrant in 2009, al-Bashir expelled humanitarian aid agencies from Darfur which has worsened the humanitarian situation;¹⁶⁴ fighting and violence are still raging in Darfur in 2016; that al-Bashir is President of Sudan with the ICC arrest warrant as motive to stay in power, and that victims and civilians have been continuously suffering from violence, displacement and humanitarian crisis for over fifteen years.¹⁶⁵ However, it should be kept in mind that the ICC arrest warrant resulted from a Security Council referral in 2005 which found that judicial intervention is an appropriate response to the threat to peace and security in Sudan.

d) Neocolonialism or reach for justice for African victims

Using their platform, African Union leaders accused the ICC of politicizing and misusing indictments against African leaders,¹⁶⁶ of selective justice and targeting African countries, and even of neocolonialism. The latter labeling, which came primarily from the accused persons¹⁶⁷ and their defense counsels,¹⁶⁸ aimed at collective African memory concerning the psychological and emotional consequences of Western European colonialism in Africa in the 19th and 20th centuries marked by slavery, racism and exploitation. However, analysis of triggering mechanisms for each ICC situation in Africa reveals that African countries themselves have in most cases asked to use the “judicial services” of the ICC. As is repeatedly stressed by the African and international NGO, six of nine situations in Africa were brought before the ICC as requests from the respective countries’ government. Aside from five self-referrals

¹⁶² See Dapo Akande, Max du Plessis and Charles Chernor Jalloh, 2010, 15.

¹⁶³ E. g. 1–2 February 2009 Decision no. Assembly/AU/Dec.221(XII), § 2.

¹⁶⁴ From March 4, 2009 to June 11, 2009, Khartoum expels aid agencies after the ICC issues Bashir’s arrest warrant. These agencies provide approximately 50 percent of total aid capacity in Darfur. See time line on <http://bashirwatch.org>.

¹⁶⁵ E. g. Darfur: top UN and African Union officials call for free movement of peacekeepers and aid workers, 3 March 2016 www.un.org/apps/news/story.asp?NewsID=53364&&Cr=Darfur&&Cr1=#.Vts-ubHi7Q (visited March 3, 2016)

¹⁶⁶ Decision on Africa’s Relationship with the International Criminal Court (ICC), 12 October 2013, Ext/Assembly/AU/Dec.1, § 4; Tladi, Dire (2009) The African Union and the International Criminal Court: The battle for the soul of international law, 34 SAYIL, 57–69, 58, 61, 64–65.

¹⁶⁷ Uhuru Kenyatta accusations see: Tommy, Ibrahim (2014) Africa’s unfinished business: ensuring justice for victims of serious international crimes, in: Reflections on the African Union ICC Relationship, ICJ Kenyan Section, 3

¹⁶⁸ Courtney Griffiths, the lead defense attorney for former Liberian President Charles Taylor, argued that Taylor’s prosecution and the ICC prosecution was a 21st century form of neocolonialism.

(Uganda, 2004; Congo, 2004; CAR I, 2005; Mali, 2012; CAR II, 2014), Côte d'Ivoire, which was not a state party, and therefore could not make a self-referral, accepted the ICC's jurisdiction by declaration (Article 12(3)) in 2003; and in 2010 reconfirmed its recognition and cooperation with the ICC. So, although the ICC prosecutor initiated a *proprio motu* investigation in Côte d'Ivoire, it was done at the request of the Côte d'Ivoire government. Then, the Security Council referred two situations in the Darfur region in Sudan and Libya. The *proprio motu* investigations are Kenyan cases, and these were initiated upon the recommendation of the Waki Commission set up by the Kenyan parties in conflict and the African Union after failed domestic attempts to establish a special domestic court to prosecute perpetrators.¹⁶⁹ This analysis shows that the African countries have reached for the ICC's help, hoping to bring justice for African victims, break the cycle of impunity, and help restore their society and judiciary.

e) Diplomatic Immunity:

International Law Limit to Cooperation with the ICC

In its battle with the ICC, the African Union was using many well-grounded and serious legal and political arguments. One of the most frequently used and supported by academic literature is a head of state immunity. The African Union's decisions concerning non-cooperation on the arrest and surrender of al-Bashir and Qadhafi

¹⁶⁹ After elections in 2007 in Kenya broke up electoral violence where more than thousand of people were killed, thousands women were raped and 600.000 people displaced. The African Union started a mediation process between the political parties in conflict and accepted the former UN Secretary-General Kofi Annan as the African Union Chief Mediator. Mediation efforts resulted with a power-sharing agreement and the creation of the Waki Commission (the Commission of Inquiry on Post-Election Violence) presided by justice Philip Waki of the Kenyan judiciary. In its Final Report on the post-election violence from 15 October 2008, it was stated that the cycle of government impunity was at the heart of the post-election violence and recommended the creation of a Special Tribunal, in the failure of which, the results of the inquiry should be handed over to the ICC. The African Union, Kenya's president and prime minister that presented the parties in conflict, accepted the report's findings and recommendations. After two failed government attempts to establish a tribunal, in July 2009, the Waki Commission sent "envelope" with the list of six names of most responsible for the post-election violence to the prosecutor of the ICC. He has met with the Kenyan president and prime minister and has received the commitments of cooperation from all relevant Kenyan institutions. (Attorney General, Minister for Justice, National Cohesion and Constitutional Affairs, president and prime minister). In November 2009 the ICC prosecutor has opened a first investigation on his own initiative. See Muthoni Wanyeki (2012) The International Criminal Court's cases in Kenya: origin and impact, Institute for Security Studies (ISS), Paper 237; <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>

¹⁷⁰ 1–3 July 2009 Decision no. Assembly/AU/Dec.245(XIII) Rev.1, § 10. In 2012 the African Union reaffirmed "its understanding that Article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and by referring the situation in Darfur to the ICC, the UN Security Council

were based on the provisions of Article 98 of the Rome Statute of the ICC relating to immunities¹⁷⁰ whose scope and content does not enjoy unanimous interpretation. Furthermore, the immunities have proven to be the greatest obstacle for the ICC criminal proceedings and case law. The Rome Statute contains two provisions related to immunities. Article 27(2) prescribes that immunities, whether under national or international law, shall not bar the Court from exercising its jurisdiction over person. Article 98(2) prohibits the Court from making a request for cooperation from states if such a request would require the requested state to act inconsistently with its obligations under international law with respect to the State or diplomatic immunities, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. The wording of these provisions makes clear that Article 27(2) deals with eliminating immunity as a bar to Court jurisdiction, while Article 98(2) tries to resolve the conflict between the state's obligations to cooperate and to respect diplomatic immunities of officials of third state, making cooperation dependable on the waiver of the immunity by the requested state. However, the Court in its so-called Malawi decision from 2011 has ignored Article 98(2) and based its decision entirely on Article 27(2) misinterpreting it as eliminating immunity for international crimes, not only as a bar to jurisdiction, but also as a bar to cooperation. The Court claimed the existence of a general exception to head of state immunity in prosecutions before international courts under customary international law meaning that it applies to states parties but also non-party states.¹⁷¹ By majority the literature rejected such interpretation,¹⁷² and after three years the Court changed its case law and found another interpretation with the same result. In 2014, the Court recognized the existence of personal immunities from criminal jurisdiction for crimes under its jurisdiction under international law, meaning that the Rome Statute cannot impose obligations on third States without their consent. However, the Court claimed that in case against al-Bashir, although the Sudan is non-party state, the Security Council's resolution on referral has lifted the immunities and thus implicitly waived the immunity granted to

intended that the Rome Statute would be applicable, including Article 98." 29–30 January 2012 Decision no. Assembly/AU/Dec.397(XVIII) § 2.

¹⁷¹ § 43 "(...) the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply."; § 44 "(...) the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions." ICC-02/05–01/09, 13 December 2011.

¹⁷² See e.g. Dapo Akande, ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong, December 15, 2011, <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/> (visited 3.10.2015.); Tladi, Dire (2013) The ICC decisions on Chad and Malawi, *Journal of International Criminal Justice* 11, 199–221; Schabas, William A, paper on the ICC forum, Invited experts on Darfur question, <http://iccforum.com/darfur> (visited 5.4.2015)

Bashir under international law by requiring from the Sudan to cooperate fully and provide any necessary assistance to the Court.¹⁷³ The literature again mostly disagree with this interpretation,¹⁷⁴ although there are supportive authors.¹⁷⁵

IV. Conclusion: The ICC's Supranational Judicial Enforcement Regime

The ICC is a court with a dual mandate. As a criminal court its main functions are to determine individual criminal responsibility or innocence, and to conduct effective and fair criminal proceedings in accordance with the rule of law. As an international court it is an enforcement mechanism of international law created by political negotiations. International law and politics have modeled an institutional and procedural framework for the ICC in line with the principles of international law, not criminal procedural law. In conflicts between the ICC's criminal and international functions, compromises are made at the expense of criminal procedural law, and the ICC's criminal mandate is subjugated to its international one. With such restrictions on its criminal procedural powers, it remains to be seen whether the ICC is a functional or dysfunctional criminal court.

Since the ICC is the treaty court, the states parties have had opportunity to strengthen the existing structures of vertical cooperation between the states and the *ad hoc* Tribunals. Instead, in order to protect their sovereignty, they have enhanced the horizontal approach to cooperation, putting the effectiveness of the ICC in the hands of state governments. The principles and procedures of horizontal mutual legal assistance are inappropriate for the enforcement of the ICC's decisions, since its basic feature is governmental discretion. Furthermore, the establishment of the ICC as a workable institution cannot be resolved by the mechanism for the en-

¹⁷³ See §§ 25–27; § 29 “(...) by issuing Resolution 1593(2005) the SC decided that the “Government of Sudan (...) shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.” Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in Resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless. Accordingly, the “cooperation of that third State (Sudan) for the waiver of the immunity”, as required under the last sentence of 98/1, was already ensured by para 2 of SC Resolution 1593(2005). The SC implicitly waived the immunities granted to Bashir under international law. Consequently, there also exists no impediment at the horizontal level (29). ICC-02/05–01/09, 9 April 2014.

¹⁷⁴ See e.g. Paola Gaeta, The ICC changes its mind on the Immunity from arrest of President Al Bashir, but it is wrong Again, April 23rd, 2014, <http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/> (visited 3. 10. 2015).

¹⁷⁵ See Boschiero, Nerina (2015) The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593, *Journal of International Criminal Justice* 13, 625–653

forcement of one specific judicial decision, which is the purpose of horizontal governmental cooperation, but rather by empowering the ICC with investigative, coercive and enforcement functions critical to conduct effective and fair criminal proceedings. Because the ICC is a court without any external enforcement powers, its model of vertical cooperation needs to replace a full-fledged criminal enforcement system.

The solution is to set up a supranational enforcement regime, and to accomplish this, two ways forward must be considered. One, which has no prospect in a near future, is the establishment of a supranational police or army. The other is the establishment of a supranational judicial enforcement regime by empowering the national courts as ICC enforcement bodies. One of the chief obstacles for supranationalization of international obligations is the international principle of non-interference in states' internal affairs. The cornerstone of the Blaškić subpoena appeal judgment that "customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs"¹⁷⁶ should be abandoned as the ICC enforcement principle. The ICC's vertical model of cooperation needs to make inroads in the states' obligation to cooperate. It should develop, *mutatis mutandis*, analogous to the EU regime of judicial cooperation in criminal matters. That regime demonstrates that courts are appropriate representatives of the state when it comes to enforcement of criminal courts decisions from other jurisdictions. The supranational enforcement mechanisms should enable direct communication and enforcement of the ICC decisions by national judicial authorities without government involvement. There is a legal and a political argument for such a solution.

Generally, the decisions of foreign or international criminal courts are in all systems of cooperation enforced by domestic criminal courts, due to their functional and operational equivalency. However, in transnational and international cooperation, the courts are not actors of cooperation and there are no direct judicial channels of communication excluded from governmental screening. One can deny the substantive relevance of the channels of communication as long as there is a legal obligation to cooperate, and the government does not have any discretionary power to decide on the ICC's request. However, this argument can be reversed. If the ICC's requests for cooperation are decided only on the basis of the legal arguments, and the state has a legal duty to cooperate without any discretionary powers, the institutions designed to decide in such cases are courts, not executive authorities.

Apart from legal arguments, political reasons also exist to explain the incompatibility of governmental cooperation with the ICC. Throughout the history of the international criminal justice, it has been proven that it is inappropriate to entrust the enforcement of international court decisions to governments of states where offenses have been committed. By their nature, the crimes in the ICC's jurisdiction often involve high governmental officials. Thus, the suspects can be either incumbents re-

¹⁷⁶ Blaškić, ICTY, Appellate Chamber, 29 October 1997, § 41.

sponsible for cooperation with the ICC, or former officials whose surrender to the ICC can affect election results. So the same government officials indicted by the ICC, or whose cooperation with the ICC can put their reelection at stake, are the ones responsible for collecting evidence for the ICC or surrendering themselves or others to the Court. The international legal obligation without the reinforcement of further pressure, incentives or sanctions is not enough to eliminate the obstruction of cooperation. The ICC's experience of cooperation with governments of accused incumbent high state officials similarly has resulted in failed proceedings. The conflicts between governmental and judicial positions on the enforcement of ICC decisions was demonstrated in 2015 in South Africa where that country's courts issued a prohibition to President al-Bashir that he leave South Africa, followed by the order to national authorities to arrest him, while at the same time the government, in defiance of the court orders, escorted him to the airport and secured his safe departure from the country.¹⁷⁷

The feasibility of enforcement of the ICC's decisions by the national courts has been proven in the implementing legislation of the Rome Statute. France, Georgia, Spain and Switzerland have taken the unprecedented step in enforcement of international criminal law, by eliminating the two-stage – governmental and judicial – procedure, and introducing the purely judicial enforcement of the ICC's decisions.¹⁷⁸ Thus, supranational direct enforcement of the ICC decisions by national courts has been introduced at the national level and should, as a general principle, be transferred by the ASP at the international level.

There is no doubt that key for the success of the ICC's supranational judicial enforcement mechanism is the democratic political order of the states parties. Hathaway's finding that a state's commitment to international human rights treaties depends on external and internal enforcement mechanisms has been proven in the case of the Rome Statute.¹⁷⁹ Since the Rome Statute is a human rights treaty with an enforcement mechanism, democratic states, and ones with effective human rights practices are more likely to join the ICC, whereas states with poor human rights practices, and non-democratic states are less likely to commit to the Court.¹⁸⁰ The majority of the ICC's states parties are democracies;¹⁸¹ have separation of powers between government and judiciary; and their judiciary apply rule of law and limit state power by holding the state accountable for its international obligation. However, the fact

¹⁷⁷ See Vyver, 2015, 563 and other literature in *supra* footnote 64.

¹⁷⁸ Crayer / Friman / Robinson / Wilmshurst, 2014, 523.

¹⁷⁹ Hathaway, Oona A., "The Cost of Commitment" (2003). John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers. Paper 273. 1–38. http://digitalcommons.law.yale.edu/lepp_papers/273, 1–38, 16–17, 24–25.

¹⁸⁰ Yvonne M. Dutton, *Explaining State Commitment to the International Criminal Court: Strong Enforcement Mechanisms As a Credible Reat*, 10 Wash. U. Global Stud. L. Rev. 477 (2011), http://openscholarship.wustl.edu/law_globalstudies/vol10/iss3/3, 477–533, 517, 518, 522.

¹⁸¹ *Ibid.*

that some non-democracies are also ICC states parties should not be an obstacle for the introduction of supranational vertical judicial cooperation. The non-democracies also have courts, and their legal or factual political dependence is an internal matter on which the ICC does not have influence.

The ICC states parties should overturn the Blaškić subpoena appeal judgment and turn the power directly over to the ICC to give orders or requests to national judicial authorities, and not to the states. At the next review conference of the Rome Statute, the new institutional design and procedural structures need to be introduced to transform the ICC's vertical governmental cooperation regime into a vertical judicial cooperation regime between the ICC and domestic courts. The model of international cooperation should be replaced with one of supranational cooperation. Thus, domestic courts need to become bodies that represent a state in cooperation with the ICC, and at the same time a direct channel between the ICC and domestic courts must be established. The concept of ICC jurisdiction as extension of national jurisdiction will be realized only when domestic courts become the ICC enforcement mechanisms. As the current constellation of political factors will undoubtedly lead to inability to reach such a radical political solution at the international level, the ASP and its subsidiary bodies responsible for cooperation need to begin threading the path towards the establishment of the supranational judicial enforcement regime for the ICC.