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JUDGING MORE BY JUDGING LESS: ISSUES AND LIMITS OF THE INTERNATIONAL CRIMINAL COURT

Summary: *With the International Criminal Court (ICC) losing not only its chance of incorporating the same great powers that decided not to support it at the very start – out of fear of losing dominance – but also about to lose long-time members such as the ones from the African Union, its chances of being a mean of institutionalized punishment against the worst individual crimes of international concern are trembling. Would the ICC obtain better outcomes if it discarded entirely its authority against member governments, and restricted its jurisdiction to cases suggested by the same countries where the crimes had been allegedly committed? The ICC could hence maintain an important role in the canalization of local jurisdictions through common, global rules: this way, even if through selective jurisdiction, it could at least limit and moderate the intentions of member States when dealing with inconvenient local enemies or oppositions. Through an analysis of the jurisdictional past of this institution and a contextualization of its controversial relationship with the United Nations (UN) Security Council, this paper aims to furnish a comparison of available outcomes, and elucidate the aforementioned possibility as an advantageous framework, although less ambitious. An eventual last focus will be put on the risks of the opposite trend, an ambitious but inefficient institution, possibly leading to the legitimization of its failures.*

Keywords: *International Criminal Court, Rome Statute, United Nations Security Council, 'Africa bias', politicization, selectivity*

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1. INTRODUCTION

Although the 'Africa bias' is a very recurring and open debate among theoretical criticisms of the ICC, with several authors even defining it as a tool of great powers constructed through political relationships, what the theoretical environment pointing out these deficiencies mostly lacks is a set of alternatives for this judicial system to improve its *modus operandi*, one that takes into count the real world boundaries this court needs to endure.[1] With this background as a broader array of ideal objectives of this work, an empirical first outlook will be made through the evaluation of past achievements or failures of the ICC: short case studies of every single investigation initiated since the beginning of its work will be proposed both in an attempt of advocating the positive aspects and the negative aspects of its ongoing activity. Once this first set of comparisons is made, they will then be contextualized in regard to the reactions of members and non-members that followed, but also in regard to the conduct of the main organs of the former towards criticisms. This first section will hence prove or disprove the first and core conjecture of this work, the scope of the Office of the Prosecutor effectively including those particular cases where no local government was advocating for its intrusion in local affairs – that is, the investigation was not sparkled by a local referral. As such, this paper aims to redefine the categorization of cases not as world powers against politically unstable states but rather through measures of efficiency, sorted by referral type. This main aspect leads the way for any possible interpretation of the role this institution takes and could take: on one side, from the perspective of preferential or punitive treatments towards some – subsequently defining whether and why the 'Africa bias' would be a thing – and on the other side the perspective of its duty in safeguarding human rights across the globe. But very importantly, such a categorization also gives a starting basis for the ponderation of what the ICC could and should do to achieve optimized solutions in its implementation.

Correspondingly following this latter aspect, the categorization of cases by type of referrals leads to a necessary deviation. The nature of referrals made by the UN Security Council, and the way they impact the outcomes of an investigation, questions the concept of universal jurisdiction: this referral type allows the ICC to prosecute individuals even outside of the boundaries of its state membership. The answer to this second, more specific supplementary conjecture, regarding the successful integration of a selective form of universal jurisdiction, would conclude the set of mainly observational arguments designated to scrutinize this court. It would therefore be possible to envision the possible sources of limits of this court, the eventual existence of binding hierarchies or practical inabilities to fulfil its original objectives on its own.

Having at last defined the outcomes of both the former, main conjecture, and of the supplementary one, a third, corollary affirmation would be inspected: the feasibility, for the ICC in a broader sense, to successfully operate outside of the political structures and political tendencies that shaped its creation at the Rome Conference.[2] After having isolated the ways the ICC relates

1 For an example of criticisms of the 'Africa bias', see: Nadia Shamsi, 'The ICC: A Political Tool? How the Rome Statute is Susceptible to the Pressures of More Power States' (2016) 24(1) Willamette Journal of International Law and Dispute Resolution 85.

2 Douglas Guilfoyle, *International Criminal Law* (Oxford University Press, 2016) 84; William Anthony Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2020) 25-27; William Anthony Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 21–22.

to other countries, what its work means for them and who and why would support or stall it, the final goal as such would be to rethink the role of this institution in a more pragmatic way.

2. EVALUATION OF PAST ACTIVITIES

Having the *ratione loci* and *ratione materiae* of the ICC as a primary focus, the aim of the following analysis is to take out selected key points from every single investigation initiated since its entry into force on 1 July 2002 as of February 2022, just as of any single case that has been opened in that regard.[3] Having done that, the goal will then be to mention all the most remarking events describing reciprocal stances of countries and of the ICC. Although the Court in question judges individuals, they will here be grouped by their country of origin, as one of the main focuses is on the behaviour of the given state and as further investigations are also grouped by country.[4] Cases will be mainly categorized depending on the way they have been initiated – whether it was self-referral, *proprio motu*[5] or an external suggestion of other State Parties of the Statute or of the UN – and their final results or current status, therefore not giving particular attention to testimonies and proofs of every analysed case but rather summarizing the course of action of the ICC and its successes or failures in its juridical intentions.[6]

2.1. CENTRAL AFRICAN REPUBLIC

The Central African Republic (CAR) has been through two investigations of the ICC, the first one – 'Central African Republic I' (CAR I) – regarding the conflict in CAR with peaks of violence in 2003 and 2004[7], and the second one – 'Central African Republic II' (CAR II) – regarding the renewed violence that started in 2012.[8] While the former is therefore related to a multilateral turmoil including Congolese factions, the second is a local conflict with the Anti-Balaka, a mainly religious and ethnic fight not seeing neighbouring countries as main.[9] Both the investigations have been initiated after a self-referral, therefore on request of the Central African Republic itself.[10] The two cases included in this investigation are the Said Case

3 Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002.

4 Ibid.

5 Initiated by the Prosecutor of the International Criminal Court.

6 Rome Statute of the International Criminal Court (n 3).

7 Yet, the International Criminal Court could not exercise jurisdiction for crimes committed before the entry into force of the Rome Statute.

8 ICC, 'Central African Republic' (n.d.) <https://www.icc-cpi.int/car> accessed 6 February 2022; ICC, 'Central African Republic II' (n.d.) <https://www.icc-cpi.int/carII> accessed 6 February 2022.

9 International Crisis Group, 'Armed Groups in the Central African Republic' [2015] Central African Republic: The Roots of Violence 2, 2-3; Philipp Kastner, 'Africa – A Fertile Soil for the International Criminal Court?' (2010) 85(1/2) Die Friedens-Warte 131, [2.1.4].

10 *Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II*, Case No ICC-01/14 (18 June 2014); Philipp Kastner (n 9) [2.1.4].

– against Mahamat Said Abdel Kani, Seleka commander – and the Yekatom and Ngaïssona Case – against Alfred Yekatom, former caporal-chef in the Forces Armées Centrafricaines and Member of Parliament in the Central African Republic, and Patrice-Edouard Ngaïssona, alleged most senior leader and National General Coordinator of the Anti-Balaka.[11] All these individuals have been charged with crimes against humanity and war crimes; Said has been charged with crimes including torture, persecution and imprisonment, while the other two have been charged with crimes including murder, extermination and deportation.[12] Clearly, due to their anti-systemic roles in the country as leading figures of enemy groups, they present a threat to the government in Bangui, explaining the country's will to collaborate. They have all been arrested and sent to custody of the ICC, where Pre-Trial Chamber II deemed reasonable to start the Trial stage.[13]

2.2. CENTRAL AFRICAN REPUBLIC AND DEMOCRATIC REPUBLIC OF THE CONGO

The first investigation in chronological order seeing the Central African Republic as the main state role – 'Central African Republic I' – is also the more complicated of the two, as this one presents a conflict between different sides, but most importantly a conflict between two member states.[14] It is composed of two cases, both of them having Jean-Pierre Bemba Gombo – head of the Mouvemente de libération du Congo (MLC) – as the main defendant; the cases also bear his name: the Bemba Case, in which he had to answer alone for alleged charges of murder, rape and pillaging, and the Bemba et al. case, where he has been brought to the Court along with Aimé Kilolo Musamba, his former Defense Counsel, Jean-Jacques Mangenda Kabongo, one of his former Defense team members, Fidèle Babala Wandu and Narcisse Arido, all five charged for having provided false proofs and testimonies to the advantage of Bemba.[15] It is important to notice that Bemba was not only a threat to the Central African Republic, but also to Joseph Kabila, President of the Democratic Republic of the Congo, during whose presidency the past tensions between the MLC and the country arose again.[16] It is therefore to no surprise that both the Central African Republic and the Democratic Republic of the Congo have come to a productive cooperation in reporting the crimes, in the case of the Central African Republic,

11 ICC, 'Situation in Central African Republic II: Alfred Yekatom surrendered to the ICC for crimes against humanity and war crimes' (17 November 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1418> accessed 6 February 2022; ICC, 'Situation in Central African Republic II: Mahamat Said Abdel Kani surrendered to the ICC for crimes against humanity and war crimes' (24 January 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1559> accessed 6 February 2022; ICC, 'Situation in Central African Republic II: Patrice-Edouard Ngaïssona arrested for crimes against humanity and war crimes' (12 December 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1425> accessed 6 February 2022.

12 Ibid.

13 Ibid.

14 ICC, 'The States Parties to the Rome Statute' (n.d.) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/ Pages/the%20tates%20parties%20to%20the%20rome%20statute.aspx> accessed 6 February 2022.

15 Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 2019) 64; ICC, 'Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo' (24 November 2013) <https://www.icc-cpi.int/Pages/item.aspx?name=PR962> accessed 6 February 2022; ICC, 'The confirmation of charges hearing in the case of The Prosecutor v. Jean-Pierre Bemba Gombo is starting Monday 12 January 2009' (9 January 2009) <https://www.icc-cpi.int/Pages/item.aspx?name=the%20confirmation%20of%20charges%20hearing%20in%20the%20case%20of%20the%20prosecutor%20v_%20jean_pierre> accessed 6 February 2022.

16 Tatiana Carayannis, *Elections in the DRC: The Bemba Surprise* (US Institute of Peace, 2008) 3–4.

and arresting and bringing Babala, one of the mentioned suspects in the case of the Democratic Republic of the Congo, to the ICC.[17] While the Bemba Case ended with the Appeals Chamber acquitting Bemba from the charges in 2018, the Bemba et al. Case has been closed with all the defendants being declared as guilty, although only partially for Babala and Arido.[18]

2.3. DEMOCRATIC REPUBLIC OF THE CONGO

Cases of the ICC regarding Congo can be divided between those that are the result of local turmoil, and those that are the product of the Kivu conflict – therefore also linked to Rwanda.[19] The former include four cases, of which two linked to the Forces Patriotiques pour la Libération du Congo (FPLC) – the Lubanga Case and the Ntaganda Case – and two linked with their opposite side, the Front des nationalistes et intégrationnistes (FNI) and its ally, the Force de résistance patriotique en Ituri (FRPI) – the Katanga Case and the Ngudjolo Chui Case.[20] The first case included charges against Thomas Lubanga Dylio, who was both at the head of the FPLC and of the Union des Patriotes Congolais (UPC), charged with enlisting and conscripting children under the age of 15.[21] The Ntaganda Case regarded Bosco Ntaganda, commander of operations of the FPLC, who was charged with war crimes and crimes against humanity for deeds committed in the Ituri region.[22] The latter two cases, joined in 2008 as one case but severed in 2012, included charges against Germain Katanga of the FRPI and Mathieu Ngudjolo Chui of the FNI, both regarding alleged war crimes and crimes against humanity committed in the Bogoro village in the Ituri district.[23] These were all leading roles of rebel groups in the

17 The remaining suspects, including Bemba, have been arrested by Belgian, Dutch and French authorities. ICC (n 15).

18 ICC, 'Bemba et al. case: ICC Trial Chamber VII finds five accused guilty of offences against the administration of justice' (19 October 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1245> accessed 6 February 2022; *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"*, Case No ICC-01/05-01/08 (8 June 2018).

19 ICC, 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' (19 April 2014) <https://www.icc-cpi.int/pages/item.aspx?name=prosecutor%20receives%20referral%20of%20the%20situation% 20in%20the%20democratic%20republic%20of%20congo> accessed 6 February 2022; Philipp Kastner (n 9) [2.1.4].

20 *Decision to Unseal the Warrant of Arrest Against Mathieu Ngudjolo Chui*, Case No ICC-01/04-02/07 (7 February 2008); ICC, 'Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo' (2 March 2006) <https://www.icc-cpi.int/pages/item.aspx?name=issuance%20of%20a%20warrant%20of%20arrest%20against%20thomas%20lubanga%20dyilo> accessed 6 February 2022; ICC, 'Katanga and Ngudjolo Chui case: ICC Trial Chamber II severs charges; Verdict on Mathieu Ngudjolo Chui to be issued on 18 December 2012' (21 November 2012) <https://www.icc-cpi.int/pages/item.aspx?name=PR856> accessed 6 February 2022; ICC, 'Second arrest: Germain Katanga transferred into the custody of the ICC' (18 October 2007) <https://www.icc-cpi.int/pages/item.aspx? name=second%20arrest_%20germain%20katanga%20transferred%20into%20the%20custody%20of%20the%20icc> accessed 6 February 2022; *Mandat d'Arrêt à l'Encontre de Germain Katanga*, Case No ICC-01/04-01/07 (2 July 2007).

21 ICC, 'Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo' (2 March 2006) <https://www.icc-cpi.int/pages/item.aspx?name=issuance%20of%20a%20warrant%20of%20arrest%20against%20thomas%20lubanga%20dyilo> accessed 6 February 2022.

22 ICC, 'Ntaganda case: ICC Appeals Chamber confirms conviction and sentencing decisions' (30 March 2021) <https://www.icc-cpi.int/news/ntaganda-case-icc-appeals-chamber-confirms-conviction-and-sentencing-decisions> accessed 13 July 2022.

23 *Decision to Unseal the Warrant of Arrest Against Mathieu Ngudjolo Chui*, Case No ICC-01/04-02/07 (7 February 2008); ICC, 'Katanga and Ngudjolo Chui case: ICC Trial Chamber II severs charges; Verdict on Mathieu Ngudjolo Chui to be issued on 18 December 2012' (21 November 2012) <https://www.icc-cpi.int/pages/item.aspx?name=PR856> accessed 6 February 2022; ICC, 'Second arrest: Germain Katanga transferred into the custody of the ICC' (18 October 2007) <https://www.icc-cpi.int/pages/item.aspx?name=second%20arrest_%20germain%20katanga%20transferred% into%20the%20custody%20of%20the%20icc> accessed 6 February 2022; *Mandat d'Arrêt à l'Encontre de Germain Katanga*, Case No ICC-01/04-01/07 (2 July 2007).

Democratic Republic of the Congo, which allegedly, the country was not able to investigate and prosecute due to lack of capacity, and therefore decided to forward to the ICC, following Uganda's example in 2004.[24] Once again, the investigation is the outcome of a self-referral of the country where those crimes were committed. With the exception of Ngudjolo Chui acquitted in 2012, the decision confirmed in 2015 by the Appeals Chamber, all the suspects have been declared as guilty of at least part of the charges, with orders of reparations for the victims of the committed crimes already confirmed for the Lubanga Case and the Katanga Case.[25]

2.4. DEMOCRATIC REPUBLIC OF THE CONGO AND RWANDA

The only two suspects charged with war crimes and crimes against humanity in the context of the Kivu conflict are Callixte Mbarushimana – the Mbarushimana Case – and Sylvestre Mudacumura – the Mudacumura Case – both from Rwanda.[26] For Mbarushimana the charges were of five counts of crimes against humanity, hence including "murder, torture, rape, inhumane acts and persecution", and six counts of war crimes, that is "attacks against the civilian population, destruction of property" and again "murder, torture, rape" and "inhumane treatment".[27] Mbarushimana had been arrested by French authorities on 28 September 2010, marking a success for the effectiveness of warrants of arrest among State Parties even when the targeted country of the investigation is not willing or not ready to cooperate.[28] This success, though, should not immediately be considered to be an absolute merit of the ICC: as will be later seen in the Sudanese situation – which caused the opposite reaction among several State Parties – it might very well rather be a question of willingness of the international community – with a particular focus on the Democratic Republic of the Congo and on France – to actually bring the suspects to justice, than an authoritative role of the ICC. This context will later serve for a broader understanding of the role of such measures and of the effectiveness of the ICC. In this case, it is important to notice that Rwanda has never been a State Party to the Rome Statute, and its eventual lack of cooperation in the forwarding of its citizens should

24 Philipp Kastner (n 9) [2.1.4].

25 ICC, 'Defence and Prosecution discontinue respective appeals against judgment in Katanga case' (25 June 2014) <https://www.icc-cpi.int/pages/item.aspx?name=PR1021> accessed 6 February 2022; ICC, 'Katanga case: Reparations Order largely confirmed' (8 March 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1364> accessed 6 February 2022; ICC, 'Lubanga case: Appeals Chamber confirms Trial Chamber II's "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable"' (18 July 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1473> accessed 6 February 2022; *Sentencing judgment*, Case No ICC-01/04-02/06 (7 November 2019); ICC, 'Ngudjolo Chui case: ICC Appeals Chamber confirms the acquittal decision' (27 February 2015) <https://www.icc-cpi.int/pages/item.aspx?name=PR1089> accessed 6 February 2022; ICC, 'Simone Gbagbo case: ICC Pre-Trial Chamber I rejects Côte d'Ivoire's challenge to the admissibility of the case and reminds the Government of its obligation to surrender Simone Gbagbo' (11 December 2014) <https://www.icc-cpi.int/pages/item.aspx?name=pr1075> accessed 6 February 2022.

26 ICC, 'Callixte Mbarushimana arrested in France for crimes against humanity and war crimes allegedly committed in the Kivus (Democratic Republic of the Congo)' (11 October 2010) <https://www.icc-cpi.int/news/callixte-mbarushimana-arrested-france-crimes-against-humanity-and-war-crimes-allegedly> accessed 14 February 2022; ICC, 'DRC situation: ICC issues an arrest warrant for Sylvestre Mudacumura' (13 July 2012) <https://www.icc-cpi.int/pages/item.aspx?name=pr827> accessed 6 February 2022.

27 ICC, 'Callixte Mbarushimana arrested in France for crimes against humanity and war crimes allegedly committed in the Kivus (Democratic Republic of the Congo)' (11 October 2010) <https://www.icc-cpi.int/news/callixte-mbarushimana-arrested-france-crimes-against-humanity-and-war-crimes-allegedly> accessed 14 February 2022.

28 Ibid.

not be surprising.[29] Yet, even though the ICC – when judging Mbarushimana – was handling a citizen of a country that did not sign the Rome Statute, in a situation denounced by a State Party of the same Statute, the Pre-Trial Chamber I dismissed the charges against him in 2011, the decision confirmed by the Appeals Chamber in 2012.[30] Although this does not imply much by itself, one conclusion can be made: the ICC had a State Party expecting results – the Democratic Republic of the Congo, which referred the situation in the first place – and the country of origin of the suspects – Rwanda – was not a State Party, which would at first induce to think an eventually very politicized institution would easily comply with the expectations of its State Parties and sentence the suspects. This did not happen for Mbarushimana, even though there was not any relevant political counterweight to the Congolese expectations.[31] Mudacumura, on the other side, whose warrant of arrest has been issued for reasonable grounds of having committed nine counts of war crimes – "attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages against personal dignity" – is still at large as of July 2022.[32] With 10 years having just passed, as the warrant had been issued on 13 July 2012, this marks a still open matter for the ICC in this situation, but also a negative aspect of its scope outside of State Parties. The handling of the Kivu conflict by the ICC might therefore be counted as a possible point in favour of the non-politicization of trials – at least not to too significant levels – in the mentioned institution, and as an ambivalent example for its efficiency to prosecute.

2.5. CÔTE D'IVOIRE

The situation in Côte d'Ivoire is another example of self-referral, where the State Party itself initiated the investigation on its territory.[33] Côte d'Ivoire authorized the ICC to investigate crimes committed in the timeframe between 2002 and 2010, but also authorized eventual investigations regarding future continuations of crimes, as long as they were regarding the same context.[34] The opened cases involve Laurent Gbagbo and Charles Blé Goudé – joined in 2015 in the Gbagbo and Blé Goudé Case – and Simone Gbagbo, wife of Laurent Gbagbo at the time of the warrant – the Simone Gbagbo Case.[35] Laurent Gbagbo, former President of Côte d'Ivoire, has historically been a fervent oppositor of Alassane Dramane Outtara, Prime Minister of Côte

29 ICC (n 14).

30 ICC, 'Mbarushimana case: ICC Appeals Chamber rejects the Prosecution's appeal' (30 May 2012) <https://www.icc-cpi.int/pages/item.aspx?name=PR798> accessed 6 February 2022.

31 Ibid.

32 ICC, 'Mudacumura Case' (n.d.) <https://www.icc-cpi.int/drc/mudacumura> accessed 6 February 2022.

33 *Decision Assigning the Situation in the Republic of Côte d'Ivoire to Pre-Trial Chamber II*, Case No ICC-02/11 (20 May 2011).

34 Ibid.

35 Burke-White W, 'A Wife Accused of War Crimes: The Unprecedented Case of Simone Gbagbo' (The Atlantic, 3 December 2012) <https://www.theatlantic.com/international/archive/2012/12/a-wife-accused-of-war-crimes-the-unprecedented-case-of-simone-gbagbo/265828/> accessed 6 February 2022; ICC, 'Simone Gbagbo case: ICC Pre-Trial Chamber I rejects Côte d'Ivoire's challenge to the admissibility of the case and reminds the Government of its obligation to surrender Simone Gbagbo' (11 December 2014) <https://www.icc-cpi.int/pages/item.aspx?name=pr1075> accessed 6 February 2022; ICC, 'Trial of Laurent Gbagbo and Charles Blé Goudé opens at International Criminal Court' (28 January 2016) <https://www.icc-cpi.int/pages/item.aspx?name=PR1184> accessed on 6 February 2022.

d'Ivoire during the first tensions between the two and President of Côte d'Ivoire at the time of the warrant against Gbagbo, Blé Goudé and Simone Gbagbo.[36] This self-referral, therefore, finds its answer one more time in the change of elites at the head of a country, denouncing their oppositions for alleged crimes. All the suspects have been charged with crimes against humanity in the 2010–2011 post-election violence, when Laurent Gbagbo lost against Outtara.[37] While Simone Gbagbo's Trial never started – as Côte d'Ivoire delayed her surrendering and tried multiple times to challenge the admissibility of the case – remaining in the Pre-Trial Stage until the charges were vacated in 2021, Laurent Gbagbo and Charles Blé Goudé were acquitted in the Trial Stage by Trial Chamber I in 2019, decision confirmed by the Appeals Chamber on 31 March 2021.[38] Just as for the Kivu conflict, the ICC handled a case where no ruling elite was actively advocating their liberation, and yet it ended with no irrational punishments against opponents of a State Party. This could be at least considered as a sign of contrast of the ICC against unilateral expectations of its supporting countries, but beyond that, also as a sign of compliance of State Parties to such decisions of the ICC, as Côte d'Ivoire did not question in an active way its backing of the ICC just because of the results of such cases.

2.6. DARFUR, SUDAN

The investigation regarding Darfur, Sudan, is the first example in the history of the jurisprudence of the ICC where the situation of alleged war crimes and crimes against humanity has been referred by the UN, and is also the first example of an investigation entirely regarding only territories outside of State Parties of its Statute – on 31 March 2005, the UN Security Council Resolution 1593 (2005) referred the situation in Darfur, including crimes committed since 1 July 2002, to the ICC.[39] The investigation in Sudan has brought six cases against a total of seven individuals: the Abd-Al-Rahman Case, against Ali Muhammad Ali Abd-Al-Rahman; the Abu Garda Case, against Bahr/Bahar Idriss Abu Garda; the Al Bashir Case, against Omar Hassan Ahmad Al Bashir; the Banda Case, against Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus; the Harun Case, against Ahmad Muhammad Harun, and finally the Hussein Case, against Abdel Raheem Muhammad Hussein.[40] All these cases point to Sudanese

36 Andrea Silvestri, 'Costa D'Avorio dalla Prima alla Seconda Repubblica: Identità e Modello di Sviluppo' (2002) 57(2) Africa: Rivista Trimestrale Di Studi e Documentazione Dell'Istituto Italiano per l'Africa e l'Oriente 179, 188-189; ICC (n 35); Renaud Girard, 'Côte D'Ivoire, la Victoire du Perdant' [2011] Revue Des Deux Mondes, 55, 56-57.

37 ICC, 'Simone Gbagbo case: ICC Pre-Trial Chamber I rejects Côte d'Ivoire's challenge to the admissibility of the case and reminds the Government of its obligation to surrender Simone Gbagbo' (11 December 2014) <https://www.icc-cpi.int/pages/item.aspx?name=pr1075> accessed 6 February 2022; ICC, 'Trial of Laurent Gbagbo and Charles Blé Goudé opens at International Criminal Court' (28 January 2016) <https://www.icc-cpi.int/pages/item.aspx?name=PR1184> accessed on 6 February 2022.

38 *Decision on the Prosecutor's Request to Vacate the Effect of the Warrant of Arrest Issued Against Ms Simone Gbagbo*, Case No ICC-02/11-01/12 (19 July 2021); ICC, 'Gbagbo and Blé Goudé Case' (n.d.) <https://www.icc-cpi.int/cdi/gbagbo-goude> accessed 6 February 2022; ICC, 'Gbagbo and Blé Goudé case: ICC Trial Chamber I files the written reasons for the acquittal' (16 July 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1470> accessed 6 February 2022.

39 *Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I*, Case No ICC-02/05 (21 April 2005); Rome Statute of the International Criminal Court (n 3).
For a summary of the international reaction to the ICC opening an investigation in Darfur, see: International Crisis Group, 'Darfur and the ICC' [2009] Sudan: Justice, Peace and the ICC 2, 5–7.

40 *Decision on the Prosecution Application Under Article 58(7) of the Statute*, Case No ICC-02/05-01/07 (29 April 2007); *Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein*, Case No ICC-02/05-01/12 (1 March 2012);

nationals who allegedly committed war crimes and crimes against humanity mainly against the population in Darfur, mostly out of ideological alignment with Arab ethnic nationalism.[41] What is most important though, is that they do not only include military and paramilitary leaders – as in the case of Abd-Al-Rahman and the Janjaweed militia – but also the highest political ranks of Sudan, with the most remarking being the President of Sudan at the time of his warrant Al Bashir, followed by his Ministers Harun and Hussein.[42] With the case against Abd-Al-Rahman about to evolve from Pre-Trial Stage to Trial Stage – as all the charges of war crimes and crimes against humanity were confirmed by Pre-Trial Chamber II in July 2021 – with Abu Garda having been tried and his charges rejected, and with Jerbo being proven dead, the first two are the only ones of all the mentioned suspects brought to the ICC, and Abu Garda is the only closed case of the Sudanese situation as of July 2022.[43] As most of the cases imply suspects at large, the situation could still in theory be overturned, but as will later be outlined in the final comparison of this chapter, most indicators point to an eventual surrendering of former President Al Bashir just because of a local change of power, and not because of the ICC actually overreaching to countries outside of its membership.[44] Even the efficiency of the measures implied with the status of suspects at large could be questioned: the Democratic Republic of the Congo – a State Party to the Rome Statute – refused to arrest Al Bashir on a state visit.[45] The Prosecutor even travelled personally to the country to seek explanations, and the latter hid behind the Rome Statute itself and other international obligations to justify its non-compliance with the ICC.[46] The same happened in South Africa, another State Party to the Rome Statute, where Al Bashir was not arrested during a meeting of the African Union in June 2015.[47] Such examples might not exclude the existence of a relative impact of warrants of arrest issued by the ICC, but they surely once again outline the focus of international support to actually apply those warrants. This first example of the Court trying to involve itself in the judgment of leading ranks of a country that is also not a State Party of its Statute, is an empirical indicator of its lack of capabilities when dealing with opposing forms of local order, not

ICC, 'ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan' (4 March 2009) <https://www.icc-cpi.int/pages/item.aspx?name=icc%20issues%20a%20warrant%20of%20arrest%20for% omar%20al%20bashir_%20president%20of%20sudan> accessed 6 February 2022; ICC, 'New suspects in the situation in Darfur, Sudan arrive voluntarily at the ICC: First appearance scheduled for tomorrow' (16 June 2010) <https://www.icc-cpi.int/Pages/item.aspx?name=pr547> accessed 6 February 2022; *Summons to Appear for Bahr Idriss Abu Garda*, Case No ICC-02/05-02/09 (7 May 2009).

41 Ibid.

42 Ibid. Kreß C, 'The ICC's First Encounter with the Crime of Genocide', in Stahn C (ed), The Law and Practice of the International Criminal Court (Oxford University Press 2015).

43 *Decision Terminating the Proceedings Against Mr Jerbo*, Case No ICC-02/05-03/09 (4 October 2013); ICC, 'Abu Garda Case' (n.d.) <https://www.icc-cpi.int/darfur/abugarda> accessed 13 July 2022; ICC, 'Al Bashir Case' (n.d.) <https://www.icc-cpi.int/darfur/albashir> accessed 6 February 2022; ICC, 'Banda Case' (n.d.) <https://www.icc-cpi.int/darfur/banda> accessed 6 February 2022; ICC, 'Harun Case' (n.d.) <https://www.icc-cpi.int/darfur/harun> accessed 6 February 2022; ICC, 'Hussein Case' (n.d.) <https://www.icc-cpi.int/darfur/hussein> accessed 6 February 2022; ICC, 'New suspects in the situation in Darfur, Sudan arrive voluntarily at the ICC: First appearance scheduled for tomorrow' (16 June 2010) <https://www.icc-cpi.int/Pages/item.aspx?name=pr547> accessed 6 February 2022; *Prosecution's Notification of Disclosure of Evidence*, Case No ICC-02/05-01/20 (24 December 2021).

44 Chutel L, 'Will Sudan Send Bashir to The Hague?' (Foreign Policy, 18 August 2021) <https://foreignpolicy.com/2021/08/18/sudan-bashir-icc-hague-justice-darfur-hemeti> accessed 6 February 2022.

45 André Mbata Mangu, 'The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview' (2015) 40(2) Africa Development / Afrique et Développement, 7–32.

46 Ibid.

47 Ibid.

to mention the fact that this was mostly possible just because of the international isolation of Sudan, matter that will be contextualized later. Though, as no further relevant backlashes from the international community took ground, it must also be said that while appearing as a not very effective tool, this external referral from the UN Security Council also comes as a not very costly measure. This leaves a space open for ambiguity on whether a balance could still be found to keep those referrals in at no loss.

2.7. KENYA

Kenya is the country with the most overall number of suspected individuals in the history of the ICC as of July 2022, although Sudan remains the one with most overall cases – the Kenyan situation therefore included the following cases: the Barasa Case, against Walter Osapiri Barasa; the Bett Case, against Philip Kipkoech Bett; the Kenyatta Case, against Uhuru Muigai Kenyatta, Francis Kirimi Muthaura and Mohamed Hussein Ali; the Gicheru Case, against Paul Gicheru, and finally the Ruto and Sang Case, against William Samoei Ruto, Joshua Arap Sang and Henry Kiprono Kosgey.[48] The investigation regarding the Kenyan situation was just as for Darfur, Sudan, initiated without the suggestion of the mentioned country itself and mainly going after some of the highest political ranks.[49] But differently from the Darfur situation, this time it involved a State Party, and it was addressed by the Prosecutor of the ICC rather than from the Security Council of the UN – therefore as *proprio motu*.[50] The investigated timeframe included the years of the post-election violence in Kenya – precisely the 2007-2008 period.[51] Trial Chamber V(A) of the ICC has terminated the proceedings both for the Kenyatta Case than for the Ruto and Sang Case, therefore setting the cases currently as closed, although new evidence from the Prosecutor could eventually lead to reopening.[52] With the exception of Paul Gicheru, who voluntarily presented himself in front of the ICC, the remaining two suspects did not surrender themselves, leaving their cases at Pre-Trial Stage.[53] To summarize all the cases: not one individual from Kenya has been condemned or declared guilty for the deeds committed in the post-election timeframe, with Gicheru being the only suspect actively tried as of July 2022. With all the remaining suspects being either at large or not being successfully proven guilty, the Kenyan situation – as the Sudanese one – proves to be, as of now, a failure

48 *Decision on the "Prosecution's Application Under Article 58(1) of the Rome Statute"*, Case No ICC-01/09-01/15 (10 September 2015); *Decision Severing the Case Against Mr Gicheru*, Case No ICC-01/09-01/15 (11 December 2020); ICC, 'Kenyatta case: Trial Chamber V(B) terminates the proceedings' (13 March 2015) <https://www.icc-cpi.int/pages/item.aspx?name=pr1099> accessed 6 February 2022; ICC, 'Ruto and Sang case: ICC Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future' (5 April 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1205> accessed 6 February 2022; *Warrant of Arrest for Walter Osapiri Barasa*, Case No ICC-01/09-01/13 (26 September 2013).
For a deeper description of the crisis in Kenya that led to the mentioned events, see: Tim Murithi, 'Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan' (2015) 40(2) Africa Development / Afrique et Développement 73, 78–80.

49 *Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II*, Case No ICC-01/09 (6 November 2009).

50 Ibid.

51 Ibid.

52 *Decision on the "Prosecution's Application Under Article 58(1) of the Rome Statute"* (n 48).

53 *Decision Severing the Case Against Mr Gicheru* (n 48); *Warrant of Arrest for Walter Osapiri Barasa* (n 48).

of the ICC. Kenya, as a State Party, reasonably demonstrates reluctancy in cooperation when it comes to its own nationals, as they are not appertaining to rebel groups either.

2.8. LIBYA

Libya is the second and last investigation of the ICC, as of July 2022, that has been both opened in a country that is not a State Party of its Statute and after a referral from the UN Security Council: with the Resolution 1970 (2011) of 26 February 2011 of the UN Security Council, the situation in the Libyan Arab Jamahiriya has been assigned to Pre-Trial Chamber I of the ICC with immediate effect.[54] The investigation in Libya led to three different cases against a total of five suspects: the Gaddafi Case, initially against Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi; the Khaled Case, against Al-Tuhamy Mohamed Khaled, and finally the Al-Werfalli Case, against Mahmoud Mustafa Busayf Al-Werfalli.[55] The first of the mentioned cases, being also the first of the ICC in Libya in chronological order, has been shrunk to one only suspect – Saif Al-Islam Gaddafi, at large – after the death of the Commander of the Armed Forces of Libya Muammar Mohammed Abu Minyar Gaddafi and the determined inadmissibility of the case against Al-Senussi.[56] What the three suspects of this case were charged with at the time of their warrants were crimes against humanity perpetrated through the State apparatus and Security Forces from 15 February 2011 until at least 28 February 2011, crimes for which Saif Al-Islam Gaddafi is still expected to be tried.[57] The Khaled Case also includes similar charges for Al-Tuhamy Mohamed Khaled – that is, for the same set of events in Libya in 2011 – and he also has not been arrested nor has he surrendered himself to the ICC.[58] Finally, the third and last case – the one against Mahmoud Mustafa Busayf Al-Werfalli – does not refer to deeds committed during the downfall of Muammar Mohammed Abu Minyar Gaddafi, but rather to individual crimes against humanity committed by the mentioned suspect in the years that followed, with an alleged number of seven rounds of executions for which Al-Werfalli has to respond.[59] He is also at large, with two arrest warrants having been issued against him.[60] One more time, the Court has been rendered ineffective in

54 *Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I*, Case No ICC-01/11 (4 March 2011); Rome Statute of the International Criminal Court (n 3).

55 *Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No ICC-01/11 (17 May 2011); *Warrant of Arrest*, Case No ICC-01/11-01/17 (15 August 2017); *Warrant of Arrest for Al-Tuhamy Mohamed Khaled with Under Seal and Ex Parte Annex*, Case No ICC-01/11-01/13 (18 April 2013).

56 *Decision on the Admissibility of the Case Against Abdullah Al-Senussi*, Case No ICC-01/11-01/11 (11 October 2013); *Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, Case No ICC-01/11-01/11 (22 November 2011)*; ICC. 'Saif Al-Islam Gaddafi case: ICC Appeals Chamber confirms case is admissible before the ICC' (9 March 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1518> accessed 6 February 2022.

57 Ibid.

58 ICC, 'ICC Prosecutor calls for the immediate arrest and surrender of the suspects, Mssrs Saif Al-Islam Gaddafi and Al-Tuhamy Mohamed Khaled to the Court' (14 June 2017) <https://www.icc-cpi.int/Pages/item.aspx?name=170614-otp-stat> accessed 6 February 2022.

59 ICC, 'Statement of ICC Prosecutor, Fatou Bensouda, following the second arrest warrant for Mr Mahmoud Mustafa Busayf Al-Werfalli: "The suspect must be arrested and immediately surrendered to the Court."' (6 July 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=180706-otp-stat-al-werfalli> accessed 6 February 2022.

60 Ibid.

the handling of a country not being a State Party of its Statute and not being voluntarily ready to cooperate, with most of its suspects being at large, reaching a similar outcome to the one in Kenya and Darfur, Sudan.

2.9. MALI

The investigation in Mali was initiated after a self-referral of a delegation of the Government of Mali to the Prosecutor of the ICC on 18 July 2012, a day before the latter would assign with immediate effect the mentioned country to Pre-Trial Chamber II.[61] The two cases that followed by this investigation are the Al Hassan Case – against Al Hassan Ag Abdoul Aziz, de facto chief of Islamic police and member of Ansar Eddine – and the Al Mahdi Case – against Ahmad Al Faqi Al Mahdi, another alleged member of Ansar Eddine and former head of the Hisbah/Hesbah.[62] While Al Hassan is still to be tried, Al Mahdi – who had surrendered himself to the ICC in 2015 – was found guilty by Trial Chamber VIII and sentenced to nine years of imprisonment, the sentence that was shortened by two years in 2021.[63] The situation in Mali is therefore one of lesser controversy, with the Government of Mali cooperating with the ICC against crimes it could not handle alone, and hence this situation also represents a reasonable success for this institution.

2.10. UGANDA

As in the just mentioned situation in Mali, the one in Uganda is also one initiated by self-referral.[64] It is the earliest self-referral in the history of the ICC, and its cases were the first to be opened: the Kony et al. Case, which originally included all the five suspects of the situation in Mali, later including charges against Joseph Kony, Vincent Otti, Okot Odhiambo and Raska Lukwiya, and the Ongwen Case – severed from the Kony et al. Case in 2015 – against Dominic Ongwen.[65] All the mentioned suspects were high members of the Lord's Resistance Army (LRA) that took part in the conflict against the national authorities of Uganda, mostly in the region of Northern Uganda; Dominic Ongwen is the only one of the mentioned suspects that surrendered himself to the ICC and is currently being tried, as two of the remaining suspects – Raska Lukwiya and Okot Odhiambo – passed away, respectively in 2006 and in 2013, while

61 *Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II*, Case No ICC-01/12 (20 July 2012).

62 ICC, 'Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu' (26 September 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1154> accessed 6 February 2022; ICC, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the trial in the case against Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud' (14 July 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=200714-otp-statement-al-hassan> accessed 6 February 2022.

63 Ibid. ICC, 'ICC Judges take a decision on Mr Al Mahdi's sentence review' (25 November 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1629> accessed 6 February 2022.

64 *Decision Assigning the Situation in Uganda to Pre-Trial Chamber II*, Case No ICC-02/04 (5 July 2004).

65 Ibid. ICC, 'ICC Pre-Trial Chamber II separates Dominic Ongwen case from Kony et al. case' (6 February 2015) <https://www.icc-cpi.int/pages/item.aspx?name=PR1088> accessed 6 February 2022.

the last two suspects remain at large.[66] This first historical investigation of the Court could be considered a failure, as only one of five suspects has been brought to judgment, even though it was a self-referral to initiate the investigation. Uganda can be considered as the only example in which an investigation initiated by self-referral did not obtain a reasonable outcome. A valid reason might be the military dominance of the rebel groups in specific regions of the country, undermining the intentions of the national authorities in forwarding the suspects to the ICC.

2.11. INVESTIGATIONS WITHOUT CASES

The ICC has initiated seven different investigations yet without cases, all after the aforementioned investigations that led to warrants and cases – these new investigations are, in chronological order of opening: the investigation in Georgia, authorized to open on 27 January 2016; the one in Burundi, authorized to open on 25 October 2017; the investigation in Bangladesh/Myanmar, authorized to open on 14 November 2019; the investigation in Afghanistan, first rejected by Pre-Trial Chamber II on 12 April 2019, but furtherly authorized by the Appeals Chamber of the ICC on 5 March 2020; the investigation in the State of Palestine, opened on 3 March 2021, after the decision of Pre-Trial Chamber I on 5 February 2021 that the Court could exercise its criminal jurisdiction regarding the Palestinian situation, and that the territory upon which it could exercise said jurisdiction also includes Gaza, the West Bank and East Jerusalem; the investigation in the Republic of the Philippines, authorized to open on 15 September 2021, and finally the investigation in Venezuela, authorized to open on 3 November 2021.[67] The investigations in Georgia, Burundi, Bangladesh/Myanmar, and Afghanistan were all initiated *proprio motu*, with the only exceptions therefore being the State of Palestine – whose investigation was initiated upon self-referral – and Venezuela – referred by a group of State Parties.[68] Georgia, Bangladesh, Afghanistan, the State of Palestine and Venezuela are State Parties of the Rome Statute as of 2022, with Myanmar never having signed the Statute and with Burundi and the Republic of the Philippines having signed it but having also withdrawn their signature later.[69] To summarize the areas of work of the ICC in the mentioned contexts: the investigation in Georgia is focused on the deeds committed during the war in the

66 Ibid. *Decision to Terminate the Proceedings Against Raska Lukwiya*, Case No ICC-02/04-01/05 (11 July 2007); ICC, 'ICC terminates proceedings against Okot Odhiambo following forensic confirmation of his passing' (20 September 2015) <https://www.icc-cpi.int/pages/item.aspx?name=PR1147> accessed 6 February 2022.

67 *Decision on the Prosecutor's Request for Authorisation of an Investigation Pursuant to Article 15(3) of the Statute*, Case No ICC-01/21 (15 September 2021); *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Case No ICC-01/19 (14 November 2019); *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, Case No ICC-01/17 (25 October 2017); ICC, 'Afghanistan: ICC Appeals Chamber authorises the opening of an investigation' (5 March 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516> accessed 6 February 2022; ICC, 'ICC Prosecutor, Mr Karim A.A. Khan QC, opens an investigation into the Situation in Venezuela and concludes Memorandum of Understanding with the Government' (5 November 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1625> accessed 6 February 2022; ICC, 'Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine' (3 March 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine> accessed 6 February 2022.

68 Ibid.
For a more detailed analysis of the ICC in Myanmar, see: Reilly Frye, 'Family Separation Under the Trump Administration' (2020) 110(2) The Journal of Criminal Law and Criminology 349, 355–357.

69 ICC (n 14).

2008-2010 timeframe, mostly in South Ossetia; the one in Burundi has no specific regional boundaries, but rather a *ratione materiae* regarding crimes against humanity committed by Burundi nationals both in their country of origin and outside of it; the investigation in Bangladesh/Myanmar – which as mentioned before regards Bangladesh as a State Party and Myanmar as a country that never signed the Rome Statute – has a focus mostly on the waves of violence from 2016 and 2017 in both countries; the situation in Afghanistan includes alleged crimes committed in the war of 2003 and onwards; the one in the State of Palestine will count alleged crimes committed on its territory since 13 June 2014, with no specified end date; the investigation in the Republic of the Philippines has a focus on the 'war on drugs' campaign in the period between 1 November 2011 and 16 March 2019, and at last, the situation in Venezuela – Venezuela I, as the Venezuela II situation has been analysed separately – involves alleged crimes committed on its territory since at least April 2017.[70]

2.12. FINAL COMPARISON

The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were expected to mark a shift from the feeling of 'victor's justice' of Nuremberg and Tokyo, and in part they did so, but political factors ended impacting very much the effectiveness of their work.[71] When the ICC became a reality, during the stipulation of the Rome Statute, one of the main intentions was to – through a permanent criminal court – eclipse such a feeling of 'victor's justice', which would target only the 'friendless'.[72] Yet, examples like the one between the Central African Republic and Congo, and the one in Ivory Coast or Mali, seem to indicate the opposite. ICC's new format of community justice ended up carrying many of the political implications attributed to these two *ad hoc* tribunals.[73] As a negative support of that point, the failures in Darfur, Sudan, Libya and Kenya demonstrate what it looks like when the ICC needs to act in front of situations not requested by the current elites of the given countries, with Libya being a failure even with the military outnumbering and overthrow of the Gaddafi supporters.

One last aspect to analyse, in the realm of practical events that could have characterized the form and conduct of the ICC, is how these undertaken investigations have affected the behaviour of both State Parties of the Rome Statute and countries that either did not sign or ratify the Statute or that withdrew their signature. The first backlash against the ICC was surely the one coming from several African countries, seeing the historical choice of targeting African countries for both investigations against State Parties of the Rome Statute and *proprio*

70 *Decision on the Prosecutor's Request for Authorisation of an Investigation Pursuant to Article 15(3) of the Statute* (n 67); *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (n 67); *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi* (n 67); ICC (n 67).

71 Kenneth A. Rodman, 'How Politics Shapes the Contributions of Justice: Lessons from the ICTY and the ICTR' (2016) 110(1) AJIL Unbound 234, 237–239.

72 Ibid. Henrietta Joy Abena Nyarko Mensa-Bonsu, 'The ICC, International Criminal Justice and International Politics' (2015) 40(2) Africa Development / Afrique et Développement 33, 36.

73 Kenneth A. Rodman, 'How Politics Shapes the Contributions of Justice: Lessons from the ICTY and the ICTR' (2016) 110(1) AJIL Unbound 234, 237–239.

motu investigations or referred situations.[74] This approach has been abused in countries such as Kenya, with the ICC being utilized through propaganda to reaffirm the local elite's position.[75] Sudan, on the other side, is allegedly planning to cooperate by surrendering its former leader just because of a local change of power – the December 2018 revolution – while Uganda maintains a cooperative status – as even though its self-referral did not lead to the capture of the commanders of the Lord's Resistance Army, it still helped the pro-systemic side gain traction on the international scene as ready to support common jurisdictional institutions, hence diminishing legal repercussions against its own leaders.[76]

As for the contexts outside of Africa, the lack of balance might just be confirming itself: when an investigation in Iraq was to eventually be opened, there was presumably pressure from the United States to circumvent the initiative, and when nationals of the United Kingdom had to be tried as they were still bounded to the jurisdiction of the ICC, the investigation was at last cancelled anyway.[77] When the President Clinton, a Democrat, initially supported the Rome Statute, he declared of having done so just to remain in a position that could influence the ICC; doubts arose immediately when the question of politically motivated investigations had been brought, stance reinforced through comparisons with the Constitution of the United States, ending with the country not ratifying the Rome Statute during the Bush Jr. administration.[78] At last, when the investigation in the State of Palestine was opened, former Prime Minister Benjamin Netanyahu promptly declared that Israel would not collaborate with the ICC.[79]

3. REFERRALS FROM THE UN SECURITY COUNCIL

With a further focus on the already mentioned referrals from the UN Security Council, and with special regard to the structural aspect implied by the mostly unilateral relationship between the said body and the ICC, it is of fundamental importance to first identify some leading criticisms and open debates, then evaluate their value and consequences in the broader context

74 Ba O, 'A Truly International Criminal Court: Why the New Prosecutor Should Look Beyond Africa' (Foreign Affairs, 18 June 2021) <https://www.foreignaffairs.com/articles/africa/2021-06-18/truly-international-criminal-court> accessed 6 February 2022.

75 International Crisis Group, 'Kenya: Impact of the ICC Proceedings' [2012] International Crisis Group 1, 11–12; Daniel Mburu, 'The Lost Kenyan Duel: The Role of Politics in the Collapse of the International Criminal Court Cases against Ruto and Kenyatta' (2018) 18(1) International Criminal Law Review 1015, [3.1].

76 Chutel L (n 44); Morgan Harris, 'Considering Colonialism: The Contentious Drafting History and Politics of the International Criminal Court' (2019) 9 Strategy and Development Review 10, [2].

77 Begg M, 'Failure to Prosecute UK War Crimes in Iraq Exposes ICC's Own Failings' (Common Dreams, 17 December 2020) <https://www.commondreams.org/views/2020/12/17/failure-prosecute-uk-war-crimes-iraq-exposes-iccs-own-failings> accessed 6 February 2022; Nadia Shamsi (n 1) 100–102.

78 David Scheffer, 'War Crimes and the Clinton Administration' (2002) 69(4) Social Research 1109, 1116; Diane Marie Amann and Mortimer Newlin Stead Sellers, 'The United States of America and the International Criminal Court' (2002) 50(1) The American Journal of Comparative Law 381, 381-384; Steven Craig Roach, 'Courting the Rule of Law? The International Criminal Court and Global Terrorism' (2008) 14(1) Global Governance 13, 15.

79 Scheindlin D and Kraja G, 'The ICC's Israel Investigation Could Backfire: It's more likely to inflame nationalist sentiments than change anything on the ground' (Foreign Policy, 12 April 2021) <https://foreignpolicy.com/2021/04/12/israel-palestine-icc-yugoslavia-icty-politics-conflict-justice> accessed 6 February 2022.

described until now – that is, to define how much the ICC depends on the UN Security Council, the reasons why, and also whether it has got or not better chances following a different path.

3.1. CRITICISMS, CONTROVERSIES AND DOUBTS

With the ICC ideally representing a neutral, objective mean of justice, the first and most visible issue that comes up is the discrepancy of values and methods caused by the allowance – to a body that does not apply strict, impersonal and bureaucratic procedures but is rather the aftermath of political tendencies and power hierarchies between states – to appoint specific situations and bring them to the attention of the Office of the Prosecutor.[80] This fear has been a leading worry since the very beginnings of the ICC, with the atrocities committed by troops of the Rwandan government against Hutu refugees in Congo in 1998 being mentioned at the Rome Conference as an example of inefficiency of the UN Security Council when reacting to such imminent threats and crimes.[81] This implies not only that the ICC is susceptible to external, biased pressure: it also opens the door to doubts about the possibilities of the Office of the Prosecutor itself. If its work is supposedly objective, why does it require external pressure to start investigations? This would either lead to the conclusion that – besides reasonable investigations opened with plausible proof – other investigations are taken in consideration *ad hoc* to satisfy the varying needs of the political background of the UN, or that not all reasonable investigations can be successfully initiated without a broader consensus. This issue was about to be additionally intensified by the introduction of the crime of aggression in 2010 with the possibility of gatekeeping by the UN Security Council, as the latter could have been appointed as an unilateral holder of the right to identify aggressions and aggressors: the Assembly of State Parties has anyway rejected this view, hence limiting the impact of the aforementioned body on the decisions of the ICC, but it still fell under the pressure of referrals.[82] Some would argue that this was still a positive compromise between the inevitable dominance of the former, while still maintaining a good chunk of the original intentions of the Rome Statute.[83]

Another issue presenting itself both in the already quoted instances of this relationship, both in the remaining occurrences, is the attempt of the ICC to behave – through the referrals of the UN Security Council – as an institution legitimated to enact universal jurisdiction for its established purposes.[84] This has been a present debate from the very start, with countries discussing the validity of such an idea at the Rome Conference in 1998, hence leading to a very polarized spectrum of perspectives on the admissibility of investigations opened on

80 Aregawi B, 'The Politicisation of the International Criminal Court by United Nations Security Council Referrals' (ACCORD, 21 July 2017) <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals> accessed 10 February 2022.

81 Daniel Mburu (n 75) [4.3]; Victor Oluwasina Ayeni and Matthew Adefi Olong, 'Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court' (2017) 25(2) African Journal of International and Comparative Law 239, 249–250.

82 Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013) 232–234; Gerhard Werle and Floran Jessberger, *Principles of International Law* (Oxford University Press, 2014) 25–26.

83 For an example, see: Carrie McDougall (n 82).

84 Gabriel Maria Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and in Practice* (Edward Elgar, 2018) [1.1].

the territory or against nationals of a non-signatory state of the Rome Statute, and with the United States from the outside still leading the counterargument – supported by often changing claims.[85] As previously analysed, there are only two examples of the situations initiated through referrals of the UN Security Council: the one in Darfur, Sudan, and the one in Libya. With the latter, considering even the attitudes of Russia at the time, being a clear instance of a country elite with no significant support from the international scene, although the Sudanese situation also did not enjoy the benefits of veto powers' protection, it still demonstrated the behaviour of an elite – whose fate was yet not determined – when attempting to contrast the legitimacy of the ICC on its soil.

At last, it is still in the context of Darfur that the third and latter of the leading controversies here identified could be best defined and described: the alleged interference of the Office of the Prosecutor in parallel attempts of peacebuilding.[86] A debate has been opened on the possibility of the incrimination of al-Bashir undermining the peace accords that were already being obtained, with the counterarguments being the eventual avoidance of a possible genocide – avoidance accomplished through the isolation of the perpetrators – and the priority of stable forms of justice before any short-term peace accords that might be fulfilled.[87]

3.2. RELIANCE ON THE UN SYSTEM

After having previously specified the negative implications of the mentioned relationship between the ICC and the UN Security Council, a further point might come to mind – in that respect – on the reasons and boundaries behind the necessity of the former of the support, guidance and even of the pressure of the UN system. What makes it so that the ICC could not – or is at least motivated not to – operate on its own, in an autonomous way, out of the directives of external political bodies? Three possibilities might occur, to additionally analyse, making it so that the ICC might seek the approval of or be bounded to the will of the UN: the first one would be the financial one, with this aspect inevitably representing the core necessity of any institution and with the UN being an outstanding resource; the second one would therefore be a reputational element, with the possibility of the ideals of an international criminal court and of a planetary consensus converging, further motivating countries to expect cooperation between the two organs representing such aims, and the third – and latter – would be the one of the UN Security Council being an inevitable tool on the path to universal jurisdiction, as it would otherwise be impossible to bring to justice perpetrators in non-signatory states of the Rome Statute.

Starting from the first, considering the structure of the financial relationship determined by the arrangements that followed the Negotiated Relationship Agreement in 2004 – as the latter implies no specific repartitions of financial duties or obligations – and the overall budget

85 Ibid. Carrie McDougall (n 82) 236–237.

86 Geoff Dancy and Florencia Montal, 'Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions' (2017) 111(3) The American Journal of International Law 689, 689-690; Steven Craig Roach, 'The Turbulent Politics of the International Criminal Court' (2011) 23(4) Peace Review: A Journal of Social Justice 546, 546–548.

87 Ibid.

amounts declared since 2017 with the new expectations for transparency of the UN system, the financial aspect could be identified as an important one when dealing with referrals from the UN Security Council.[88] Although State Parties of the Rome Statute provide most of the resources through so-called 'assessed contributions', and even though the UN are not expected to support economically the field activities of the ICC – not even when dealing with their own referrals – it is a constant praxis that the UN provide additional budget to support their referrals.[89] That way, even if the Court does not exist primarily through apported budget of the UN that is not the one defined for State Parties of the Rome Statute, it has still got a significant economic factor motivating the opening – no matter what results it will lead to – of new investigations referred by the UN Security Council. It is therefore not just a matter of political impact for the Office of the Prosecutor, but also one of economic bonuses behind one choice or the other.

The second aspect – the reputational one – is also the one that might have been identified most by what has already been mentioned through the comparative analysis of the history of the ICC cases: current State Parties do not expect a similarity of principles with the UN's consensus, on the contrary, leaving members have defined the impact of the latter as being the sole reason of their decision. It could be as such entirely discarded, and actually considered as an opposite tendency, one that would motivate the ICC to keep its fair distances from the global consensus and rather maintain its current State Parties; but also, it could compensate the first mentioned issue of economic interests caused by the revenues from the UN system. It would not be wise to demolish a membership of states almost entirely funding the institution, just for what constituted less than 2 % of the whole budget from 2017 to 2020.[90] That is, as long as the wills of the two are in contrast: if the UN Security Council targets countries with no significant support among the State Parties of the Rome Statute – as were the cases of Sudan and Libya – the balance might still fall on the ICC being reasonably motivated to open an investigation.

At last, the opportunity to accomplish universal jurisdiction – against the voluntary will of country elites and against their sovereignty to choose whether the Rome Statute applies to them too – through the undiscussed role of the UN Security Council. With universal jurisdiction being originally denied to the ICC at the Rome Conference in 1998, these one-time referrals to open investigations outside of the usually conceded bounds would present a very selective form of such jurisdiction, with the UN being the gatekeeper of aforesaid occurrences.[91] This aspect is surely one that has been both aspired from prosecutors and judges at the ICC, with judge Ibáñez still trying to apply the same form of undiscussed universality of the Rome Statute regarding the Sudanese situation – even though it had been, as mentioned, refuted at the very historical start of this institution.[92] But what should be a breaking point for

88 Negotiated Relationship Agreement between the International Criminal Court and the United Nations (22 July 2004) ICC-ASP/3/Res.1; UNSCB, 'Total Expenses' (n.d.) <https://unsceb.org/total-expenses> accessed 11 February 2022; UNSCB, 'Total Revenue' (n.d.) <https://unsceb.org/fs-revenue> accessed 11 February 2022.

89 Beth Van Schaack, 'Deconstructing Syria's Would-Be International Criminal Court Referral: The Politics of International Justice' (2020) 56(1) Stanford Journal of International Law 1, 62–63.

90 UNSCB (n 88).

91 Gabriel Maria Lentner, 'UN Security Council Referrals to the ICC and the Principle of Legality' (*EJIL: Talk!*, 12 November 2021) <https://www.ejiltalk.org/un-security-council-referrals-to-the-icc-and-the-principle-of-legality> accessed on 12 February 2022; Ovo Imoedemhe, 'Unpacking the Tension between the African Union and the International Criminal Court: The Way Forward' (2015) 23(1) African Journal of International and Criminal Law 74, 102.

92 Ibid. For an additional perspective on the applicability of Article 13 (b) of the Rome Statute, see: Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court* (Brill | Nijhoff, 2018).

this argument should not as much be the legality of these projections of power, but rather the empirical proof of inefficiency to operate in such contexts and to prosecute the accused as long as they represent – or are protected by those who represent – the leading elite of a country; which, mentioning again the debate over the eventual interference of the Office of the Prosecutor in the peace accords in Sudan, flips the meaning of the situation. If peace is disregarded as a political matter and put behind to indict a president for the sake of justice as a pure value, then it is also contradictory to open a case knowing that it will not lead to results, but that it is just supposed to send a message: that would make the case more political than jurisdictional, using the same approach initially refuted.

4. CONCLUSION

The first and main question expressed in this paper was whether the Office of the Prosecutor would efficiently operate in cases where the local government is not ready or – most importantly – willing to cooperate, even if a member State. This has been, at least regarding the outcomes at the time of writing, dismissed through observational proof: the ICC has been successful in the enacting of justice on a voluntary level among its State Parties, but all the situations born out of external referrals either ended up with the Office of the Prosecutor abandoning the case, or with the suspects never being brought to The Hague, or with the same suspects being finally surrendered after a change of power in the given state. Neither has the specific structure of selective, universal jurisdiction applied with the consensus of the UN Security Council proved to be effective, which also refutes the second hypothesis of these referrals actually bringing suspects to trial, once again with a focus on non-cooperating countries. Though, this point might still not exclude the eventuality of a coexistence of external referrals from the UN Security Council and self-referrals, as the lack of international support is a precondition for such external referrals to pass, and the overall endorsement from State Parties might stay unchallenged. At last, the third and last initial affirmation of this work – the possibility for the ICC to operate outside of political boundaries – is also subsequently refuted. Not only is the ICC an institution born from political compromises, and therefore far from being an instance of pure and autonomous justice, but its work has proved the impossibility, and even risks, of trying to obtain results without the needed, material support from the international scene.

What might at first glance look like closing an eye to the crimes committed by those currently in charge in a given country, would be nothing else but the acknowledgment of the inevitably limited capacities of the ICC, something that is not the outcome of a lack of morality of principles, but an avowal of the realm in which the Court is bound to operate. Although it might be against some of the initial intentions at the Conference in Rome in 1998, an institution ready to find formal excuses for its scope boundaries – partially seen with the many instances in which investigations against world powers have resulted in renounces or have never been opened at all – might pose a greater danger than an admitted lack of control over situations with no political consensus over their relevance. Restricting the jurisdiction of the ICC to self-referrals, and eventually to also external referrals of the UN Security Council, therefore excluding investigations *proprio motu* and upon external referral from other State

Parties of the Rome Statute, would reaffirm the authority of the Court on the only matters it has successfully canalized and moderated, or to the ones that at least bear no further loss. The persistence in maintaining the original structure defined by the Rome Statute in 1998, probably out of adhesion to the – praiseworthy, for sure – principles that initially designed the conduct of this institution, comes at the cost of loss of State Parties of the mentioned Statute and of cases that could have been brought to the ICC, which could have ended in a reasonable judgment and in satisfying reparations for the victims, but that are this way bound to either an inadequate trial – in a country that could be neither able to competently investigate or sentence the suspects and nor is ready to cooperate with the ICC – or no trial at all. And as already stated, it would not just be about states not being ready to cooperate, but also about what might symbolically be an even worse risk: *a posteriori* justifications through official decisions of actual failures to prosecute political elites. In such a context, the danger would not be purely pragmatic, but also idealistic, as those same principles founding the ICC would be overturned against themselves.

This restriction is not a change that should be made to simply facilitate the work of the institution by removing what it deems as difficult tasks, but a change that should be made as a ponderation regarding the real-life advantages it could bring to victims of war crimes and crimes against humanity across the globe, and one that should be made with a broader understanding of what could be of the principles outlined in Rome in 1998. A further debate left, though, is the one of public reputation – as already pointed out for the ICTY: would the switch appear as hypocritical or actually improve the image of this court?[93]

BIBLIOGRAPHY

1. Amann D M and Sellers M N S, 'The United States of America and the International Criminal Court' (2002) 50(1) *The American Journal of Comparative Law* 381
2. Ayeni V O and Olong M A, 'Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court' (2017) 25(2) African Journal of International and Comparative Law 239
3. Carayannis T, *Elections in the DRC: The Bemba Surprise* (US Institute of Peace, 2008)
4. Dancy G and Montal F, 'Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions' (2017) 111(3) The American Journal of International Law 689
5. Frye R, 'Family Separation Under the Trump Administration' (2020) 110(2) The Journal of Criminal Law and Criminology 349
6. Galand A S, *UN Security Council Referrals to the International Criminal Court* (Brill | Nijhoff, 2018)
7. Girard R, 'Côte D'Ivoire, la Victoire du Perdant' [2011] *Revue Des Deux Mondes*, 55
8. Guilfoyle D, *International Criminal Law* (Oxford University Press, 2016)
9. Harris M, 'Considering Colonialism: The Contentious Drafting History and Politics of the International Criminal Court' (2019) 9 Strategy and Development Review 10

93 Enis Omerović and Glorija Alić, 'Perception of the ICTY in Bosnia and Herzegovina: the Tribunal between Law and Politics' (2017) 3(1) SEE Law Journal 1, 1–4.

10. Imoedemhe O, 'Unpacking the Tension between the African Union and the International Criminal Court: The Way Forward' (2015) 23(1) African Journal of International and Criminal Law 74
11. International Crisis Group, 'Armed Groups in the Central African Republic' [2015] *In Central African Republic: The Roots of Violence* 2
12. International Crisis Group, 'Darfur and the ICC' [2009] Sudan: Justice, Peace and the ICC 2
13. International Crisis Group, '*Kenya: Impact of the ICC Proceedings' [2012]* International Crisis Group 1
14. Kastner P, 'Africa – A Fertile Soil for the International Criminal Court?' (2010) 85(1/2) *Die Friedens-Warte* 131
15. Kreß C, 'The ICC's First Encounter with the Crime of Genocide', in Stahn C (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015)
16. Lentner G M, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and in Practice* (Edward Elgar, 2018)
17. Mangu A M, 'The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview' (2015) 40(2) Africa Development / Afrique et Développement
18. Mburu Daniel M, 'The Lost Kenyan Duel: The Role of Politics in the Collapse of the International Criminal Court Cases against Ruto and Kenyatta' (2018) 18(1) International Criminal Law Review 1015
19. McDougall Carrie, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013)
20. Mensa-Bonsu H J A N, 'The ICC, International Criminal Justice and International Politics' (2015) 40(2) *Africa Development / Afrique et Développement* 33
21. Murithi T, 'Ensuring Peace and Reconciliation while Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan' (2015) 40(2) Africa Development / Afrique et Développement 73
22. Omerović E and Alić G, 'Perception of the ICTY in Bosnia and Herzegovina: the Tribunal between Law and Politics' (2017) 3(1) SEE Law Journal 1
23. Roach S C, 'Courting the Rule of Law? The International Criminal Court and Global Terrorism' (2008) 14(1) *Global Governance* 13
24. Roach S C, 'The Turbulent Politics of the International Criminal Court' (2011) 23(4) Peace Review: A Journal of Social Justice 546
25. Rodman K A, 'How Politics Shapes the Contributions of Justice: Lessons from the ICTY and the ICTR' (2016) 110(1) AJIL Unbound 234
26. Schabas W A, *An Introduction to the International Criminal Court* (Cambridge University Press, 2020)
27. Schabas W A, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010)
28. Scheffer D, 'War Crimes and the Clinton Administration' (2002) 69(4) Social Research 1109
29. Shamsi N, 'The ICC: A Political Tool? How the Rome Statute is Susceptible to the Pressures of More Power States' (2016) 24(1) Willamette Journal of International Law and Dispute Resolution 85
30. Silvestri A, 'Costa D'Avorio dalla Prima alla Seconda Repubblica: Identità e Modello di Sviluppo' (2002) 57(2) *Africa: Rivista Trimestrale Di Studi e Documentazione Dell'Istituto Italiano per l'Africa e l'Oriente* 179
31. Stahn C, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 2019)
32. Van Schaack B, 'Deconstructing Syria's Would-Be International Criminal Court Referral: The Politics of International Justice' (2020) 56(1) Stanford Journal of International Law 1
33. Werle G and Jessberger F, *Principles of International Law* (Oxford University Press, 2014)

REGULATIONS AND DOCUMENTS

1. *Negotiated Relationship Agreement between the International Criminal Court and the United Nations (22 July 2004)* ICC-ASP/3/Res.1
2. *Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002*

JUDGMENTS AND OTHER DECISIONS

1. Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I, Case No ICC-02/05 (21 April 2005)
2. Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, Case No ICC-01/14 (18 June 2014)
3. Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I, Case No ICC-01/11 (4 March 2011)
4. Decision Assigning the Situation in the Republic of Côte d'Ivoire to Pre-Trial Chamber II, Case No ICC-02/11 (20 May 2011)
5. Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II, Case No ICC-01/12 (20 July 2012)
6. Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II, Case No ICC-01/09 (6 November 2009)
7. Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Case No ICC-02/04 (5 July 2004)
8. Decision on the Admissibility of the Case Against Abdullah Al-Senussi, Case No ICC-01/11-01/11 (11 October 2013)
9. Decision on the "Prosecution's Application Under Article 58(1) of the Rome Statute", Case No ICC-01/09-01/15 (10 September 2015)
10. Decision on the Prosecution Application Under Article 58(7) of the Statute, Case No ICC-02/05-01/07 (29 April 2007)
11. Decision on the Prosecutor's Application Under Article 58 Relating to Abdel Raheem Muhammad Hussein, Case No ICC-02/05-01/12 (1 March 2012)
12. Decision on the Prosecutor's Request for Authorisation of an Investigation Pursuant to Article 15(3) of the Statute, Case No ICC-01/21 (15 September 2021)
13. Decision on the Prosecutor's Request for Authorization of an Investigation, Case No ICC-01/15 (27 January 2016)
14. Decision on the Prosecutor's Request to Vacate the Effect of the Warrant of Arrest Issued Against Ms Simone Gbagbo, Case No ICC-02/11-01/12 (19 July 2021)
15. Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No ICC-01/19 (14 November 2019)
16. Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, Case No ICC-01/17 (25 October 2017)

17. Decision Severing the Case Against Mr Gicheru, Case No ICC-01/09-01/15 (11 December 2020)
18. Decision Terminating the Proceedings Against Mr Jerbo, Case No ICC-02/05-03/09 (4 October 2013)
19. Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, Case No ICC-01/11-01/11 (22 November 2011)
20. Decision to Terminate the Proceedings Against Raska Lukwiya, Case No ICC-02/04-01/05 (11 July 2007)
21. Decision to Unseal the Warrant of Arrest Against Mathieu Ngudjolo Chui, Case No ICC-01/04-02/07 (7 February 2008)
22. Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", Case No ICC-01/05-01/08 (8 June 2018)
23. Mandat d'Arrêt à l'Encontre de Germain Katanga, Case No ICC-01/04-01/07 (2 July 2007)
24. Prosecution's Notification of Disclosure of Evidence, Case No ICC-02/05-01/20 (24 December 2021)
25. Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No ICC-01/11 (17 May 2011)
26. Sentencing judgment, Case No ICC-01/04-02/06 (7 November 2019)
27. Summons to Appear for Bahr Idriss Abu Garda, Case No ICC-02/05-02/09 (7 May 2009)
28. Warrant of Arrest, Case No ICC-01/11-01/17 (15 August 2017)
29. Warrant of Arrest for Al-Tuhamy Mohamed Khaled with Under Seal and Ex Parte Annex, Case No ICC-01/11-01/13 (18 April 2013)
30. Warrant of Arrest for Walter Osapiri Barasa, Case No ICC-01/09-01/13 (26 September 2013)

INTERNET SOURCES

1. Aregawi B, 'The Politicisation of the International Criminal Court by United Nations Security Council Referrals' (*ACCORD*, 21 July 2017) <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals> accessed 10 February 2022
2. Ba O, 'A Truly International Criminal Court: Why the New Prosecutor Should Look Beyond Africa' (*Foreign Affairs*, 18 June 2021) <https://www.foreignaffairs.com/articles/africa/2021-06-18/truly-international-criminal-court> accessed 6 February 2022
3. Begg M, 'Failure to Prosecute UK War Crimes in Iraq Exposes ICC's Own Failings' (*Common Dreams*, 17 December 2020) <https://www.commondreams.org/views/2020/12/17/failure-prosecute-uk-war-crimes-iraq-exposes-iccs-own-failings> accessed 6 February 2022
4. Burke-White W, 'A Wife Accused of War Crimes: The Unprecedented Case of Simone Gbagbo' (*The Atlantic*, 3 December 2012) <https://www.theatlantic.com/international/archive/2012/12/a-wife-accused-of-war-crimes-the-unprecedented-case-of-simone-gbagbo/265828/> accessed 6 February 2022
5. Chutel L, 'Will Sudan Send Bashir to The Hague?' (*Foreign Policy*, 18 August 2021) <https://foreignpolicy.com/2021/08/18/sudan-bashir-icc-hague-justice-darfur-hemeti> accessed 6 February 2022
6. ICC, 'Abu Garda Case' (n.d.) <https://www.icc-cpi.int/darfur/abugarda> accessed 13 July 2022
7. ICC, '*Afghanistan: ICC Appeals Chamber authorises the opening of an investigation*' (5 March 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516> accessed 6 February 2022
8. ICC, 'Al Bashir Case' (n.d.) <https://www.icc-cpi.int/darfur/albashir> accessed 6 February 2022

9. ICC, 'Banda Case' (n.d.) <https://www.icc-cpi.int/darfur/banda> accessed 6 February 2022
10. ICC, '*Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo*' (24 November 2013) <https://www.icc-cpi.int/Pages/item.aspx?name=PR962> accessed 6 February 2022
11. ICC, '*Bemba et al. case: ICC Trial Chamber VII finds five accused guilty of offences against the administration of justice*' (19 October 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1245> accessed 6 February 2022
12. ICC, 'Callixte Mbarushimana arrested in France for crimes against humanity and war crimes allegedly committed in the Kivus (Democratic Republic of the Congo)' (11 October 2010) <https://www.icc-cpi.int/news/callixte-mbarushimana-arrested-france-crimes-against-humanity-and-war-crimes-allegedly> accessed 14 February 2022
13. ICC, 'Central African Republic' (n.d.) <https://www.icc-cpi.int/car> accessed 6 February 2022
14. ICC, 'Central African Republic II' (n.d.) <https://www.icc-cpi.int/carII> accessed 6 February 2022
15. ICC, '*Defence and Prosecution discontinue respective appeals against judgment in Katanga case*' (25 June 2014) <https://www.icc-cpi.int/pages/item.aspx?name=PR1021> accessed 6 February 2022
16. ICC, '*DRC situation: ICC issues an arrest warrant for Sylvestre Mudacumura*' (13 July 2012) <https://www.icc-cpi.int/pages/item.aspx?name=pr827> accessed 6 February 2022
17. ICC, 'Gbagbo and Blé Goudé Case' (n.d.) <https://www.icc-cpi.int/cdi/gbagbo-goude> accessed 6 February 2022
18. ICC, '*Gbagbo and Blé Goudé case: ICC Trial Chamber I files the written reasons for the acquittal*' (16 July 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1470> accessed 6 February 2022
19. ICC, 'Harun Case' (n.d.) <https://www.icc-cpi.int/darfur/harun> accessed 6 February 2022
20. ICC, 'Hussein Case' (n.d.) <https://www.icc-cpi.int/darfur/hussein> accessed 6 February 2022
21. ICC, '*ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan*' (4 March 2009) <https://www.icc-cpi.int/pages/item.aspx?name=icc%20issues%20a%20warrant%20of%20arrest%20for%20omar%20al%20bashir_%20president%20of%20sudan> accessed 6 February 2022
22. ICC, '*ICC Judges take a decision on Mr Al Mahdi's sentence review*' (25 November 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1629> accessed 6 February 2022
23. ICC, '*ICC Pre-Trial Chamber II separates Dominic Ongwen case from Kony et al. case*' (6 February 2015) <https://www.icc-cpi.int/pages/item.aspx?name=PR1088> accessed 6 February 2022
24. ICC, '*ICC Prosecutor calls for the immediate arrest and surrender of the suspects, Mssrs Saif Al-Islam Gaddafi and Al-Tuhamy Mohamed Khaled to the Court*' (14 June 2017) <https://www.icc-cpi.int/Pages/item.aspx?name=170614-otp-stat> accessed 6 February 2022
25. ICC, '*ICC Prosecutor, Mr Karim A.A. Khan QC, opens an investigation into the Situation in Venezuela and concludes Memorandum of Understanding with the Government*' (5 November 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1625> accessed 6 February 2022
26. ICC, '*ICC terminates proceedings against Okot Odhiambo following forensic confirmation of his passing*' (20 September 2015) <https://www.icc-cpi.int/pages/item.aspx?name=PR1147> accessed 6 February 2022
27. ICC, '*Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo*' (2 March 2006) <https://www.icc-cpi.int/pages/item.aspx?name=issuance%20of%20a%20warrant%20of%20arrest%20against%20thomas%20lubanga%20dyilo> accessed 6 February 2022
28. ICC, '*Katanga and Ngudjolo Chui case: ICC Trial Chamber II severs charges; Verdict on Mathieu Ngudjolo Chui to be issued on 18 December 2012*' (21 November 2012) <https://www.icc-cpi.int/pages/item.aspx?name=PR856> accessed 6 February 2022

29. ICC, '*Katanga case: Reparations Order largely confirmed*' (8 March 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1364> accessed 6 February 2022

30. ICC, '*Kenyatta case: Trial Chamber V(B) terminates the proceedings*' (13 March 2015) <https://www.icc-cpi.int/pages/item.aspx?name=pr1099> accessed 6 February 2022

31. ICC, '*Lubanga case: Appeals Chamber confirms Trial Chamber II's "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable"*' (18 July 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1473> accessed 6 February 2022

32. ICC, '*Mbarushimana case: ICC Appeals Chamber rejects the Prosecution's appeal*' (30 May 2012) <https://www.icc-cpi.int/pages/item.aspx?name=PR798> accessed 6 February 2022

33. ICC, 'Mudacumura Case' (n.d.) <https://www.icc-cpi.int/drc/mudacumura> accessed 6 February 2022

34. ICC, '*New suspects in the situation in Darfur, Sudan arrive voluntarily at the ICC: First appearance scheduled for tomorrow*' (16 June 2010) <https://www.icc-cpi.int/Pages/item.aspx?name=pr547> accessed 6 February 2022

35. ICC, '*Ngudjolo Chui case: ICC Appeals Chamber confirms the acquittal decision*' (27 February 2015) <https://www.icc-cpi.int/pages/item.aspx?name=PR1089> accessed 6 February 2022

36. ICC, 'Ntaganda case: ICC Appeals Chamber confirms conviction and sentencing decisions' (30 March 2021) <https://www.icc-cpi.int/news/ntaganda-case-icc-appeals-chamber-confirms-conviction-and-sentencing-decisions> accessed 13 July 2022

37. ICC, '*Prosecutor receives referral of the situation in the Democratic Republic of Congo*' (19 April 2014) <https://www.icc-cpi.int/pages/item.aspx?name=prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo> accessed 6 February 2022

38. ICC, '*Ruto and Sang case: ICC Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future*' (5 April 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1205> accessed 6 February 2022

39. ICC. '*Saif Al-Islam Gaddafi case: ICC Appeals Chamber confirms case is admissible before the ICC*' (9 March 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1518> accessed 6 February 2022

40. ICC, '*Second arrest: Germain Katanga transferred into the custody of the ICC*' (18 October 2007) <https://www.icc-cpi.int/pages/item.aspx?name=second%20arrest_%20germain%20katanga%20transferred%20into%20the%20custody%20of%20the%20icc> accessed 6 February 2022

41. ICC, '*Simone Gbagbo case: ICC Pre-Trial Chamber I rejects Côte d'Ivoire's challenge to the admissibility of the case and reminds the Government of its obligation to surrender Simone Gbagbo*' (11 December 2014) <https://www.icc-cpi.int/pages/item.aspx?name=pr1075> accessed 6 February 2022

42. ICC, '*Situation in Central African Republic II: Alfred Yekatom surrendered to the ICC for crimes against humanity and war crimes*' (17 November 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1418> accessed 6 February 2022

43. ICC, '*Situation in Central African Republic II: Mahamat Said Abdel Kani surrendered to the ICC for crimes against humanity and war crimes*' (24 January 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1559> accessed 6 February 2022

44. ICC, '*Situation in Central African Republic II: Patrice-Edouard Ngaïssona arrested for crimes against humanity and war crimes*' (12 December 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1425> accessed 6 February 2022

45. ICC, '*Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu*' (26 September 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1154> accessed 6 February 2022

46. ICC, '*Statement of ICC Prosecutor, Fatou Bensouda, following the second arrest warrant for Mr Mahmoud Mustafa Busayf Al-Werfalli: "The suspect must be arrested and immediately surrendered to the Court."*' (6 July 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=180706-otp-stat-al-werfalli> accessed 6 February 2022

47. ICC, '*Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine*' (3 March 2021) <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine> accessed 6 February 2022

48. ICC, '*Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the trial in the case against Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*' (14 July 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=200714-otp-statement-al-hassan> accessed 6 February 2022

49. ICC, '*The confirmation of charges hearing in the case of The Prosecutor v. Jean-Pierre Bemba Gombo is starting Monday 12 January 2009*' (9 January 2009) <https://www.icc-cpi.int/Pages/item.aspx?name=the%20confirmation%20of%20charges%20hearing%20in%20the%20case%20of%20the%20prosecutor%20v_%20jean_pierre> accessed 6 February 2022

50. ICC, 'The States Parties to the Rome Statute' (n.d.) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 6 February 2022

51. ICC, '*Trial of Laurent Gbagbo and Charles Blé Goudé opens at International Criminal Court*' (28 January 2016) <https://www.icc-cpi.int/pages/item.aspx?name=PR1184> accessed on 6 February 2022

52. Lentner G M, 'UN Security Council Referrals to the ICC and the Principle of Legality' (*EJIL: Talk!*, 12 November 2021) <https://www.ejiltalk.org/un-security-council-referrals-to-the-icc-and-the-principle-of-legality> accessed on 12 February 2022

53. Scheindlin D and Kraja G, 'The ICC's Israel Investigation Could Backfire: It's more likely to inflame nationalist sentiments than change anything on the ground' (*Foreign Policy*, 12 April 2021) <https://foreignpolicy.com/2021/04/12/israel-palestine-icc-yugoslavia-icty-politics-conflict-justice> accessed 6 February 2022

54. UNSCB, 'Total Expenses' (n.d.) <https://unsceb.org/total-expenses> accessed 11 February 2022

55. UNSCB, 'Total Revenue' (n.d.) <https://unsceb.org/fs-revenue> accessed 11 February 2022

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SUDEĆI MANJE – OSTVARITI VIŠE: PROBLEMI I GRANICE MEĐUNARODNOG KAZNENOG SUDA

Sažetak

S Međunarodnim kaznenim sudom (ICC) koji gubi ne samo svoju priliku da inkorporira one iste velike sile koje su odlučile da ga ne podrže na samom početku – zbog straha od gubitka utjecaja – već koji je također na putu gubitka dugotrajnih država članica poput onih iz Afričke unije, dovode se u pitanje njegove mogućnosti da postane sredstvo institucionaliziranog kažnjavanja najgorih individualnih zločina od međunarodnog interesa. Bi li ICC postigao bolje ishode kada bi u potpunosti isključio svoj autoritet nad državama članicama, i, dakle, ograničio svoju jurisdikciju na slučajeve koji su mu predloženi od samih država gdje su zločini navodno počinjeni? ICC bi mogao sačuvati važnu ulogu u kanaliziranju lokalnih jurisdikcija preko zajedničkih, globalnih pravila: na taj način, iako kroz selektivnu nadležnost, ovaj bi međunarodni sud mogao barem ograničavati i ublažiti namjere država članica u bavljenju s nezgodnim lokalnim neprijateljima ili opozicijama. Preko analize jurisprudencije ove institucije i kontekstualizacije njezina kontroverznog odnosa s Vijećem sigurnosti Ujedinjenih naroda (UN), cilj je ovog istraživanja ponuditi usporedbu dostupnih ishoda, razjašnjavajući gorenavedenu mogućnost jednog pogodnijeg, iako manje ambicioznog, okvira rada. Zadnji do rada bit će posvećen istraživanju rizika suprotne tendencije, jedne ambiciozne no neučinkovite institucije, koja bi mogla voditi prema legitimizaciji svojih propusta.

Ključne riječi: *Međunarodni kazneni sud, Rimski statut, Vijeće sigurnosti Ujedinjenih naroda, „afrička pristranost“, politizacija, selektivnost*

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