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**MPhil Thesis**

**THE DYNAMICS OF THE ICC AND AFRICA THROUGH THE PRISM OF NEO-COLONIALISM**

* 1. **. Introduction**

Since the Statute of the International Criminal Court[[1]](#footnote-1) (“Rome Statute”) entered into force on 1 July 2002, it has had 124 state parties. Of those who have ratified, 34 are African states,[[2]](#footnote-2) thus making Africa the largest regional grouping on the ICC’s Assembly of State Party. Hence it is unquestionable that Africa’s support for the Court in particular during its inception was strong. Such early support follows Africa’s backing of two international criminal tribunals dealing with the continent. The first is the International Criminal Tribunal for Rwanda (“ICTR”), which was established by the UN Security Council in November 1994 to prosecute the perpetrators of the Rwandan genocide and other international crimes occurring there.[[3]](#footnote-3) Following ICTR, the Special Court for Sierra Leone was set up to similarly try those responsible for crimes against humanity in that country.[[4]](#footnote-4) That court was established as a hybrid court – a mix of domestic and international criminal tribunal.[[5]](#footnote-5) The Tribunals established to deal with these events provided an immediate impetus to an idea that had been percolating for decades – a specialised international criminal court.[[6]](#footnote-6) With such a court, the international community could have greater assurance that the rights and ideals enshrined in its leading legal instruments would be upheld, and dispassionate justice would be delivered when acts were committed against civilian populations when specific legal definitions were met.

The situation, at least on the surface, have changed markedly since those early days of the 1990s. In its relatively brief history, ICC’s attention has been mostly directed to various alleged atrocities committed in various African states. To date, 24 cases have been brought before the Court from 10 situations: Uganda, the Democratic Republic of the Congo (“DRC”) – 2 situations in each of the following countries: Sudan, the Central African Republic (“CAR”), Kenya, Libya, Côte d’Ivoire, Mali and Georgia.[[7]](#footnote-7) As can be plainly seen, all of the situations dealt with by the Court – other than Georgia – concern Africa, with the result that all of the individuals so far prosecuted before the ICC have been Africans. Even with regards to the Georgia situation, there have been voices opining that the ICC’s Office of the Prosecutor (“OTP”) only opened investigation there merely to demonstrate that the Court does not only or exclusively target Africa.[[8]](#footnote-8)

In one sense, there is no surprise engendered by this ICC engagement with African issues. In the shift from colonial rule to self-government, many African states were essentially left to fend for themselves with respect to creating and sustaining any semblance of democratic institutions or constitutional infrastructures.[[9]](#footnote-9) In so many African nations, autocratic governments backed by often ruthless military and para-military operatives became the norm.[[10]](#footnote-10) These governments are almost continually embroiled in power struggles against resistance groups that use force and, more recently, groups considered to be terrorist in nature. The topic needs no further elaborate recitation of stories; one simply can recall the history leading up to the Rwandan genocide.

Nevertheless, ICC’s apparent focus on Africa has sparked furious criticism. The practical arguments advanced by this line of criticism is distilled to a single expression, and the commencement point for the analysis contemplated by this dissertation – selective prosecution. Hailemariam Desalegn, the AU chairman and Prime Minister of Ethiopia, said at the close of a two-day summit on 26 May 2013 that African leaders had come to a consensus that the ICC process conducted in Africa was flawed. "The intention was to avoid any kind of impunity... but now the process has degenerated to some kind of *race hunting*,"[[11]](#footnote-11) There have been instant and practical responses to this particular allegation. For instance, Archbishop Desmond Tutu said, “this is partly because independent tribunals that were established to handle cases concerning the former Yugoslavia, Cambodia and other countries have naturally led to a reduction in the scope of the court’s activities.”[[12]](#footnote-12) However, such explanation also cannot entirely erase the concern about the lack of cases dealing with non-African situation, because the fact is the OTP has indeed received information on alleged atrocities in Iraq, Venezuela, Palestine, Colombia, Honduras and Afghanistan, but it has decided not to open investigations into those situations but instead kept them under preliminary examination.[[13]](#footnote-13)

Another line of argument brought against ICC in the context of Africa is that the work of the Court is instead undermining rather than assisting Africa’s effort to solve its continental problems.[[14]](#footnote-14) The indictment of President al-Bashir of Sudan is often taken as illustrative of the problem. The AU made a statement talking about “the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to a harmonized approach to justice and peace, neither of which should be pursued at the expense of the other”.[[15]](#footnote-15) There have been similarly detailed and lengthy responses to this particular allegation, most of which emphasize the primacy of holding those responsible to justice and avoid impunity.[[16]](#footnote-16) However, there have been very few, if any, who pause and reflect on the wisdom of the OTP’s handling of referral situations. In her thought-provoking article, Parvathi Menon argues that “States tend to self-refer situations in an attempt to obtain legitimacy in the international arena and domestic political mileage against their opponents. This observation is buttressed by the fact that *the OTP has, to date, not investigated the government of any self-referring state, but has concentrated on members of rebel groups alone*.”[[17]](#footnote-17) Hence in both Uganda and Sudan warring parties have used the ICC’s intervention to brand opponents as *hostis humanis generis*, or enemies of mankind, while agents of the government as the referring party are insulated from the reach of justice.[[18]](#footnote-18) The argument has also been made that the same situation occurred in the case of Côte d’Ivoire: that the self-referral is simply a tool for the Ouattara government to strengthen its own hold on power by discrediting the opposition led by the eventual accused, former president Laurent Gbagbo.[[19]](#footnote-19)

The result of such criticism is the perpetuation of a view that the ICC does not work in the best interest of Africa – in fact the Court works against Africa. Apart from the mere fact of apparent focus towards Africa and its perceived negative effect on peace in the continent, substantial legal issues also cloud the rancour between the ICC and African states. Two issues stand out: (1) the prosecution of a sitting head of state, President Omar al-Bashir of Sudan, and (2) the trial attendance of President Uhuru Kenyatta and Deputy President William Ruto of Kenya. The prosecution of President al-Bashir[[20]](#footnote-20) brought to the forefront the issue of head of state immunity. The source of controversy is that Article 27 of the Rome Statute famously provides that any immunities that may attach to the official capacity of a person do not bar the Court from exercising jurisdiction over such a person.[[21]](#footnote-21) From the perspective of the AU and several African states, this is inconsistent with the immunity enjoyed by heads of state under customary international law.[[22]](#footnote-22) Admittedly, this is a difficult issue and remains to be settled; even the bulk of academic literature also remains sharply divided. First, there is a question of President al-Bashir’s immunity in his own case,[[23]](#footnote-23) and then there is another question regarding ICC’s request for state parties to surrender the president and the parties’ obligation to satisfy the request.[[24]](#footnote-24) Meanwhile, with regards to trial attendance in the *Kenyatta* and *Ruto* cases,[[25]](#footnote-25) after protracted vigorous opposition, in November 2013 the ICC’s Assembly of States Parties adopted Rule 134 *quater* as an amendment to the Rules of Procedure and Evidence of the Court,[[26]](#footnote-26) thereby allowing the Trial Chamber to excuse the accused from continuous presence at his or her trial when the accused has to perform “*extraordinary public duties at the highest national level*”.[[27]](#footnote-27) Even then there are still commentators who argue that such amendment contravenes the wording of the Statute and, therefore, should be considered invalid.[[28]](#footnote-28) These two issues are understandably controversial for African states, because they reflect the feeling that the ICC has no qualm in interfering in the working of African governments and/or causing disruption in the way African heads of state and governments go about their duties running their respective country.

Those controversies have led to various reactions from the AU. On a more constructive note, the AU Assembly has made a number of proposals in an attempt to put an end to the prosecution of President al-Bashir, including a proposal for deferral of the case under Article 16 of the Rome Statute.[[29]](#footnote-29) The AU Assembly has also encouraged African states to put forward amendments to the Rome Statute, following which Kenya proposed an amendment to Article 27 of the Rome Statute, which would provide for immunity of heads of states and their deputies.[[30]](#footnote-30) A more extreme reaction is to call upon non-cooperation of African states against ICC[[31]](#footnote-31) and even withdrawal of African states from the Rome Statute.[[32]](#footnote-32) In his statement, President Kenyatta described the Court as “a vehicle that has strayed off course to the detriment of our sovereignty, security and dignity as Africans,”[[33]](#footnote-33)

One of the ways to view these African acts of resistance against the ICC is through the prism of neo-colonialism. This is encapsulated by the renowned African scholar, Mahmood Mamdani, who proclaimed the notion that the Court is part of some new ‘international humanitarian order’ in which there is the worrying emphasis ‘on big powers as enforcers of justice internationally’.[[34]](#footnote-34) Part of his thesis is that the ICC is a component of this new order, an order that ‘draws on the history of modern Western colonialism’.[[35]](#footnote-35) In a similar vein, Paul Kagame, president of Rwanda, states: “Rwanda cannot be party to ICC for one simple reason … with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries.”[[36]](#footnote-36)

From the perspective of legal history, this view echoes the opinion that the development of international law in general is shaped and guided, even imposed, by western powers. Mohammed Bedjaoui, former president of the International Court of Justice, remarked that “[international law] thus consisted of a set of rules with a geographical basis (it was a European law), ... and political aims (it was an imperialist law).”[[37]](#footnote-37) In this vein, president Bedjaoui is among the first scholars from the Third World to criticize international law in such way, giving rise to the movement of Third World Approaches to International Law (“TWAIL”). One strong proponent of TWAIL is Anthony Anghie, whose monograph[[38]](#footnote-38) advanced as its main point a pattern of domination and subordination in the relation between the West and non-Western entities, spanning almost the entire history of international law from the time of Vitoria, the subsequent colonial expansion and all the way until the modern ‘war on terrorism’.

Neo-colonialism, or sometimes also called neo-imperialism, is broadly defined as the geopolitical practice of using capitalism, business globalisation, and cultural imperialism to influence a country, in lieu of either direct military control or indirect political control.[[39]](#footnote-39) However, in this context the term is more appropriately defined as a continuation of the concept ‘colonialism’ and ‘imperialism’, the term ‘empire’ itself is put by defined by Michael Doyle as:

“a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social or cultural dependence. Imperialism is simply the process or policy of maintaining an empire.”[[40]](#footnote-40)

According to Anthony Anghie, ‘colonialism’ generally refers to the practice of settling a territory,[[41]](#footnote-41) while ‘imperialism’ is simply a process or policy of maintaining an empire. Nevertheless, he uses both term interchangeably because of their close connection.[[42]](#footnote-42) Anghie asserts that the term imperialism or neo-colonialism is more suitable for use in our modern situation because it more accurately captures the practices of powerful western states.[[43]](#footnote-43) Obviously, after the World War II and with the crystallization of the law on self-determination, outright colonialism has no place in international law.[[44]](#footnote-44) What has been left in its stead is essentially imperialism in the guise of less outright or blatant political and economic influence but acute influence none the less.

So far it can be observed that ‘neo-colonialism’ is rather a political term, more a creature of political science than law. Indeed, it is believed by many that the exact origin of that term can be traced to Kwame Nkrumah, former president of Ghana (1960–66). The term appeared in the 1963 preamble of the Organization of African States Charter,[[45]](#footnote-45) and was the title of his 1965 book on the subject.[[46]](#footnote-46) A political scientist, Nkrumah wrote:

“The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus *its political policy is directed from outside*…

The result of neo-colonialism is that foreign capital is used for the exploitation rather than for the development of the less developed parts of the world. Investment, under neo-colonialism, increases, rather than decreases, the gap between the rich and the poor countries of the world. The struggle against neo-colonialism is not aimed at excluding the capital of the developed world from operating in less developed countries. It is aimed at *preventing the financial power of the developed countries being used in such a way as to impoverish the less developed*.”[[47]](#footnote-47)

The above passage highlights that the notion of neo-colonialism largely concerns the economy and welfare of third world countries and their people. Indeed criticism against the repercussions of international free trade and the domination of foreign investment has been one of the focuses of even legal scholars advancing third world views.[[48]](#footnote-48) On the one hand, it may be questioned whether such economic aspect have anything to do with the relation between the ICC and Africa. On the other hand, Nkrumah’s passage above also acknowledged that one of the essences of neo-colonialism is the control of a third world state’s political policy by outside forces.[[49]](#footnote-49)

That notion relates to the long-standing rule of non-intervention in international law. States developed the principle of non-intervention as a means to secure each individual state’s sovereignty in the midst of interaction with each other. As Oppenheim stated, the prohibition of intervention is a “corollary of every state’s right to sovereignty, territorial integrity and political independence.”[[50]](#footnote-50) The United Nations has repeatedly emphasized that states are strictly prohibited from intervening in the domestic affairs of other states, most famously in Article 2.4 of the UN Charter. The non-intervention principle, however, is not simply restricted to situations involving use of force, acts of aggression, or armed conflict. The topic has been further clarified by the ICJ in *Nicaragua* to include the concept that a state cannot intervene in a dictatorial way in the internal affairs of another state.[[51]](#footnote-51) The court went on to clarify that for an intervention to be prohibited, it must impinge on matters that are directly within a state’s sovereign rights. These include the choice of a political, economic, or social and cultural system and the creation and formulation of foreign policy.[[52]](#footnote-52) Interestingly, in *Congo v Uganda* the court affirmed that the principle of non-intervention prohibits a State “to intervene, directly or indirectly, with or without armed force, in support of the internal opposition within a State.”[[53]](#footnote-53) Going back to the particular observation regarding ICC’s interference to domestic dynamic in Uganda and Côte d’Ivoire, the Court actually often prosecute those opposing the self-referring government – the opposite situation commented upon in *Congo v Uganda*. But the point remains that ICC’s prosecution is seen by several African parties and the AU as an affront to the sovereignty of African countries and a mechanism that unduly interferes with sovereignty. For some, this is also tantamount to western imperialism and a form of neo-colonialism.

* 1. **. Problem statement:**

The animosity between the ICC on the one hand and the AU and African states on the other is plainly undesirable. The effect of that animosity is the paralysis in the prosecution of international crimes conducted by the Court. While some argue that the ICC itself prioritises the process of international justice at the expense of peace and stability in Africa,[[54]](#footnote-54) on the other hand it is undeniable that the efforts to end impunity for international crimes in Africa must continue and that the ICC is an essential agency in those efforts.[[55]](#footnote-55)

This thesis looks at the dynamics between the Court and Africa through that prism. Criticism of the ICC as a tool of western hegemony to control or subjugate Africa gives rise to several questions regarding the exact means and nature of ‘neo-colonialism’ in the context of the Court’s dealings with Africa. The stance of the African states can either be a theoretically informed position or it can simply be rhetorical. These issues will be investigated in the thesis. To that end, the theories and approaches regarding neo-colonialism are going to be probed. These theories and approaches will be put to the test in the context of the negotiation and conclusion of the Rome Statute as well as the prosecutorial mechanism and practice of the Court. In depth analysis on these points may reveal whether there is any particular theory (or a few theories which together) supporting the African states’ charge of neo-colonialism against the ICC.

However, even if the allegation of neo-colonialism against the Court turns out to be merely rhetorical, questions remain whether anything need to be changed to improve the dynamics between the Court and Africa. Additionally, as in many other scenarios perception may be more important than the facts. As sometimes said, rhetoric repeated over and over again may end up becoming the truth. Therefore in any event it is imperative to explore whether there is anything in either the Court’s substantive rules or procedural mechanism which can appropriately be changed or improve to revitalise the court's standing and foster more trust and cooperation from African states.

1.2.1 Considerations related to neo-colonialism

What must be considered is whether or not there is a real relationship between twenty first century neo-colonialism and the International Criminal Court. To explore this systematically, considerations must be made as to any possible manifestation in the institution itself, its doctrines and/ or the structure of the Rome Statute as a document. As part of this the question must be asked as to whether in one or all of these aspects or even in modern international law more generally that is essentially neo-colonial by nature and whether there are current practices with ICC or affiliated organization (e.g. the United Nations Security Council) that reinforce such behaviours. Furthermore, one must consider whether neo-colonialism appears as an endemic state through the institution or the law more generally or whether it is only directed towards a special region of the globe (e.g. towards Africa but not toward Latin America or South East Asia, which also have long histories of colonial occupation).

To understand these as research topics in themselves a clearer understanding of how neo-colonialism is traditionally defined and considered is needed. This is particularly relevant to this thesis as the term is potentially being applied in a judicial context as opposed to the political and economic contexts in which it is usually applied. Arguably the first instance of neo-colonialism being applied in a judicial context was in 1971 in research by Keeffe relating to Washington D.C. (District of Columbia) and the failure of the federal government to provide certain judicial avenues of presentation and appeal that are open to American citizens living outside of the high African-American populated community.[[56]](#footnote-56) Most commonly, charges of judicial neo-colonialism appear in the form of judicial complicity.[[57]](#footnote-57) Niezen provides one of the few rigorous analyses of the topic.[[58]](#footnote-58),[[59]](#footnote-59) What greatly distinguishes Niezen’s thinking from that which will be explored in this thesis is that the term judicial neo-colonialism is being considered from both institutional and legislative perspectives. In contrast, the focus of Niezen’s work is in the self-realizatory aspects of indigenous populations within a larger society and as a means for clearly identifying rights violations and discriminatory practices. The work by Eades tries to consider the arguments and considerations of Niezen in an Australian context with respect to the aboriginal population.[[60]](#footnote-60) Similar work is done by Capulong in a Phillipino setting.[[61]](#footnote-61) There is also the Israeli-Palestinian focused research by Barnbridge, which despite its broad title is quite local in its consideration of only a single conflict.[[62]](#footnote-62)

Furthermore, unfortunately, none of these works specifically focus on the idea of a foreign entity [corporate, governmental, or multi-lateral (e.g. a non-governmental organization such as the United Nations or the ICC) and the effects on local judiciary practices and strictures ever considered. Thus, the work in thesis has the potential to lay the ground work and possibly even devise a framework for considering the existence of judicial neo-colonialism. Perhaps the closest research is the brief work by Tondini on East Timor with respect to international peace keeping efforts.[[63]](#footnote-63) At least in that work there is an external agent. However, again the issue arises that the main consideration is focused on only a section of the population as opposed to the entire country itself as the subject of neo-colonialism. The focus of that article is the rebuilding of a justice system in a post-conflict scenario. Tondini considers how international authorities often select either a *dirigiste* or a consent-based approach, thereby representing the essential terms of reference of past interventions, despite a largely failed historical record with such approach.

* 1. **. Statement of purpose:**

The central aim of this thesis is to test the validity of the assertion that the ICC is a tool to exercise western hegemony over Africa and a vehicle of neo-colonialism. The ultimate purpose is to explore and find ways to improve and rehabilitate the Court’s efforts to deal with international crimes in Africa. To that end, the underlying assertion of neo-colonialism must first be ascertained in the context of the ICC’s inception and the subsequent development in the Court’s investigations and prosecutions.

**1.4 Research question(s):**

This research is prompted by the allegation of selective-prosecution against Africa by the African Union and some African states, whereas ICC’s prosecutions are driven by Western-hegemony / neo-colonialism sentiment. Several questions arise from such allegation, which can succinctly formulated as follows:

1. What is the exact meaning and nature of neo-colonialism in the context of the relation between the ICC and Africa, and whether the African states’ position on ICC is supported by any theoretical basis on neo-colonialism or merely rhetorical?
2. How is the notion of neo-colonialism relevant to or even influenced by the establishment of the ICC, as well as its prosecutorial practices?
3. How can the dynamics between the ICC and Africa be improved to revitalise the Court’s standing in Africa and foster more effective response against international crimes?

**1.5 Overview of methodology:**

This research will be conducted using qualitative assessment of primary and secondary source materials. The thesis is mainly a library-based research study where the materials are largely available through law libraries and internet search engines (e.g. Westlaw UK, Social Science Research Network (SSRN), and similar means). The research does not require quantitative assessment, such as empirical data analysis, or questionnaires, although some very basic statistics regarding membership, participation, prosecution, and claims of general international atrocities will be considered as a basis to validate or discredit the allegations of neo-colonialism.[[64]](#footnote-64)

Those sources primarily reflect in general the sources of international law, as enumerated in Article 38(1) of the Statute of the International Court of Justice: treaties, customary international law, general principles of law as well as judicial decisions and writings of publicists.[[65]](#footnote-65) The ICC Statute, being a treaty itself, which established the Court, is obviously the most essential starting point in much of the discussion. At this point it should be noted that the Statute also contains a provision on applicable law in Article 21. The author, herein contends that the Statute requires its own elaboration on applicable law to better reflect the criminal law context in which the Court operates.[[66]](#footnote-66)

The provision enumerates the following sources to be applied by the Court, in the following order:[[67]](#footnote-67) (1) the Statute itself, the Elements of Crime, and the Court’s Rules of Procedures and Evidence; (2) where appropriate, applicable treaties as well as principles and rules of international law including the law of armed conflict; (3) general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime; and (4) the Court’s previous decision.

Looking at the language of Article 21, the primary concern there is the enumeration of the ranking and relevance of the sources to be applied by the Court, even though the “interrelationship of sources is more complex than Article 21’s apparently rigid hierarchy implies” as “the overlap between the sources is too complex to reduce to simple formulae, including by reference to hierarchy”.[[68]](#footnote-68) Furthermore, several substantive issues are not expressly addressed such as the relevance of other possible sources e.g. international case law (other than human rights case law[[69]](#footnote-69)), writings of highly qualified publicists, *travaux preparatoire*, and instruments of international organizations such as UN General Assembly resolutions. These are complex questions on their own and outside the scope of this thesis.[[70]](#footnote-70) In any event, in most instances here the various sources are used not for their binding nature but in connexion with ascertaining the background and objective of those rules and decision on a normative and policy level.

Hence this research to a large extent reflects the New Haven School, which is also known as a strand of jurisprudence oriented to policy. Harold Lasswell and Myres McDougal of Yale Law School in New Haven, Connecticut conceived of this method in the mid-1940s.[[71]](#footnote-71) This approach views international law as a decision-making process involving various actors in the international community, each of which use international law as a means to promote both order and certain values.[[72]](#footnote-72) The New Haven school can be contrasted with positivism, which ascertains the rules and the concept of law only from the rules themselves.[[73]](#footnote-73) As put by the ICJ, “Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.”[[74]](#footnote-74) Hence the analysis of legal rules must be distant from social policy.[[75]](#footnote-75)

In contrast, here the legal instruments such as treaties, statutes of international courts, etc. are still largely the starting point in the discussion of the law, but those instruments are not treated as freestanding, because they are in fact a legal construct catering to the policy, values and preference of those conceiving the instruments.[[76]](#footnote-76) Therefore, the Rome Statute and other rules and instruments analysed in this thesis are not seen as immutable and autonomous, but as the outcomes of a continuing process of decision-making as various actors try to achieve their goals and objectives with regards to ICC. Of course, of particular concern is any possible trace of neo-colonialism policy in the inception and working of the Court.

One other related methodology used in this thesis is the one known as the Third World Approaches to International Law (‘TWAIL”). As its appellation suggests, this method approaches the discussion of international from the perspective of third world countries.[[77]](#footnote-77) In a rather strongly worded assessment, TWAIL is said to have as its objective the deconstruction and unpacking of international law as a medium to create and perpetuate a racialized hierarchy of norms and institutions to subjugate non-Europeans to Europeans.[[78]](#footnote-78) From there, TWAIL undertakes to construct and alternative normative legal edifice for international governance in order to eradicate the condition of under development in the Third World.[[79]](#footnote-79) This purpose fits the aim and purpose of this thesis, at least in so far as the thesis is a serious attempt to enquire any aspect of neo-colonialism which is to be understood as the attempt to sustain western domination over Africa, as well as proposing possible ways for the Court and Africa to go forward and set the ICC free from any such imperialist notion.

Finally, this thesis will employ case studies in numerous junctures in order to advance the overall project objectives. In particular, case studies devoted to major ICC cases such as the failed *al-Bashir* or *Kenyatta* prosecutions, as well as the latest *Gbagbo* prosecution, would open additional research avenues from which to examine various points in this thesis. However, the case study will not be restricted only to those situation dealt with the Court. Of equal importance are those situations that were not finally included in the OTP’s docket. A prominent example is the failed attempts in the UN SC to refer the situation in Israel and the Palestine territories to the Court. This case is worth noting as some have claimed that t highlights the alleged discriminating treatment, but as it is imbued within a larger socio-religious context that clearly dates back seventy years if not thousands. Thus the actions undertaken pre-date the court. Whereas African cases are taken up by ICC have arisen since the establishment of the ICC. However, there are other situations in non-African parts of the globe are much more akin to the African cases that have been prosecuted but have been left untouched. In this respect, a case study devoted to those external events has equal appeal.[[80]](#footnote-80)

**1.6 Rationale and significance:**

ICC’s establishment is an historic point in international criminal law whereas a permanent international criminal court is conceived for the first time to deal with perpetrators of serious human rights violations. An overriding objective of the Court is to have “an end to impunity for the perpetrators … and thus contributing to the prevention of such crimes”.[[81]](#footnote-81) This objective strongly resonates with a majority of African states, which have witnessed the horrors of genocides, crimes against humanity and war crimes over the decades. On the other hand, hard questions remain regarding the willingness and ability of these African states to prosecute those crimes at the national level.[[82]](#footnote-82)

As long as the relevant crimes cannot be prosecuted and the perpetrators punished within the domestic legal framework of African states, the presence and work of ICC is imperative in ensuring that there is no impunity. Herein lies the problem. In general, many African states are either unable or unwilling to carry out the tasks. At the outset, it has been observed that quite often instances of international crimes would actually require the participation of those with governmental authority in the commission of the crime.[[83]](#footnote-83) Therefore it would be hard to see that the very same government will be willing or able to effectively prosecute its own officials, especially those high in the chain of command.[[84]](#footnote-84) Otherwise, domestic institutions often simply lack the capacity.[[85]](#footnote-85) The problem is thus further complicated by the immunity issue previously addressed.

Nevertheless, such a notion of complementarity remains the cornerstone of the Rome Statute. Even more, whenever ICC exercises its jurisdiction, it still does not possess its own enforcement power. The Court must rely on cooperation from member states or others who come forward with help.[[86]](#footnote-86) “Having no police force, military, or territory of its own, the ICC will need to rely on States Parties to, among other things, arrest individuals and surrender them to the Court, collect evidence, and serve documents in their respective territories. Without this assistance, the ICC will encounter great difficulty conducting its proceedings.”[[87]](#footnote-87) In this respect the Statute upholds and preserves, rather than undermining, the sovereignty of states.[[88]](#footnote-88) This, thus, can create a certain inherent conflict for the States themselves when they (or at least part of their government) is implicated in such actions.

However, in light of the circumstances where neither the local population nor the international community cannot pin its hope on domestic prosecution, this means that ICC continues to represent the most realistic and viable tool to prosecute international crimes in Africa. Therefore it is imperative that the dynamics of the relation between the Court and Africa remains strong, cooperative and supportive of one another instead of being acrimonious. We can plainly see the result of any lack of trust and cooperation in the *al*-*Bashir* prosecution, which has languished for a decade. In this vein, this thesis is important in probing and interrogating any element of neo-colonialism in the ICC’s relation with Africa. This must first be clarified, before various ways can be explored in which the Court’s work with regard to Africa will be revitalised, leading to more effective and robust prosecutions of ‘situations’ occurring in Africa.

As far as the aspect on neo-colonialism is concerned, it is submitted that this dissertation, to the best of the author’s knowledge, is the first to comprehensively broach the subject of ICC from such angle. The ICC has been subject to very extensive academic literature, including on the dynamics between the Court and Africa. But apart from several excellent comprehensive textbooks on the Court and the Rome Statute in general, so far the research and discussion have dealt with different points of view and contexts. Hence there is a clear gap, with respect to the issue of neo-colonialism in ICC’s relation with Africa. For a representative example of several works related to this dissertation (and which also inform and illuminate the thoughts here) – albeit not directly dealing with the issue of neo-colonialism are the following: (1) Dr. Imoedemhe’s dissertation at the University of Leicester in 2014, which dealt with the question of how complementarity can be implemented in member states with a particular focus on Africa and Nigeria.[[89]](#footnote-89) Hence the focus there is on the capacity building, in terms of the normative rules and implementation, on the domestic level to prosecute international crimes; (2) Dr. Hobbs’s dissertation in the University of Manchester in 2012 looks at the dynamics between the concept of State sovereignty and the new international criminal law regime established by the Rome Statute.[[90]](#footnote-90) The main conclusion drawn there is that internal state sovereignty is still quite strong because the Rome Statute does not go beyond the minimum requirements to even oblige the State to adopt straightforward domestic legislation to implement the Statute at the domestic level.[[91]](#footnote-91) Thus the focus there is on the effect of the Statute on the state’s exercise of sovereignty. This is not the same as interrogating the neo-colonialism aspect in the Statute itself and in the working of the ICC’s prosecution; and (3) the closest that one has come to an academic discussion on ICC and neo-colonialism is Prof du Plessis’ monograph ‘The International Criminal Court that Africa Wants’.[[92]](#footnote-92) The monograph refuted, among others, the charge that the ICC is an agent of western hegemony and imperialism,[[93]](#footnote-93) but the difference with this dissertation is that Prof du Plessis largely relied on factual circumstances such as self-referrals, without extensive interrogation into the theoretical and philosophical underpinnings of the concept of neo-colonialism.

**1.7 Role of the researcher:**

As this is not a quantitative study, the role of the researcher is one that is mediating – interpreting and analysing – the various materials making up the research to arrive at the answer(s) of the research questions. The process starts by investigating the relevant materials to be used in the research. The materials are then interpreted and analysed by the researcher using various theories and based on the researcher’s own judgment. At this point it should be noted that this study, as one concerning international criminal law and international law more generally, could not avoid the element of subjective choice or preferable ideals. Consistent with the previous reference to the New Haven School, the elaboration of the various sources of law and instruments pertaining to ICC and Africa are done in light of the policy, which may drive the making and implementation of those rules. This involves the researcher considering the humanitarian, moral and social purposes of the law governing the ICC and using those same considerations in suggesting the ways to improve the relation between the Court and Africa and its effectiveness in prosecuting situations in Africa.

**1.8 Definition of key terminology:**

Rome Statute

The Rome Statute of the International Criminal Court (or the ICC Statute) is the treaty that established the ICC, adopted in Rome on 17 July 1998 entered into force on 1 July 2002.[[94]](#footnote-94) Currently, 124 states are parties to the Statute, including all the countries of South America, almost all of Europe, and 34 African countries – almost half of the total number of states in Africa.[[95]](#footnote-95) A further 31 states that have signed the Statute have not ratified it. Three signatory states – Israel,[[96]](#footnote-96) Sudan[[97]](#footnote-97) and the United States[[98]](#footnote-98) – have declared that they no longer intend to ratify the Statute and therefore no longer have any legal obligation arising out of their previous signature – such as those under Article 18 of the VCLT.[[99]](#footnote-99) Among those states that have neither signed nor acceded to the Rome Statute are China and India. On the other hand, Ukraine, a signatory state which otherwise has not ratified the Statute, has accepted the ICC's jurisdiction for a period starting in 2013.[[100]](#footnote-100)

Elements of Crime

The Elements of Crime[[101]](#footnote-101) is a document that defines each of the crimes listed in Articles 6, 7 and 8 of the Rome Statute, so as to provide clarity and precision in the provisions’ application. Article 9(1) of the Court’s Statute states that the Elements of Crime “shall assist the Court in the interpretation and application of article 6, 7 and 8.” thus suggesting that this instrument is not positively binding upon the Court.[[102]](#footnote-102) The Elements is adopted based on a two-thirds majority of the Assembly of State Parties,[[103]](#footnote-103) with the latest one adopted at the 2010 Review Conference in Kampala, Uganda.

Rules of Procedure and Evidence

The Rules of Procedure and Evidence (the “Rules”) is an instrument detailing all aspects of the Court’s working mechanism. If the Rome Statute is to be considered as the ICC’s constitution, then the Rules is akin to its administrative law. Specifically with regards to this research, the Rules provide detailed provisions governing the working mechanism of the Court’s investigation and prosecution.[[104]](#footnote-104) Other parts, which are greatly relevant, concern the composition and administration of the Court and the OTP.[[105]](#footnote-105)

 ‘Situation’

A ‘situation’ is shorthand for a series of events that fall within the ICC’s jurisdiction. The term itself originates from Article 13 of the Rome Statute, which among others provides “The Court may exercise jurisdiction … if: (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party;” It should be noted that a given situation may give rise to multiple charges and accused. For instance, in the ‘Kenya situation’ the OTP has made several charges against different accused – hence a few separate cases.

Complementarity

Textually, ‘complementarity’ refers to a situation where two or more different things improve or emphasize each other’s quality. In legal term, the American English Dictionary defines complementarity as “a principle of law which stipulates that jurisdictions will not overlap in legislation, administration, or prosecution of crime”.[[106]](#footnote-106) The last notion of prosecution of crime is the focus of complementarity used in this thesis. As reflected in Article 17 of the Rome Statute, complementarity here means that the Court do not exercise jurisdiction in cases unless the state which otherwise have jurisdiction over the case is unable or unwilling to so prosecute. At the outset, this provision closes a jurisdictional gap[[107]](#footnote-107) in domestic legal systems that may give rise to impunity, while at the same time affirms the primacy of national courts’ exercise of jurisdiction over international crimes.[[108]](#footnote-108)

State Immunity

The customary rule of state immunity protects a state and its property from the jurisdiction of the courts of other states, reflecting the principle of sovereign equality of states. The rule covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity).[[109]](#footnote-109) State immunity developed from, and is still mainly governed under, customary international law. In 2004 the United Nations Convention on Jurisdictional Immunities[[110]](#footnote-110) was concluded as an instrument intended to comprehensively govern this area, but the treaty has not entered into force for lack of ratification. The ever-present issue in state immunity is the nature and scope of the immunity. While initially held to be absolute, at the end of the 19th century the increasing involvement of states in commerce prompted some courts to restrict the immunity only to acts *iure imperii* and to deny immunity for acts *iure gestionis*.[[111]](#footnote-111) Further developments continue to push the possible boundary of state immunity, although in a recent decision, the ICJ refused to set aside state immunity in cases concerning violation of *ius cogens*.[[112]](#footnote-112)

Head of State Immunity

This is immunity from the jurisdiction of foreign courts enjoyed by heads of state. Such immunity is part of the wider concept of immunity enjoyed by high-ranking state officials under customary international law.[[113]](#footnote-113) Traditionally this immunity was indeed enjoyed by heads of state as the embodiment of the state. However heads of government and minister of foreign affairs are also *ex officio* entitled to this immunity as they represent their state internationally across the whole range of governmental activities.[[114]](#footnote-114) Apart from these three positions, there has been no clear line on who else may be eligible to claim this immunity as ‘high-ranking official’.[[115]](#footnote-115)

The scope and restriction of this immunity form one of the prominent issues – as embodied in the *al-Bashir* case – in this thesis, to be elaborated further in the upcoming chapter(s). At this point suffices to note that the OTP’s prosecution of sitting head of state such as Sudan’s al-Bashir is considered by some to be at odds with the immunity enjoyed by the president under customary international law. At the heart of this controversy is Article 98 of the Rome Statute which states provides that immunities attaching to the official capacity of a person under international law shall not bar the Court from exercising jurisdiction over such person.

Referral

‘Referral’ in this context means an act of referring a ‘situation’ to the Court so that an investigation and prosecution can be launched by the OTP. In principle, a situation can be referred to the Court by a state party[[116]](#footnote-116) or the UN Security Council.[[117]](#footnote-117) Other than these referrals, the prosecutor may initiate an investigation *proprio motu*, but this will also require authorization from the Pre-Trial Chamber of the Court.[[118]](#footnote-118)

Deferral

‘Deferral’ in this context means an act of halting or discontinuing an investigation of prosecution of a ‘situation’. Under Article 16 of the Rome Statute, the UN Security Council acting under Chapter VII of the UN Charter may request that an investigation or prosecution be deferred for a period of 12 months, subject to renewal under the same conditions.

**1.9 Organisation of the thesis**

The allegation that ICC is a hegemonic tool of western powers and an extension of neo-colonialism agenda poses, first and foremost, the question on the meaning various theories of neo-colonialism itself, both in its original political as well as legal context. Detailed discussion on that point will be done in Chapter 1, where analysis can also touch upon the history of international law and in particular international criminal law to trace any influence that colonialism and imperialism had in the development of the law. The history stretches as far back as the Nuremberg trial all the way to the ICTY and ICTR, canvassing the history of enforcing international norms against genocide, crimes against humanity and war crimes. Having set out the theoretical basis, therefore Chapter II can proceed with a detailed examination into the history and circumstances of the Court’s creation: (1) the background, process, (2) contentious issues, and (3) the motives, as well as positions of each group of states involved in the process.

Examination into the process as well as the contentious issues arising during the Rome conference and contemporary negotiations may reveal the position and motives of each group of states involved in drawing up the Statute. At outset, the fact is that African countries were among the strongest supporters of ICC at its inception. Whether any neo-colonial agenda also coloured the process, especially from the standpoint of western powers, is to be investigated in this chapter. If yes, then there is a further question of how any possible neo-colonialism agenda still did not deter those African states from supporting and ratifying the ICC. In particular, it is interesting to examine further whether circumstances where most of the Court’s docket will be populated with situations occurring in Africa could have been foreseen at the time of ICC Statute’s early ratification.

Having dealt with the circumstances leading to and during the inception of the Court, the next step in Chapter III is to analyse whether the structure and design of the prosecutorial arm of the ICC, the OTP, in fact works against Africa or in any way reflect any possible neo-colonialist sentiment. Noting the various bases under which the Court may exercise jurisdiction - complementarity, self-referral and UN Security Council referral – this chapter will then focus on the organisation and mechanism for the OTP, including the standards and requirements, for choosing the way ‘situations’ to be prosecuted. In order to have a comprehensive and holistic understanding, not only will the discussion deal with legal provisions but also the factual realities of the OTP’s working, including – for instance – how considerations such as personnel and budget allocation may or may not influence the decision to pursue a situation.

Chapter IV then puts the jurisdictional basis, structure and mechanism of ICC’s prosecution in practice, from the first major case in *Lubanga* until the latest one in *Gbagbo*. Charges of neo-colonialism will be put to the test in these cases. Of course the fact is that several cases dealt with by ICC were actually the result of self-referrals, including the Kenya situation. In addition, the *al-Bashir* prosecution was referred to the Court by the UN SC. Nevertheless, the decision to commence prosecution is not the only focus of this chapter, but also the actions of the OTP and reactions from the AU and African states (including the state where the situation(s) occur). Various expressions have been employed, from rejection of cooperation to threats of withdrawal from the Statute itself. Extensive analysis of all these elements will interrogate how the notion of neo-colonialism is used and influence the rift between the Court and Africa.

Another aspect examined in chapter IV is the opposite circumstances: situations in which the Court may potentially prosecute but has not done so. Examples include the situations in Syria and Israel-Palestine. The fact that these situations did not end up in ICC’s docket has been the catalyst of criticism of the Court’s supposed bias and discrimination against Africa.

While the previous chapter looked at the discord between ICC and Africa mainly from institutional and practical standpoint, Chapter V examines the legal substance dominating the exchange of arguments between the two sides, which largely concerns head-of-state immunity in the *al-Bashir* case and attendance during trial in the Kenyacases. There are still heated debates even in the wider international law community on these issues. Whereas any notion of neo-colonialism is not apparently evident in academic discussions on these issues, this chapter aims to incorporate an analysis which also takes into account the theory that imperialism and neo-colonialism shapes the normative rule of international law, including these substantive issues. Hence this chapter does not merely aim to contribute to the wider discussion on the proper position to be taken, but with the addition of a new perspective of neo-colonialism.

Having analysed the Court from various perspectives, several possible ways to alleviate any apparent allegation of neo-colonialism in the part of the ICC must be ascertained; this is done in Chapter VI. The most obvious is to have contentious provisions in the ICC Statute amended – especially those regarding head of state immunity and attendance at trial – in order to better reflect the view of AU. But this issue, even on substance, is far from settled and there will be a lot of procedural as well as political obstacles to have the amendment. In terms of the workings of the OTP, greater collaboration and cooperation with African authorities at regional and domestic level will be much welcomed, hence an analysis into the various means that this can be achieved – as well as any changes in the existing rules regulating the workings of the OTP – is necessary. In particular, it is also possible that analysis turns into the considerations and approach that OTP should take when dealing with self-referrals which can be politicised domestically.

Finally, Chapter VII offers general conclusions in light of the discussion in the preceding chapters.

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**Chapter II Creation of the International Criminal Court**

2.0 Introduction

This chapter begins by introducing the court’s creation in terms of the surrounding history, circumstances, and general background, which enables a philosophical context to evaluate the aims of the ICC irrespective of its ultimate organization, achievements and limitations. Next chapter present the process of the court’s creation. This is described with respect to its organizational and operational aspects and focuses on the strictly factual and mechanical aspects of the ICC, its composition, and its day to day functionality. The third part of the chapter addresses issues that are potentially controversial. There are seven major issues that are introduced. The first relates to the challenges of expanding and changing definitions of war crimes, and then the issue of ex post facto criminalization due to certain acts having occurred prior to the founding of the ICC. The next issues that are focused on relate to the current membership of the ICC and how that membership is reflected in the judicial composition of the ICC. The chapter then discusses the ever evolving relationships that the ICC has with its various member states, specifically with respect to legislative complementarity and where this important component has fallen short. The ICC’s membership roster is then compared to that of the of the UN Security Council with respect to understanding several recent failures for referrals (e.g. Syria).

The chapter then moves on to consider logistical issues that pose real and significant limitations and restrictions for the ICC, and how this might infkuence its relationship with African States. Next, the chapter addresses explicitly the current scholarship with respect to considerations of neo-colonialism within the ICC. The chapter then ends with a country by country presentation of specific stakeholder motives for a selected group of countries that represent the entire spectrum of ratified members, non-ratified signatories, and others. Specific countries that are considered include China, Côte d’Ivoire, Democratic Republic of Congo, Israel, South Africa, Uganda, and the United States. This is followed by a short overview of the conclusions of this work.

2.1 History, Circumstances and Background of the Court’s Creation

While Schabas notes that war crimes have been a prosecutable offense in many societies dating back to the ancient Greeks,[[119]](#footnote-119) Bassiouni argues that the first modern war crimes prosecution (and subsequent execution) was of Peter von Hagenback in 1474.[[120]](#footnote-120) However, it was not really until the middle of the nineteenth century that a change in sensibilities and an evolving concept of humanity and human rights brought about this as a formal legal concept. For example, in the United States the history of such prosecutions dates back to the American Civil War.[[121]](#footnote-121) Typically the focus has been on atrocities towards civil populations including pillaging and raping, although the abuse of prisoners has sometimes been included as well.[[122]](#footnote-122),[[123]](#footnote-123)

A major component was the work by Gustav Monnier, who in his role as one of the founders of the Red Cross movement, advocated for some form of multi-national entity to prosecute violation of the Geneva Convention of 1864.[[124]](#footnote-124) This was the first of four Geneva Conventions and was entitled “Amelioration of the Condition of the Wounded in Armies in the Field.[[125]](#footnote-125) The concept was to protect victims subject to armed conflicts.[[126]](#footnote-126) Arguably, the Hague Convention of 1899 and its subsequent incarnation of 1907 demarcate the first real embodiment of an international agreement in the area of war crime codification.[[127]](#footnote-127) Of particular importance is Article 46 that mentions “…family honour and rights, the lives of persons, and private property, as well as religious convictions and practice”, as well as protection of cultural objects. The document also refers to the concept of a public conscience, which is often referred to as the Martens clause as a legacy to its creator.[[128]](#footnote-128) This was later used by Baron Deschamps to urge the Council of the League of Nations to create an international tribunal to prosecute war crimes.[[129]](#footnote-129) Nonetheless, the general history of war crime prosecutions has been mostly taking place at the national level. However, this national basis for tribunals prosecuting war crimes came with an inherent limitation, notably based on the fact that those in positions of governmental power are the ones that are very often responsible for conducting, or at least overseeing, those atrocities.

Schabas argues that what is often forgotten or misunderstood today is that the Hague Conventions were never designed to create criminal liability on an individual basis, but were instead designed to invite States to undertake investigation and assist with the apprehension, detention, and prosecution of suspects.[[130]](#footnote-130) As evidence of this Schabas cites the absence of the specification any sanctions and concludes that the acts were therefore illegal but not specifically criminal. In fact, it was not until the Nuremberg Trials following the Second World War that an international tribunal was established to prosecute war crimes.[[131]](#footnote-131) This was despite the language in the Versailles Treaty of 1918, which called for the prosecution of Kaiser Wilhelm II ‘for a supreme offence against international morality and the sanctity of treaties’ in an international tribunal over the objections of the American delegates.[[132]](#footnote-132),[[133]](#footnote-133) Additionally, the Versailles Treaty resulted in German based tribunals for the prosecution of German soldiers, commonly referred to as the Leipzig Trials.[[134]](#footnote-134) Shortly thereafter was the Treaty of Sevres of 1920. Although never ratified by Turkey and thus there were never prosecutions, the Treaty made provisions for war crime trials as part of the peace with Turkey.[[135]](#footnote-135) The League of Nations also considered the establishment of an international tribunal but was unable to achieve this due to a paucity of members to ratify the proposal.[[136]](#footnote-136) According to Kochavi,[[137]](#footnote-137) this did League of Nations document, however, ultimately became the basis for the latter document the Draft Convention for the Establishment of a United Nations War Crimes Court,[[138]](#footnote-138) which was finally accepted on 8 August 1945 as the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)’.[[139]](#footnote-139)

Thus, the first truly international tribunal for war crime prosecution were the Nuremberg tribunals, which were initiated by the Moscow Declaration of 1 November 1943 and established by precedent the primacy of territorial jurisdiction over the mentioned offences related to the execution of hostages and allied officers[[140]](#footnote-140) and is considered as the cornerstone of British post-war policies.[[141]](#footnote-141) The Nuremberg Tribunal had its jurisdiction limited to only crimes against peace, crimes against humanity, and war crimes. Notably, Schabas argues that some of these tribunals could actually be considered as an extension of domestic legislation since they resulted in German civil authorities prosecuting German citizens.[[142]](#footnote-142) This was followed by United Nations drafting of the Code of Crimes against the Peace and Security of Mankind in 1950[[143]](#footnote-143) and the Report of the Committee on International Criminal Court Jurisdiction.[[144]](#footnote-144)

The enforcement of all four Geneva Conventions has been through the International Red Cross. Until the close of the Second World War there was no other formal enforcement. Since that point there has been a major departure. This is true for both the philosophical basis and the logistical implementation. On July 17, 1998, one hundred and twenty countries voted to adopt a multilateral treaty establishing the world's first permanent international criminal court to try individuals accused of genocide, war crimes, and crimes against humanity.[[145]](#footnote-145) Additionally, seven countries voted against establishing the ICC and twenty-one countries abstained. Israel, together with the United States, was among the seven states that initially voted against the statute.

2.2 The Processes of the Court’s Creation

Description of the court itself can be divided into two components: organizational and operational. These are described in detail in the following two subsections.

2.2.1 Organizational

As the ICC is supposed to serve as supplementary mechanism to existing national judicial systems, the ICC only takes cases selectively. These may be from national referrals when a country is unable to prosecute from decisions by the prosecutors’ office (see below) when a country is unwilling to prosecute, or from a referral from the United Nations Security Council. Three state parties to the Rome Statute—Uganda, the Democratic Republic of the Congo, and the Central African Republic—have referred situations occurring on their territories to the Court. The Security Council has referred to the ICC two non-state parties: Sudan and Libya. Finally, Pre-Trial Chambers have granted authorization to open investigations into the situation in Kenya, a state party, and now Côte d’Ivoire, a non-state party.[[146]](#footnote-146)

Currently, there are 124 states, which are party to the Rome Statute and therefore members of the ICC. With 124 member states Kaye and Raustiala argue that the ICC is the most significant 21st century development in international justice.[[147]](#footnote-147) To understand the current participation levels globally, this thesis divides countries into one of three categories: (1) Signatories states that have ratified the treaty; (2) Signatory states that have not ratified the treaty; and (3) Non-signatory states.[[148]](#footnote-148) Table 1 lists all of the member states of the ICC; these are signatories that have ratifies the treaty. Table 2 shows those seven countries that are signatories to the Rome Statute but have not ratified it and are therefore not voting members of the Assembly. Prominent amongst them are the United States and Israel. According to the Vienna Convention on the Law of Treaties,[[149]](#footnote-149) a state that has signed but not ratified a treaty is obliged to refrain from "acts which would defeat the object and purpose" of the treaty. However, these obligations do not continue if the state makes clear that it does not intend to become a party to the treaty. As will be discussed below, the situation of Israel and the United States is complex because they were signatories and then retracted themselves. In 2002 both Israel and the United States, as well as the Sudan availed themselves of this option.[[150]](#footnote-150) In particular Israel cited the ICC’s failure to include terrorism and drug trafficking and the explicit concern that the list of war crimes would be expanded to include the transfer of civilian populations of an occupying power into occupied territory.[[151]](#footnote-151) There was also the issue that Israel was not permitted from joining any of the five UN Regional Groups.[[152]](#footnote-152)

Table 3 lists the remaining non-signatory states of which there are 41. Notable amongst this group is China, India, North Korea, and Saudi Arabia. Notably there is a mechanism to withdraw from membership, which requires a waiting period of year to go into effect.[[153]](#footnote-153)

Table. 1 ICC Member States Shown by Region (Signatories States that Have Ratified)[[154]](#footnote-154)

| Europe | Africa & the Middle East | Asia & Eurasia | North & South America |
| --- | --- | --- | --- |
| Albania | Afghanistan | Australia | Antigua & Barbuda |
| Andorra | Benin | Bangladesh | Argentina |
| Austria | Botswana | Cambodia | Barbados |
| Belgium | Burkina Faso | Cook Islands | Belize |
| Bosnia and Herzegovina | Burundi | East Timor | Bolivia |
| Bulgaria | Cape Verde | Fiji | Brazil |
| Croatia | Central African Republic | Georgia | Canada |
| Cyprus | Chad | Japan | Chile |
| Czech Republic | Comoros | Marshall Islands | Colombia |
| Denmark | Cote d’Ivoire | Mongolia | Costa Rica |
| Estonia | Democratic Republic of the Congo | Nauru | Dominica |
| Finland | Djibouti | New Zealand | Dominican Republic |
| France | Gabon | Phillipines | Ecuador |
| Germany | Gambia | Samoa | El Salvador |
| Greece | Ghana | South Korea | Grenada |
| Hungary | Guinea | Tajikistan | Guatemala |
| Iceland | Guyana | Vanuatu | Honduras |
| Ireland | Jordan |  | Mexico |
| Italy | Kenya |  | Panama |
| Latvia | Lesotho |  | Paraguay |
| Liechentenstein | Liberia |  | Peru |
| Lithuania | Madagascar |  | Saint Kitts and Nevis |
| Luxembourg | Malawi |  | Saint Lucia |
| Malta | Maldives |  | Saint Vincent & the Grenadines |
| Montenegro Moldova | Mali |  | Trinidad and Tobago |
| Netherlands, The | Mauritius |  | Uruguay |
| Norway | Namibia |  | Venezuela |
| Poland | Niger |  |  |
| Portugal | Nigeria |  |  |
| Republic of San Marino |  |  |  |
| Republic of Macedonia | Palestine |  |  |
| Romania | Republic of the Congo |  |  |
| Serbia | Senegal |  |  |
| Slovakia | Seychelles |  |  |
| Slovenia | Sierra Leone |  |  |
| Spain | South Africa |  |  |
| Sweden | Suriname |  |  |
| Switzerland | Tunisia |  |  |
| United Kingdom | Uganda |  |  |
|  | Zambia |   |  |

Table 2. ICC Signatory States Shown by Region that Have Not Ratified[[155]](#footnote-155)

|  |  |  |  |
| --- | --- | --- | --- |
| Europe | Africa & the Middle East | Asia & Eurasia | North & South America |
| Ukraine | Bahrain | Thailand | United States |
|  | Israel |  |  |
|  | Sudan |  |  |
|  | Kuwait |  |  |
|  | Yemen |  |  |

Table 3. Non-party, non-signatory States[[156]](#footnote-156)

|  |  |  |  |
| --- | --- | --- | --- |
| Europe | Africa & the Middle East | Asia & Eurasia | North & South America |
| Vatican City | Brunei | Azerbaijan | Cuba |
|  | Equatorial Guinea | Belarus | Nicaragua |
|  | Ethiopia | China |  |
|  | Iraq | India |  |
|  | Lebanon | Indonesia |  |
|  | Libya | Kazakhstan |  |
|  | Mauritania | Kiribati |  |
|  | Qatar | Laos |  |
|  | Rwanda | Malaysia |  |
|  | Saudi Arabia | Micronesia |  |
|  | Somalia | Myanmar |  |
|  | South Sudan | Nepal |  |
|  | Swaziland | Niue |  |
|  | Togo | North Korea |  |
|  | Turkey | Pakistan |  |
|  |  | Palau |  |
|  |  | Papua New Guinea |  |
|  |  | Singapore |  |
|  |  | Sri Lanka |  |
|  |  | Tonga |  |
|  |  | Turkmenistan |  |
|  |  | Tuvalu |  |
|  |  | Vietnam |  |

2.2.2 Operational

Presently the ICC is organized into four main branches. One is the Judicial Division. This branch is responsible to hear all cases that come before the Court. A second one is the Presidency, which is the most senior judge of the Judicial Division. This individual is selected by the other members of the Judicial Division. A third branch is the Office of the Prosecutor. This is headed by the Prosecutor who investigates crimes and initiates proceedings before the Judicial Division. The final branch is the Registry. This is headed by the Registrar and has the administrative responsibilities of the ICC. Specifically, the Registrar is tasked with managing all the day to day operations of the headquarters, detention unit, and public defence office.

A two-thirds majority of the state parties most vote in favour of any amendment (except those amending the list of crimes) and will not enter into force until it has been ratified by seven-eighths of the states parties. A state party which has not ratified such an amendment may withdraw with immediate effect.[[157]](#footnote-157) Interestingly, any amendment to the list of crimes within the jurisdiction of the court will only apply to those states parties that have ratified it and, therefore, no ratification of that is necessary.

The most notable change was in 2010 when a Review Conference was held in Kampala, Uganda.[[158]](#footnote-158) As part of that the ICC member states adopted a definition of the crime of aggression, thereby allowing the ICC to exercise jurisdiction over the crime for the first time. At that point there was also an expansion of the list of war crimes.

The Court's management oversight and legislative body and is composed of representatives of the States, which have ratified or acceded to the Rome Statute. It is referred to as the Assembly of States Parties. Each country that has ratified the Rome Statute is entitled to send a representative, plus alternatives and advisers. The Assembly of States Parties meets annually at the seat of Court in the Hague or at the Hague or at the United Nations Headquarters in New York. Special sessions may also be requested and they may be open.[[159]](#footnote-159)

The goal is that decisions can be achieved through consensus. If this fails each State Party is entitled to a single vote. States that have not ratified the Rome Statute and, therefore are not State Parties may still partake in the Assembly as non-voting observers.[[160]](#footnote-160) The President, the Prosecutor and the Registrar or their representatives may also participate, as appropriate, in the meetings of the Assembly.[[161]](#footnote-161) The Assembly is also responsible for adoption of the Rules of Procedure and Evidence and the Elements of Crime.[[162]](#footnote-162)

At these annual sessions, the Court’s budget, the status of contributions, and the audit reports are all considered, as well as any reports related to the activities of the Bureau, the Court, and the Board of Directors of the Trust Fund for Victims. The Assembly is further tasked with election of, inter alia, the Judges, the Prosecutor and Deputy Prosecutors. As part of these actions, the Assembly may dismiss a Judge, Prosecutor, or Deputy Prosecutor. This is done through a secret ballot.[[163]](#footnote-163)

Unfortunately, despite extremely high expectations at the founding of the ICC, the reality of what has been achieved has in most eyes fallen short of the anticipated actions. Arguably, the expectations of individual member states, non-governmental organizations (NGOs) and the international community in general were simply unrealistic with respect to the 2002 creation of the ICC. Five years after its initial establishment, Burke-White observed that financial restrictions, political realities, and a highly circumscribed capacity on the part of the ICC to bring suspects into custody had all largely limited the ICC’s ability to bring any widespread accountability or an end of impunity for international crimes.[[164]](#footnote-164) Whether some of this failure can be ascribed to contentious issues surrounding the court’s creation is the subject of the next subsection of this chapter. Prominent amongst the factors is the concept of complementarity. In fact, Burke-White argues that for the ICC to begin to deliver on its full potential that there must be a new era of multi-level governmental interaction to which the term “Pro-active complementarity is assigned.[[165]](#footnote-165)

2.3 Contentious Issues Surrounding the Court’s Creation

The contentious issues surrounding the court’s creation can largely be classified into the following seven categories: (1) definitional issues; (2) ex post facto criminalization (3) membership comprehensiveness; (4) relationships with external international organizations; (5) relationships with national entities, (6) logistical issues, and (7) neo-colonial overtones.

2.3.1 Definitional Issues

While the ICC's jurisdictional remit currently includes a number of well-established core crimes including genocide,[[166]](#footnote-166) serious violations of title laws and customs applicable in armed conflict (war crimes),[[167]](#footnote-167) and crimes against humanity,[[168]](#footnote-168),[[169]](#footnote-169) the Statute fails to include several serious crimes, such as airplane hijacking and biological and chemical warfare.

Additionally, like all areas of jurisprudence the law is not static. This is particularly true in two respects. First is the issue that cases arise before the court that present issues that have never before been considered. Under such circumstances, new precedents are set that have the potential to change all future legislation and the interpretation and enforcement of such legislation in that area. Second is a slow but ever changing concept of morality. This is especially true with respect to human rights. The most striking case of this is the concept of slavery, where the activity went from being legal to being largely eliminated in less than 100 years.[[170]](#footnote-170) Other good examples include the rights of women, ethnic minorities, children and workers with respect to job place safety. Again, in less than 100 years women went from having no voting rights and few property ownership and legal rights to major political power in the United Kingdom,[[171]](#footnote-171) Germany,[[172]](#footnote-172) and the United States.[[173]](#footnote-173),[[174]](#footnote-174)

As such, what is defined as a war crime or other activity that falls within the jurisdiction of the ICC and how it comes to be defined has major issues. First the process is extremely complicated. Next, the process is not at all transparent. Finally the process is rarely consistent as it is driven by external historical actions. As example, as early as 1913, the Hague Convention IV has been used as a basis to define war crimes.[[175]](#footnote-175) Subsequent to this, the Leipzing Trials set precedent in the sinking of hospital ships and the murder of the civilian survivors, which was then considered as part of this informal but expanding definition of war crimes.[[176]](#footnote-176) Notably, the actual codification of the 1899 and 1907 Hague Conventions did not actually occur until 1993 as part of the Statue of the International Criminal for the Former Yugoslavia.[[177]](#footnote-177)

As another example, the term genocide was first introduced as part of the Nuremberg Trials but not as part of the statutes. Instead, it fell under crimes against humanity for the mass murder of Jews, Gypsies, and the disabled. Genocide was recognised by the United Nations as a resolution in December of 1946 as a crime against international law and evolved in 1948 as the Convention for the Prevention and Punishment of the Crime of Genocide, as part of Article II of the 1948 Convention as Article 6 in the Statute of the International Criminal Court.[[178]](#footnote-178),[[179]](#footnote-179)

2.3.2 Ex Post Facto Criminalization

Like in the case of the adoption of the Charter of the International Military Tribunal after World War 2, some of the cases that the ICC has considered can be considered as ex post facto criminalization. Arguably the same defence can be raised, specifically in the form of the 1928 Kellogg – Briand Pact for crimes against peace.[[180]](#footnote-180) Schabas also flagged the fact the ‘prohibition of retroactive crimes was a principle of justice and thus a failure to prosecute Nazi crimes would be a fundamental disservice to the larger concept of justice.[[181]](#footnote-181) The IMT was finally adopted in December of 1945 in a modified format known as Control Council Law 10.[[182]](#footnote-182)

2.3.3 Membership Comprehensiveness

One potential criticism of the ICC is the composition of judges. According to the organizations bylaws there are 5 regional groups. These are the African group, the Asian Group, the Eastern European Group, the Western European Group, and the Latin American and Caribbean Group. If a group has a minimum of 17 state parties than they are entitled to representation by 3 judges. As is evident in Table 4, each of the 5 regional groups has the necessary membership to warrant the 3 person representation. However when considering the total number of state parties, the African group with its 34 state parties has more than 38% more countries than the average of only 24.6. Furthermore, when the total number of potential members are considered (the summation of Tables 1 – 3), what is readily apparent is that there are more countries in the African group than any other group, thereby creating a situation where representation as a function of state membership will, therefore, always disadvantage African countries. Namely, that the maximum number of judges is only 3, irrespective if the state party membership is only the required minimum of 17 or 52 (the potential maximum membership).

This raises the question of whether the representation should be arranged in some other manner. One possible was would be to change the maximum allowable number of judges. For instance, the court could have 1 representative per 6 member states. Alternatively, the representation could be population based. In some ways this would be fairer. Under that current system an extremely small country with almost no population to represent becomes as power as the largest and most populace country. For example, the Cook Islands, which is barely identifiable on the map is entitled to representation equal to that of China. To balance this apparent inequity there could be also a two-part regional membership where part of the equation to determine the number of judges is based on the number of state parties and part of it would be based on population. Such a system would be more akin to how the United States composes it Congress with the House of Representatives have 1 representative per a certain number of people, with a minimum representation of at least member per state and the Senate, in contrast, have a total of 2 representatives per state irrespective of size or population.[[183]](#footnote-183)

Table 4. Judicial representation as a function of State Party Membership.[[184]](#footnote-184)

|  |  |  |
| --- | --- | --- |
| Group | Number of states parties | Number of judges allocated |
| African Group | 34 | 3 |
| Asian Group | 19 | 3 |
| Eastern European Group | 18 | 3 |
| Latin American and Caribbean Group | 27 | 3 |
| Western European and Others Group | 25 | 3 |

2.3.4 Relationships with National Entities

The concept of complementarity has been a major subject related the ICC.[[185]](#footnote-185) Prominent in this area of scholarship is the work by Burke-White that considered the issue of multi-level governance in the context of the Democratic Republic of Congo and its interactions with the ICC.[[186]](#footnote-186) In the just published book “The International Criminal Court and national courts: a contentious relationship.” Jurdi investigates the uneasy relationship between state-based legislative and judicial infrastructures and the ICC.[[187]](#footnote-187) While ideally the two should work in a context of complementarity, the reality is often far from this.[[188]](#footnote-188) Jurdi investigates this in detail with respect to what is characterized as either a ‘willingness’ or an ‘unwillingness’ to prosecute. As such the concept of self-referral takes on a great importance. Jurdi looks at this with respect to three case histories.[[189]](#footnote-189) The first regards Uganda with respect to the Lord’s Resistance Army.[[190]](#footnote-190) The second involves the Democratic Republic of Congo.[[191]](#footnote-191) The third and final involves Sudan. In the first instance there is self-referral. In the second case Jurdi argues that a better engagement with national infrastructures would have vastly improved the outcomes.[[192]](#footnote-192) Finally, in the third Jurdi changes the concept of complementarity from being one of the ICC and national infrastructures to that of the ICC and the UN Security Council with respect to the latter’s referral of the case to the ICC.[[193]](#footnote-193),[[194]](#footnote-194) Interestingly, in the proposed framework for pro-active complementarity, Burke-White attempts to shift the prosecutorial burden back onto national entities[[195]](#footnote-195)

However, the present arrangement involves a highly uneven application of the complementarity. Specifically, only a certain percentage of the signatories with ratification (i.e. the full assembly members) have complementary national legislation and/or co-operation legislation. This is summarized in Table 5. Of particular interest is the failure of the vast majority of the African state party members to enact such legislation. In the initial group reported in 2006 (see Table 5) only South Africa had both Complementarity legislation and co-operation legislation enacted. A further four member state parties (i.e. Congo, Mali, Burundi, and Niger)) had complementarity legislation enacted and Congo had further co-operation legislation drafted. This left the majority of the 34 African state party members with no formal national legislation, as a supporting efforts either in the judicial or enforcement realms.

Table 5. States with Complementary National Legislation as of 2006[[196]](#footnote-196)

| States | Complementarity legislation | Co-operation legislation |
| --- | --- | --- |
| Australia, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Denmark, Estonia, Finland, Georgia, Germany, Iceland, Liechtenstein, Lithuania, Malta, Netherlands, New Zealand, Slovakia, South Africa, Spain, Trinidad and Tobago, United Kingdom | Enacted | Enacted |
| Colombia, Congo, Serbia, Montenegro | Enacted | Draft |
| Burundi, Costa Rica, Mali, Niger, Portugal | Enacted | None |
| France, Norway, Peru, Poland, Slovenia, Sweden, Switzerland | Draft | Enacted |
| Austria, Japan, Latvia, Romania | None | Enacted |
| Argentina, Benin, Bolivia, Botswana, Brazil, Central African Republic, Democratic Republic of Congo, Dominica, Gabon, Ghana, Greece, Ireland, Italy, Kenya, Lesotho, Luxembourg, Nigeria, Samoa, Senegal, Uganda, Uruguay, Zambia | Draft | Draft |
| Dominican Republic, Ecuador, Honduras, Hungary, Jordan, Panama, Venezuela | Draft | None |
| Mexico | None | Draft |
| Afghanistan, Albania, Andorra, Antigua and Barbuda, Barbados, Belize, Burkina Faso, Cambodia, Cyprus, Djibouti, Fiji, Gambia, Guinea, Guyana, Liberia, Malawi, Marshall Islands, Mauritius, Mongolia, Namibia, Nauru, Paraguay, Saint Vincent and the Grenadines, San Marino, Sierra Leone, The Republic of Macedonia, Tajikistan, Timor-Leste, United Republic of Tanzania | None | None |

2.3.5 Relationships with External International Organizations

Notably, the ICC only has two UN Security Council members. This speaks to a certain possible inherent dysfunction due to a perceived lack of credibility because of the absence of membership by the arguably most powerful nations in the world. In fact, Kaye and Raustiala explore the complicated and sometimes adversarial relationship between the UN Security Council and the ICC.[[197]](#footnote-197)

2.3.6 Logistical Issues

There are also many logistical issues that arise in the administration of the ICC that have a major impact on its effectiveness. A lot of these revolve around funding limitations and insufficient administrative infrastructure. These directly impact both the ability of the ICC to do its work and the general perception of the level of effectiveness that the ICC could have. For example, according to Appel, the ICC could deter government sponsored human rights violations by instigating financial penalties or creating other economic disincentives to decrease their expected benefits.[[198]](#footnote-198) However, to date, no such actions have been undertaken. In this area, Reynolds investigated the possible effectiveness of using the ICC as a deterrence to recruiting child soldiers ICC.[[199]](#footnote-199) In that work, which was based on classic deterrence theory (i.e. severity, celerity, and certainty),[[200]](#footnote-200) Reynolds concludes that the crime of child soldier recruitment continues to persist despite the modicum of deterrence provided by the ICC to which she ascribes a long list of social factors including persistent poverty, an absence of a consistent and robust family structure, religious and ideological beliefs and an overwhelming disparity between supply and demand.[[201]](#footnote-201)

Similarly Posner noted that if the ICC takes on a case that involves the reparation for victims of mass atrocities, there will be exceptional challenges because the vast majority of perpetrators will not be convicted and only relatively modest funds will be recoverable with respect to the number of victims. Additionally the distribution mechanisms for reparations might be seen as morally arbitrary and politically contentious.[[202]](#footnote-202)

2.3.7. Neo-colonial Overtones

Although the phenomenon of neo-colonialism is commonly associated with economic or political - as opposed to legal - implications, the ICC’s indictment of Al-Bashir (as will be discussed extensively in subsequent chapters) brought up charges by African member states of neo-colonialism. In the only work exclusively devoted to the subject of neo-colonialism and the ICC, Schuerch’s 2016 doctoral thesis “The International Criminal Court at the mercy of powerful states: How the Rome Statute promotes legal neo-colonialism" investigates exactly this mechanism and specifically how this ideas intersects the discipline of international criminal law (ICL) in the larger context and the ICC more specifically.[[203]](#footnote-203) This is done in multiple parts. The first considers the particular notions traditionally affiliated with colonialism and neo-colonialism and the specific historical precedents related to their manifestation in an African context. Next Schuerch considers whether and to what extent neo-colonial concepts can be applied to explain or describe a current day legal context. Following this, Schuerch addresses the issue that the ICC and the broader field of ICL are by definition universal in nature (e.g. thus the use of terms such as ‘crimes against humanity’). It is at this point that Schuerch uses the definitional position of the crimes that are covered by the Rome Statute to argue that their multi-national (or at lease extra-national) nature in part negates the traditional application of the term neo-colonial or neo-imperialistic as it implies something than the traditional, direct asymmetry of a stronger country exploiting a weaker one, but the argument is not particularly robust.[[204]](#footnote-204) So while the ICC is certainly not the mouth piece of a single nation, the argument could be made that the ICC at its core represents most strongly the opinions and interests of a relatively small group of countries that have traditionally held power and engaged in colonial type activities either in Africa, in other parts of the world, or in a combination of the two. Ultimately, it is this concept of asymmetry to which Schuerch returns to explain what is characterized as a reconceptualization of the term neo-colonialism with the context of international criminal law.[[205]](#footnote-205)

2.4 Examples of the Range and Variety of Stakeholder Motives

Despite the seven areas of easily identifiable limitations and concerns presented in section 2.3 and its various subsections, the reality is that a large number of States readily joined and rather rapidly ratified the Rome Statute. The motivation to do so, or not, can only be considered as varied as the nations themselves. In the various subsections below is an incomplete list and a random sampling of some of the opinions and positions expressed (at least publicly) by the various countries. Some of these are members as per Table 1, some are non-ratified signatories as per Table 2, and the remainder are non-signatories as per Table 3. As the publically expressed reasons tell a rather incomplete story they are presented in a simple alphabetical order, instead as in either a regional or a positional grouping. In this chapter there is also no analysis as to the impact of the ICC on each of these individual countries, although interestingly, the sheer act of membership seems to have a positive effect on international criminality levels. As observed by Appel states that have ratified the Rome Statute commit lower levels of human rights abuses than non-ratifiers.[[206]](#footnote-206) The further analysis of the impact of the ICC will be addressed explicitly in later chapters.

2.4.1 China (The People's Republic of China)

Despite a significant investment in the initial talks and formation efforts of the ICC, China has refused to become a signatory member.[[207]](#footnote-207) Specifically, China has raised several major objections to the ICC. First it opposes the ICC as an impingement of its own sovereignty and that of other nation states. Next it has raised the issue that the encouragement and in fact strong theoretical reliance upon the concept of complementarity would enable the ICC to exert control over China’s national judicial system. The third objection that has been raised related to the fact that jurisdiction as currently defined covers not only international conflicts but ones that are internal to a single country. For China this is a major issue as it relates to human rights activities and the long term fate of Hong Kong and Taiwan. Next, China protests that the ICC jurisdiction as currently written includes peacetime crimes against humanity, not just wartime ones. This is another huge component for China as its relations with Nepal and Myanmar both possibly full under this category.[[208]](#footnote-208) Furthermore, China claims that the Prosecutor[[209]](#footnote-209)'s right to initiate prosecutions may open the Court to political influence.[[210]](#footnote-210) Finally China asserts that the existence of the ICC actually undermines the role of the UN Security Council, on which China of course exerts a very strong influence. A recent example of this occurred in 2014 when China in league with Russia vetoed the UN’s Security Council’s effort to refer the case of Syria to the ICC.[[211]](#footnote-211)

Gao and Wang vigorously argue that ultimately China will have to become a signatory to the Rome Statute if it is to protect its own self interests.[[212]](#footnote-212) Tao provides an extensively analysis of the actions and countermeasures that China has taken to date in the context of a non-signatory ICC participant including attending the annual assembly meetings and committee meetings as a non-voting member.[[213]](#footnote-213)

2.4.2 Côte d’Ivoire

Based in part on the reports issued by the United Nations Human Rights Commission[[214]](#footnote-214),[[215]](#footnote-215) and a report from the United Nations Security Council,[[216]](#footnote-216) the ICC undertook an investigation of atrocities reported in the Côte d’Ivoire. A full accounting of this is available elsewhere[[217]](#footnote-217),[[218]](#footnote-218) and will be discussed as one of the main cases in this thesis. Côte d'Ivoire is a very interesting situation as it is a non-signatory and, thus, falls under the following… Pursuant to article 12(3) of the Rome Statute of the International Criminal Court, a state that is not a party to the Statute may, "by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question." The state that does so is not a State Party to the Statute, but the Statute is in force for the state as if it had ratified the Statute, only on an ad hoc basis. However, a state that lodges an article 12(3) declaration cannot refer a situation to the Court. This means that the Prosecutor can only open an official investigation after a State Party or the United Nations Security Council refer the situation to the Court. Alternatively, the Prosecutor can open an investigation after a Pre-Trial Chamber gives its consent to do so, but only after it is presented with preliminary evidence. Specifically Côte d'Ivoire accepted the jurisdiction of the ICC on 18 April 2003, which was back dated to 19 September 2002 and was granted with an indefinite jurisdictional end date.[[219]](#footnote-219) The situation was updated on 15 February 2013, and Côte d'Ivoire is now fully a state party to the ICC.

2.4.3 Democratic Republic of Congo

At the September 2003 Assembly of States Parties, the ICC announced that it intended to monitor the evolving situation in the Ituri district of the northeastern Democratic Republic of Congo (DRC), where massacres, rape, and forcible displacement were routinely occur. As one of the early cases the involvement in the DRC was particularly important as it (even in the pre-trial stage) was surrounded with declarations relating to the involvement of cross-national players Because of the broad prosecutorial discretion granted to the Office of The Prosecutor the spectre was immediately raised as to the extent to which the Court would go in pursuing individuals irrespective of the military, political, and corporate affiliations.[[220]](#footnote-220) The issue of non-state actors was a reality that possibly was not as fully considered in the creation of the ICC as many of its other aspects.[[221]](#footnote-221)

2.4.4 Israel

As stated in section 2.2.1 Israel was a brief signatory of the Rome Statute (in part due to pressure from the United States)[[222]](#footnote-222) and then renounced it due to the ICC’s failure for direct representation in one of the UN regional groups and due to definitional and jurisdictional concerns over the Palestinian situation and the ICC’s failure to consider acts of terrorism and other issues closely related to Israel’s stated national security concerns. The situation is a bit ironic as Israel was originally one of the strongest supporters for the establishment of the ICC,[[223]](#footnote-223) no doubt as an outgrowth of the experience of the Jews during World War II.

2.4.5 Uganda

The government of Uganda reached an agreement with the Office of the Prosecutor of
the ICC to start investigating the activities of the Lord's Resistance Army (LRA), 2 with a view to indicting and bringing to trial those who have committed crimes.[[224]](#footnote-224) As this will not be one of the cases studied in depth later in this thesis,[[225]](#footnote-225) it is interesting to consider that this case demonstrate what a pro-active engagement of the ICC can look like from a state party, even an African one.[[226]](#footnote-226)

2.5 Conclusions

This chapter first presents the history, circumstances, and background of the court’s creation. Next the process of the court’s creation is described with respect to its organizational and operational aspects. The third part of the chapter addresses issues that are potentially contentious. These include challenges related to expanding and changing definitions and ex post facto criminalization due to certain acts having occurred prior to the founding of the ICC. Additional issues relate to the current membership of the ICC and how it is (or is not) represented judicially. The chapter then considers the ever evolving relationships that the ICC has with its various member states, specifically with respect to legislative complementarity. A short observation is then made as to the representation currently in the ICC versus that of the UN Security Council. The chapter then proceeds to look at logistical issue based limitations and restrictions and then considers explicitly the current scholarship with respect to considerations of neo-colonialism within the ICC. The chapter then ends with a country by country presentation of specific stakeholder motives for a selected group of countries that represent the entire spectrum of ratified members, non-ratified signatories, and others. Specific countries that are considered include China, Democratic Republic of Congo, Côte d’Ivoire, Israel, and Uganda.

What can be understood from this chapter is that the establishment of the ICC represented an enormous leap forward in the area of international criminal law. It represented in many way the culmination of more than a hundred years of effort clearly dating back to the middle of the nineteenth century, and while many could argue that the 2002 launch of the ICC had major flaws that its ability to have a permanent sitting body to look at war crimes and related offenses against humanity needs to be acknowledged as a major accomplishment. It should also be noted that African States have played a key role in such development, notably the fact that they have massively ratified the status allowing the establishment of the court.

This is not to say that the present limitations and difficulties highlighted herein should be disregarded. There are many serious concerns that were identified. Several of them are inter-related. Specifically, the current constitution of the ICC membership is not comprehensive. There are many countries that are not ratified signatories, or even signatories. Of particular concern is that some of the traditionally most influential countries in the realm of international diplomacy and global policy setting i. e. the membership of the United Nations Security Council is not fully represented. In fact, the presence of only 2 UNSC members is of great concern. Another membership related problem stems from how the member state parties are grouped in the 5 regional entities from which judicial representation is derived. As noted above, a country like Israel is not included with its neighbours and the number of countries within the African group is much too high with respect to the fact that judicial representation is limited to 3 members per regional group irrespective of the number of member party states in the group, the percentage of them as a representation of the total possible participation, or the population that they represent. It is possibly in this last group of aspects that a visible asymmetry arise in the ICC’s composition and starts to look discriminatory. Now that these structural issues have been explored, the following chapters are devoted to the actual operation of the ICC in its pursuit of justice in an African context. To this end, the upcoming chapters will analyse the cases that have been selected, the mechanisms through which the selection was done, and the actual actions that the court took with respect to just considering, convening a committee or actually pursuing prosecution.

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23. Admittedly the referral of the situation in Sudan by the Security Council means that for the most part the overwhelming view is that President al-Bashir does not enjoy immunity from ICC’s jurisdiction in such particular situation. SeeDan Terzian, ‘Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593’, (2011) 16 UCLA J Int’l Law and Foreign Affairs 279 (arguing that President al-Bashir does not enjoy immunity before ICC). [↑](#footnote-ref-23)
24. See Paola Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, (2009) 7(2) J Int Criminal Justice 315-332. Prof Gaeta argues that the ICC does not have such authority and therefore member states have no obligation to comply with the Court’s request. For an example of the opposite view, see Dapo Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities’, (2009) 7(2) J Int’l Criminal Justice 333-352; Jens Iverson, ‘Head of State Immunity is not the same as State Immunity: A Response to the African Union’s Position on Article 98 of the ICC Statute’, (EJIL: *Talk!*, 13 February 2012) <<http://www.ejiltalk.org/head-of-state-immunity-is-not-the-same-as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/>> accessed 1 April 2016. [↑](#footnote-ref-24)
25. *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11. It should be noted that the Kenyatta case had been dropped by the prosecutor in 2014. ‘ICC drops Uhuru Kenyatta charges for Kenya ethnic violence’ (BBC Online, 5 December 2014) < <http://www.bbc.com/news/world-africa-30347019>> accessed 8 April 2016. Meanwhile the Court’s Trial Chamber has dismissed the Ruto case in 2016. ‘Kenya's William Ruto's case dismissed by ICC’ (BBC Online, 5 April 2016) < <http://www.bbc.com/news/world-africa-35965760>> accessed 8 April 2016. Nevertheless the prosecution had taken years and therefore long enough to give rise to controversies among African states. [↑](#footnote-ref-25)
26. See ICC Assembly of State Parties ‘Amendments to the Rules of Procedure and Evidence’ Resolution ICC-ASP/12/Res.7. [↑](#footnote-ref-26)
27. *Ibid* 4. [↑](#footnote-ref-27)
28. See Abel Knottnerus, ‘The International Criminal Court and Presence at Trial: the (In)validity of Rule 134quater’, (ICD Brief, 5 September 2014) <<http://www.rug.nl/research/portal/files/14164460/Knottnerus_International_Crimes_Database_Brief_2014.pdf>> accessed 1 April 2016; Kevin Jon Heller, ‘Will the New RPE 134 Provisions Survive Judicial Review? (Probably Not.)’, (Opinio Juris, 28 November 2013) <<http://opiniojuris.org/2013/11/28/will-new-rpe-134-provisions-survive-judicial-review/>> accessed 1 April 2016). [↑](#footnote-ref-28)
29. African Union, ‘Report of the African Union High Level Panel on Darfur’, (Peace and Security Council 207th Meeting at the Level of the Heads of State and Government, 29 October 2009) 242. [↑](#footnote-ref-29)
30. ICC Assembly of State Parties, ‘Report of the Working Group on Amendments’, (7 December 2012) Doc No ICC-ASP/13/31 [12]. [↑](#footnote-ref-30)
31. Assembly of the African Union, ‘Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)’ (27 July 2010) Assembly/AU/Dec.296 (XV) [5], [8]-[9]; Assembly of the African Union, ‘Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)’ (3 July 2009) Assembly/AU/Dec.245 (XIII) [10]. [↑](#footnote-ref-31)
32. As late as February 2016, Kenya has proposed, with backing from other African states, to lay out a roadmap for the withdrawal of African states from the Rome Statute. See ‘African Union members back Kenyan plan to leave ICC’, (the Guardian, 1 February 2016) <http://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court> accessed 4 April 2016. [↑](#footnote-ref-32)
33. The statement in front of he AU Assembly is available online <<http://www.president.go.ke/2016/01/30/statement-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-on-the-status-of-the-kenyan-situation-at-the-icc/>> accessed 4 April 2016. [↑](#footnote-ref-33)
34. Mahmood Mamdani, ‘Darfur, ICC and the New Humanitarian Order.’ (The Zeleza Post, 25 September 2008) <http://www.zeleza.com/blogging/african-affairs/darfur-icc-and-new-humanitarian-order-mahmood-mamdani> accessed 4 April 2016. [↑](#footnote-ref-34)
35. Mamdani also posited that the Court shares an aim of ‘mutual accommodation’ with the world’s only superpower: a fact which to Mamdani ‘is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic and Congo’, given that all of these ‘are places where the United States has no major objection to the course chartered by ICC investigations’. *Ibid.* [↑](#footnote-ref-35)
36. David Kezio-Musoke, ‘Rwanda: Kagame Tells why He is Against ICC Charging Bashir’ (Daily Nation, 3 August 2008) <http://allafrica.com/stories/200808120157.html> accessed 4 April 2016. [↑](#footnote-ref-36)
37. M Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier, 1979) 50. See also G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP, 2004) 237. [↑](#footnote-ref-37)
38. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2004). See also M Bedjaoui, International Law: Achievements and Prospects (Martinus Nijhoff, 1991) 5-11. Specifically on Africa, see TO Elias, *Africa and the Development of International Law* (A. W. Sijthoff, 1972). [↑](#footnote-ref-38)
39. Jean-Paul Sartre, *Colonialism and Neo-colonialism* (Routledge, 2001). [↑](#footnote-ref-39)
40. Michael Doyle, *Empires* (Cornell University Press, 1986) 45. [↑](#footnote-ref-40)
41. Anghie’s characterisation of ‘colonialism’ here should be distinguished with the concept of ‘occupation’ as one of the traditional mean to gain territory under international law. There is admittedly a fine distinction between the two, as the term ‘terra nullius’ itself is now also subject to the stigma of colonialism. Nevertheless it should be assumed that in case of colonialism, the settlement is in a legal sense, done with the intention to acquire territory over which an entity has lawfully gained possession. [↑](#footnote-ref-41)
42. For instance, the British Empire of the nineteenth century engaged in both colonial and imperial practices. [↑](#footnote-ref-42)
43. Anghie (n38) 11. [↑](#footnote-ref-43)
44. See United Nations General Assembly ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ (14 December 1960) Doc. A/Res/15/1514. [↑](#footnote-ref-44)
45. Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39. [↑](#footnote-ref-45)
46. Kwame Nkrumah, *Neo-Colonialism, The Last Stage of Imperialism* (Thomas Nelson & Sons, Ltd., 1965). This book is Nkrumah’s theoretical development and extension of the socio-economic and political arguments presented by Lenin in the pamphlet *Imperialism, the Highest Stage of Capitalism* (1917). [↑](#footnote-ref-46)
47. Nkrumah, *ibid* at Introduction (emphasis added). [↑](#footnote-ref-47)
48. See, among others, Bhupinder Chimni, ‘Third World Approaches to International Law: a Manifesto’, (2006) 28 Int’l Comm LR 3, 8-14; Bernard Hoekman & Michel Kostecki, *The Political Economy of the World Trading System: from GATT to WTO* (OUP, 1995); M Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP, 2010) 1-8. [↑](#footnote-ref-48)
49. Arguably, We should further engage the African nations; with the major questions being how are cases selected; is great transparency needed; and are there greater and or better opportunities for involvement beyond the 4 pillars such as address things like maritime piracy. [↑](#footnote-ref-49)
50. Lassa Oppenheim, *Oppenheim’s International Law* (The Lawbook Exchange, 1920) 428 [↑](#footnote-ref-50)
51. *Military and Paramilitary Activities in and Around Nicaragua* *(Nicaragua/United States)* (Judgment) [1986] ICJ Rep 14. [↑](#footnote-ref-51)
52. *Ibid* [205]. [↑](#footnote-ref-52)
53. *Armed Activities on the Territory of the Congo* *(Democratic Republic of the Congo/Uganda)* (Judgment) [2005] ICJ Rep 116. [↑](#footnote-ref-53)
54. For instance, the AU explained that its opposition against ICC’s prosecution of president al-Bashir ‘Bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonized approach to justice and peace, neither of which should be pursued at the expense of the other’. African Union Press Release, ‘Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court’, Addis Ababa 14 July 2009. [↑](#footnote-ref-54)
55. As noted by Kiyani, it is telling for instance that some local peoples in Northern Uganda who, while frustrated by the OTP’s partial prosecution of only offenders from one party to the civil war, have nevertheless called for increased judicial activity to prosecute more offenders especially from the state and its proxies. Asad Kiyani, ‘Third World Approaches to International Criminal Law’ (2016) 109 AJIL Unbound 255. [↑](#footnote-ref-55)
56. See Arthur John Keeffe, "Neocolonialism in the District of Columbia." ABAJ 57 (1971): 793. [↑](#footnote-ref-56)
57. See Abdullahi Ahmed An-Na‘im, "Editorial note: From the neocolonial ‘Transitional’to indigenous formations of justice." International Journal of Transitional Justice 7.2 (2013): 197 - 204. [↑](#footnote-ref-57)
58. See Ronald Niezen, The Rediscovered Self: Indigenous Identity and Cultural Justice.( Montreal, QC: McGill-Queen's University Press, 2009) 236 pp. [↑](#footnote-ref-58)
59. For more general works on the topic, the reader is referred to writings by Edward Said, Bhabha and Gayatri Spivak, [↑](#footnote-ref-59)
60. See Diana Eades, *Courtroom talk and neocolonial control*. Vol. 22. Walter de Gruyter, 2008. [↑](#footnote-ref-60)
61. See Eduardo RC Capulong, "Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines." Ohio St. J. on Disp. Resol. 27 (2012): 641. [↑](#footnote-ref-61)
62. See Robert Perry Barnidge, "Some (preliminary) thoughts on neocolonialism and international law." Indian Society of International Law (2009): 115 - 121. [↑](#footnote-ref-62)
63. See Matteo Tondini, "From Neo-Colonialism to a ‘Light-Footprint Approach’: Restoring Justice Systems." *International Peacekeeping* 15.2 (2008): 237 - 251. [↑](#footnote-ref-63)
64. See John Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, (4th edn, Sage, 2013), research approach 3. [↑](#footnote-ref-64)
65. Although note that the status of judicial decisions and writings of publicists within the ICC Statute is subject to some uncertainty. See below. [↑](#footnote-ref-65)
66. William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 383-385; Margaret deGuzman, ‘Article 21 – Applicable Law’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (2nd edn, C. H. Beck 2008) 702. [↑](#footnote-ref-66)
67. See Rome Statute (n1) arts 21(1)(a)-(c) and 21(2). [↑](#footnote-ref-67)
68. Robert Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’, (2009) 12(3) New Criminal Law Review 390, 393-394. [↑](#footnote-ref-68)
69. See Rome Statute (n1) art 21(3). [↑](#footnote-ref-69)
70. See, for instance, Dov Jacobs, ‘Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories’ inJean d'Aspremont & Jörg Kammerhofer (eds.), *International Legal Positivism World* (CUP 2014), arguing that the principle of legality in international criminal law should restrict the application of the rules of treaty interpretation in the Vienna Convention on the Law of Treaties with regards to the Rome Statute. [↑](#footnote-ref-70)
71. Myers McDougal & Michael Reisman, ‘International Law in Policy Oriented Perspective’ in R St. J MacDonald & Douglas Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff 1983); Michael Reisman, ‘Theory About Law: Jurisprudence for a Free Society’ (1999) 108 Yale LJ 939. [↑](#footnote-ref-71)
72. See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 1-10. [↑](#footnote-ref-72)
73. Steven Ratner & Anne-Marie Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’ (1999) 93(2) AJIL 291-302. [↑](#footnote-ref-73)
74. *South West Africa* (Advisory Opinion) [1966] ICJ Rep 6 [49]. [↑](#footnote-ref-74)
75. See *ibid*, joint diss. op. of judges Fitzmaurice and Spender [466]. [↑](#footnote-ref-75)
76. Myres McDougal & Michael Reisman, ‘The Prescribing Function in the World Constitutive Process: How International Law is Made’, (1981) 6 Yale Studies in World Public Order 355, 377. See also Dame Higgins who wrote, “Policy considerations, although they differ from ‘rules’, are an integral part of that decision making process which we call international law; the assessment of so-called extra legal considerations is part of the legal process, just as is reference to the accumulation of past decisions and current norms.” Rosalyn Higgins. 'Integration of Authority and Control: Trends in the Literature of International Law and International Relations', in Michael Reisman and Bums Weston, *Toward World Order and Human Dignity* (Free Press 1976) 85. [↑](#footnote-ref-76)
77. In a more layman term, TWAIL is also often associated as a *network* of scholars who share the same approach. Nevertheless the fact that these scholars use a common approach in their scholarship of international law justifies the designation of TWAIL as a methodology in its own right. See Obiora Okafor, ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology or Both?’ (2008) 10 Int’l Comm LR 371-378. [↑](#footnote-ref-77)
78. Makau Mutua, ‘What is TWAIL?’, (2000) 94 Proc ASIL 31. [↑](#footnote-ref-78)
79. *Ibid*. See also Chimni (n48). [↑](#footnote-ref-79)
80. Points suggested from reading the recent interview of ICC chief prosecutor, Fatou Bensouda; see Mark MacKinnon, ‘ICC's chief prosecutor fights to prove the institution's worth’ (Globe and Mail, 6 February 2015) <http://www.theglobeandmail.com/news/world/chief-prosecutor-fights-to-prove-international-criminal-courts-worth/article22851501/?cmpid=rss1> accessed 13 February 2015. [↑](#footnote-ref-80)
81. See Rome Statute (n1) Preamble [5]. [↑](#footnote-ref-81)
82. See Ovo Imoedemhe, *National Implementation of the Complementarity Regime of the Rome Statute of the International Criminal Court: Obligations and Challenges for Domestic Legislation with Nigeria as a Case Study*, PhD dissertation submitted at the University of Leicester (2014). [↑](#footnote-ref-82)
83. *Ibid* 3. For instance is the definition of ‘torture’ under the Convention Against Torture, requiring the involvement of government official. See 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1. [↑](#footnote-ref-83)
84. This can be obviously be seen in the *al-Bashir* and *Kenya* cases. See *Al-Bashir* (n20); *Kenyatta* (n25); *Ruto* (n25). [↑](#footnote-ref-84)
85. See generally the work of Jann Kleffner, *Complementarity of the Rome Statute and National Criminal Jurisdictions* (CUP 2008); Eric Witte, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya* (Open Society Foundations 2011). [↑](#footnote-ref-85)
86. See Rome Statute (n1) Part IX. [↑](#footnote-ref-86)
87. Valerie Oosterveld, Mike Perry and John McManus, ‘The Cooperation of States with the International Criminal Court’ (2002) 25 Fordham ILJ 767. To illustrate the difficulty even when it comes to arresting those who oppose the government of a referring state: arrest warrants have been issued against members of the Lord’s Resistance Army of Uganda since 2005 in the case of *Prosecutor v Joseph Kony et al*, yet until now the ICC has not been able to commence proceedings with respect to the suspects because they have not been arrested and surrendered to the ICC for that purpose. [↑](#footnote-ref-87)
88. Patricia Hobbs, *Revisiting the International Criminal Law Regime established by the Rome Statute from the perspective of State Sovereignty*,PhD dissertation submitted at the University of Manchester (2012). [↑](#footnote-ref-88)
89. Imoedemhe (n74). [↑](#footnote-ref-89)
90. Hobbs (n80). [↑](#footnote-ref-90)
91. Hobbs (n80) 27. [↑](#footnote-ref-91)
92. du Plessis (n14). [↑](#footnote-ref-92)
93. du Plessis (n14) 52 et seq. [↑](#footnote-ref-93)
94. See <<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>> accessed 30 March 2016. [↑](#footnote-ref-94)
95. *Ibid*. [↑](#footnote-ref-95)
96. *ibid*, footnote 3. [↑](#footnote-ref-96)
97. *ibid*, footnote 8. [↑](#footnote-ref-97)
98. *ibid*, footnote 10. [↑](#footnote-ref-98)
99. 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. [↑](#footnote-ref-99)
100. Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014. See ICC Press Release, 8 September 2015 <<https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1146.aspx>> accessed 30 March 2016). [↑](#footnote-ref-100)
101. International Criminal Court ‘Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010’Doc RC/11. [↑](#footnote-ref-101)
102. See further, Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court* (OUP 2002) 1059-1062, 1077-1078. [↑](#footnote-ref-102)
103. Rome Statute (n1) art 9(1). [↑](#footnote-ref-103)
104. International Criminal Court Assembly of State Parties ‘Rules of Procedure and Evidence’ (adopted 9 September 2002, entered into force 9 September 2002) Doc ICC-ASP/1/3 (Part.II-a), chapter 5 (Rule 104-130). [↑](#footnote-ref-104)
105. *Ibid* chapter 2 (Rule 4-11). [↑](#footnote-ref-105)
106. See <http://oxforddictionaries.com/definition/american_english/complementarity> accessed 2 February 2013. [↑](#footnote-ref-106)
107. Imoedemhe (n74) 20. [↑](#footnote-ref-107)
108. John Holmes, ‘The Principle of Complementarity’ in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations and Results* (Kluwer, 1999) 41-78, 41-42. He notes that numerous states argue that there is an obligation for states to prosecute international crimes, hence an international court cannot take precedence in this regard. [↑](#footnote-ref-108)
109. Peter-Tobias Stoll, ‘State Immunity’ in Max Planck Encyclopedia of Public International Law (2011) [1]. See also Hazel Fox, ‘International Law and Restraints on the Exercise of Jurisdiction by National Courts of States’ in Malcolm Evans (ed), *International Law* (3rd ed, OUP 2010) chapter 12. [↑](#footnote-ref-109)
110. 2004 United Nations Convention on Jurisdictional Immunities of States and Their Properties (adopted 2 December 2004), UN Doc A/59/508. [↑](#footnote-ref-110)
111. Fox (n100). [↑](#footnote-ref-111)
112. See *Jurisdictional Immunities of the State (Germany/Italy; Greece intervening)* (Judgment), [2012] ICJ Rep 99. [↑](#footnote-ref-112)
113. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment), [2002] ICJ Rep 3. [↑](#footnote-ref-113)
114. See Andrew Sanger, ‘Immunity of State Officials from the Criminal Jurisdiction of a Foreign State’ (2013) 62(1) ICLQ 193, 197-198. [↑](#footnote-ref-114)
115. A few authors pointed out that some state ministers undertake some international travel and often represent their State at the international level, but this means that one must look into the facts in the case of particular minister. Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2011) 21 EJIL 821. As further guidance, the International Court held that officials holding non-ministerial posts such as *Procureur de la République* and Head of National Security did not enjoy immunity as officials occupying high-ranking offices of the State. *Certain Questions of Mutual Assistance in Criminal Matters* *(Djibouti v France)* (Judgment), [2008] ICJ Rep 177. [↑](#footnote-ref-115)
116. Rome Statute (n1) art 14. [↑](#footnote-ref-116)
117. *Ibid* art 13(b). [↑](#footnote-ref-117)
118. *Ibid* art 15. [↑](#footnote-ref-118)
119. See William A Schabas An Introduction to the International Criminal Court. (Cambridge University Press, 2011) [↑](#footnote-ref-119)
120. See M Cherif Bassiouni "From Versailles to Rwanda in seventy-five years: The need to establish a permanent international criminal court." Harvard Human Rights Journal 10 (1997): 11 [↑](#footnote-ref-120)
121. For background on the development of American History in this realm and the critical role of Columbia Professor Francis Lieber in setting a judicial context and then precedent see Burrus M Carnahan "Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity." American Journal of International Law (1998): 213 - 231 [↑](#footnote-ref-121)
122. See William A Schabas An Introduction to the International Criminal Court. (Cambridge University Press, 2011) [↑](#footnote-ref-122)
123. Activities that are defined as war crimes is an evolving concept. For example, child soldier recruitment is one of the newest additions to the list of actions considered as a war crimes under international criminal law. [↑](#footnote-ref-123)
124. Nowak was one of the first to identify the contributions of Gustav Monnier. See Scott Nowak "Justice in Burma." Michigan State Journal of International Law 19 (2011): 667 - 721 [↑](#footnote-ref-124)
125. Jean S Pictet provides a comparison and a discussion of the evolution of the various Geneva Conventions in Jean S Pictet "The New Geneva Conventions for the Protection of War Victims", The American Journal of International Law, 45 (3) (1951): 462 - 475 [↑](#footnote-ref-125)
126. For a more comprehensive understanding of the role of the International Red Cross in both the formation and the enforcement of the various Geneva Conventions, see Chandler P Anderson "The International Red Cross Organization", The American Journal of International Law, 14 (1): (1920): 210 [↑](#footnote-ref-126)
127. See Geoffrey Best "Peace conferences and the century of total war: the 1899 Hague Conference and what came after." International Affairs 75.3 (1999): 619 - 634 [↑](#footnote-ref-127)
128. See Theodor Meron "The Martens Clause, principles of humanity, and dictates of public conscience." The American Journal of International Law 94.1 (2000): 78 - 89 [↑](#footnote-ref-128)
129. See Lord Phillimore "An International Criminal Court and the Resolutions of the Committee of Jurists." British Yearbook of International Law 3 (1922): 79 - 86 [↑](#footnote-ref-129)
130. See William A Schabas An Introduction to the International Criminal Court. (Cambridge University Press, 2011) [↑](#footnote-ref-130)
131. See Telford Taylor The anatomy of the Nuremberg trials: a personal memoir. Knopf, 2012 [↑](#footnote-ref-131)
132. See Paul Birdsall Versailles twenty years after. Reynal & Hitchcock, 1962 [↑](#footnote-ref-132)
133. See the Treaty of Peace between the Allied and Associated Powers and Germany (‘Treaty of Versailles’) (1919) TS 4, Article 227 [↑](#footnote-ref-133)
134. See Claud Mullins The Leipzig Trials. Witherby, 1921. [↑](#footnote-ref-134)
135. See AE Montgomery "VIII. The Making of the Treaty of Sèvres of 10 August 1920." The Historical Journal 15.04 (1972): 775 – 787 [↑](#footnote-ref-135)
136. See the League of Nations Convention for the Creation of an International Criminal Court, League of Nations OJ Special Supplement No. 156 (1936), LN Document C.547(I.M.384(I)1937.V (1938) [↑](#footnote-ref-136)
137. See Arieh J Kochavi Prelude to Nuremberg, Allied War crimes Policy and the Question of Punishment, Chapel Hill North Carolina, University of North Carolina Press (1998) [↑](#footnote-ref-137)
138. See the United Nations (UN) ‘Draft Convention for the Establishment of a United Nations War Crimes Court’, UN War Crimes Commission, Document C.50(1), 30 September 1944 [↑](#footnote-ref-138)
139. See the United Nations (UN) ‘Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)’, Annex, (1951) 82 UNTS 279 [↑](#footnote-ref-139)
140. See AR Carnegie "Jurisdiction Over Violations of Laws and Customs of War." Brit. YB Int'l L. 39 (1963): 402. [↑](#footnote-ref-140)
141. See Anthony Glees "The Making of British Policy on War Crimes: History as Politics in the UK." Contemporary European History 1.02 (1992): 171 - 197 [↑](#footnote-ref-141)
142. See William A Schabas An Introduction to the International Criminal Court. (Cambridge University Press, 2011) [↑](#footnote-ref-142)
143. See the International Law Commission. "Draft Code of Crimes against the Peace and Security of Mankind." Report of the International Law Commission on the Work of Its Forty-eighth Session (1996). [↑](#footnote-ref-143)
144. See the United Nations (UN) ‘Report of the Committee on International Criminal Court Jurisdiction’, UN Document A/2135 (1952) [↑](#footnote-ref-144)
145. See David Stoelting Rome Treaty Marks Historic Moment in International Criminal Law, N.Y. L.J., (Aug. 28, 1998), at 1 [↑](#footnote-ref-145)
146. See W. Lyons Scott "Introductory Note to the International Criminal Court: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire." International Legal Materials 51.2 (2012): 225 - 267 [↑](#footnote-ref-146)
147. See David Kaye and Kal Raustiala "The Council and the Court: Law and Politics in the Rise of the International Criminal Court." Texas Law Review, Forthcoming (2016): paper 16 - 13 [↑](#footnote-ref-147)
148. As per Article 12(3) of the Rome Statute states that “[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.” Id. art. 12(3). [↑](#footnote-ref-148)
149. See Ian M Sinclair "Vienna Conference on the Law of Treaties." International and Comparative Law Quarterly 19.01 (1970): 47-69 [↑](#footnote-ref-149)
150. See Daniel A Blumenthal’s article "Politics of Justice: Why Israel Signed the International Criminal Court Statute and What the Signature Means, The." (2001): 593 that was written just after the initial signing [↑](#footnote-ref-150)
151. See the American Non-Governmental Organizations Coalition for the International Criminal Court. Ratifications & Declarations. Accessed 2006-12-04. [↑](#footnote-ref-151)
152. See Israel Ministry of Foreign Affairs, 30 June 2002. Israel and the International Criminal Court. Accessed 2002-06-30. [↑](#footnote-ref-152)
153. As will be discussed later in this thesis in detail, there was an indictment of Sudan’s sitting president Omar Al-Bashir. This was considered by many as contravening international norms of providing immunity for acting heads of state. In response to this in June 2009, the African states of Comoros, Djibouti, and Senegal demanded through the African Union that other African member states withdraw en masse. For information directly on this case, see Situation in Darfur, Sudan, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad al Bashir (Mar. 4, 2009), available at http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf; Situation in Darfur, Sudan, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad al Bashir (July 12, 2010), available at http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptci/95?lan=en-GB. Notably ‘since 1990, numerous former heads of state have been legitimately prosecuted for serious human rights abuses or economic crimes in domestic courts. Recently, ex-President Alberto Fujimori of Peru was convicted and sentenced in Peru’s own court system to twenty-five years in prison for human rights abuses committed while in office. There is an ongoing trial of former President Hosni Mubarak of Egypt within its domestic system.’ as reported in W. Lyons Scott "Introductory Note to the International Criminal Court: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire." International Legal Materials 51.2 (2012): 225 - 267 [↑](#footnote-ref-153)
154. Data taken from https://en.wikipedia.org/wiki/States\_parties\_to\_the\_Rome\_Statute\_of\_the\_International\_Criminal\_Court#States\_parties [↑](#footnote-ref-154)
155. Data taken from https://en.wikipedia.org/wiki/States\_parties\_to\_the\_Rome\_Statute\_of\_the\_International\_Criminal\_Court#States\_parties [↑](#footnote-ref-155)
156. Data taken from https://en.wikipedia.org/wiki/States\_parties\_to\_the\_Rome\_Statute\_of\_the\_International\_Criminal\_Court#States\_parties [↑](#footnote-ref-156)
157. See Article 121 of the Rome Statute United Nations (UN) ‘Rome Statute of the International Criminal Court’ http://legal.un.org/icc/statute/99\_corr/cstatute.htm [↑](#footnote-ref-157)
158. <http://iccreviewconference.blogspot.ie/> (note the current website is presently unavailable; so this citation is being provided as an interim reference) [↑](#footnote-ref-158)
159. See https://www.icc-cpi.int/asp [↑](#footnote-ref-159)
160. See https://www.icc-cpi.int/asp [↑](#footnote-ref-160)
161. See https://www.icc-cpi.int/asp [↑](#footnote-ref-161)
162. See https://www.icc-cpi.int/asp [↑](#footnote-ref-162)
163. See https://www.icc-cpi.int/asp [↑](#footnote-ref-163)
164. See William W. Burke-White "Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice." Harvard International Law Journal 49 (2008): 53. [↑](#footnote-ref-164)
165. See William W. Burke-White "Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice." Harvard International Law Journal 49 (2008): 53. [↑](#footnote-ref-165)
166. See Rome Treaty Articles 5-6, supra note 5, at 1003-1004. [↑](#footnote-ref-166)
167. See Rome Treaty Articles 5 and 8 1003-1004, 1006-1009 [↑](#footnote-ref-167)
168. See Rome Treaty Articles 5 and 7 1003--1005. [↑](#footnote-ref-168)
169. See also Karen Berg, A Permanent International Criminal Court, 34 U.N. Chronicles. 30, 32 (1997). [↑](#footnote-ref-169)
170. See Seymour Drescher Abolition: a history of slavery and antislavery. Cambridge University Press, 2009. [↑](#footnote-ref-170)
171. See Ray Strachey "The Cause" a Short History of the Women's Movement in Great Britain." (1928) [↑](#footnote-ref-171)
172. See Ute Frevert "Women in German History from Bourgeois Emancipation to Sexual Liberation." (1989) [↑](#footnote-ref-172)
173. See Lois W Banner "Women in Modern America a Brief History." (1995) [↑](#footnote-ref-173)
174. See Marylynn Salmon Women and the law of property in early America. Haworth Press, 1986. [↑](#footnote-ref-174)
175. See the Carnegie Endowment for International Peace “Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars”, Washington: 1914. [↑](#footnote-ref-175)
176. See James F Willis Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War, Westport, CT: Greenwood Press (1982) [↑](#footnote-ref-176)
177. See the United Nations (UN) Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Document S/RE/827, Annex [↑](#footnote-ref-177)
178. See the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS (1951) 277 [↑](#footnote-ref-178)
179. See William A Schabas "Convention for the Prevention and Punishment of the Crime of Genocide." United Nations Audiovisual Library of International Law (2008) [↑](#footnote-ref-179)
180. See the Kellogg-Briand Pact 1928 http://www.yale.edu/lawweb/avalon/imt/kbpact.htm [↑](#footnote-ref-180)
181. See William A Schabas An Introduction to the International Criminal Court. (Cambridge University Press, 2011) [↑](#footnote-ref-181)
182. See the Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January 1946, 50 - 55 [↑](#footnote-ref-182)
183. See Alexander Hamilton, James Madison, John Jay, and Lawrence Goldman The federalist papers. (Oxford University Press, 2008) [↑](#footnote-ref-183)
184. Data take from https://en.wikipedia.org/wiki/States\_parties\_to\_the\_Rome\_Statute\_of\_the\_International\_Criminal\_Court#States\_parties [↑](#footnote-ref-184)
185. See Phil Clark "Law, politics and pragmatism: The ICC and case selection in the Democratic Republic of Congo and Uganda." Courting conflict (2008): 37 - 44 [↑](#footnote-ref-185)
186. See William W. Burke-White "Complementarity in practice: the international Criminal Court as part of a system of multi-level Global Governance in the Democratic Republic of Congo." Leiden Journal of International Law 18.03 (2005): 557 - 590. [↑](#footnote-ref-186)
187. See Nidal Nabil Jurdi The International Criminal Court and national courts: a contentious relationship. (Routledge 2016) [↑](#footnote-ref-187)
188. See Nidal Nabil Jurdi The International Criminal Court and national courts: a contentious relationship. (Routledge 2016) [↑](#footnote-ref-188)
189. Later in this thesis there will be an extensive revisiting of each of the three cases presented by Nidal Nabil Jurdi The International Criminal Court and national courts: a contentious relationship. (Routledge 2016) [↑](#footnote-ref-189)
190. See Tim Allen Trial justice: the international criminal court and the Lord’s resistance army. (Zed Books, 2006) [↑](#footnote-ref-190)
191. See Phil Clark "Law, politics and pragmatism: The ICC and case selection in the Democratic Republic of Congo and Uganda." Courting conflict (2008): 37 - 44 [↑](#footnote-ref-191)
192. See Nidal Nabil Jurdi The International Criminal Court and national courts: a contentious relationship. (Routledge 2016) [↑](#footnote-ref-192)
193. See Nidal Nabil Jurdi The International Criminal Court and national courts: a contentious relationship. (Routledge 2016) [↑](#footnote-ref-193)
194. Matthew Happold "II. Darfur, the Security Council, and the International Criminal Court." International and Comparative Law Quarterly 55.01 (2006): 226 - 236. [↑](#footnote-ref-194)
195. William W. Burke-White "Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice." Harvard International Law Journal 49 (2008): 53 [↑](#footnote-ref-195)
196. Data taken from https://en.wikipedia.org/wiki/States\_parties\_to\_the\_Rome\_Statute\_of\_the\_International\_Criminal\_Court#States\_parties [↑](#footnote-ref-196)
197. See David Kaye and Kal Raustiala "The Council and the Court: Law and Politics in the Rise of the International Criminal Court." Texas Law Review, Forthcoming (2016): paper 16 - 13. [↑](#footnote-ref-197)
198. See Benjamin J Appel "In the Shadow of the International Criminal Court Does the ICC Deter Human Rights Violations?." Journal of Conflict Resolution (2016): 0022002716639101. [↑](#footnote-ref-198)
199. See Abigail Reynolds Deterring the Use of Child Soldiers in Africa: Addressing the Gap Between the Mandate of the International Criminal Court and Social Norms and Local Understandings. Diss. Leiden University, The Netherlands, 2016. [↑](#footnote-ref-199)
200. See Robert Jervis "Deterrence theory revisited." World Politics 31.02 (1979): 289 - 324. [↑](#footnote-ref-200)
201. See Abigail Reynolds Deterring the Use of Child Soldiers in Africa: Addressing the Gap Between the Mandate of the International Criminal Court and Social Norms and Local Understandings. Diss. Leiden University, The Netherlands, 2016. [↑](#footnote-ref-201)
202. See Eric A Posner "A Minimalist Reparations Regime for the International Criminal Court." Contemporary Issues Facing the International Criminal Court. Brill, (2016) 264 – 270 [↑](#footnote-ref-202)
203. See RJ Schuerch “The International Criminal Court at the mercy of powerful states: How the Rome Statute promotes legal neo-colonialism." (2016) PhD Thesis University of Amersterdam, The Netherlands [↑](#footnote-ref-203)
204. See RJ Schuerch “The International Criminal Court at the mercy of powerful states: How the Rome Statute promotes legal neo-colonialism." (2016) PhD Thesis University of Amersterdam, The Netherlands [↑](#footnote-ref-204)
205. See RJ Schuerch “The International Criminal Court at the mercy of powerful states: How the Rome Statute promotes legal neo-colonialism." (2016) PhD Thesis University of Amersterdam, The Netherlands [↑](#footnote-ref-205)
206. See Benjamin J Appel "In the Shadow of the International Criminal Court Does the ICC Deter Human Rights Violations?." Journal of Conflict Resolution (2016): 0022002716639101. [↑](#footnote-ref-206)
207. See Bing Bing Jia "China and the International Criminal Court: the current situation." SYBIL 10 (2006): 87. [↑](#footnote-ref-207)
208. See Stewart Manley "Gauging the Economic and Political Costs to China of Article 13 (b) Referrals of Sudan and Myanmar to the International Criminal Court." East Asia Law Review 7 (2012): 333. [↑](#footnote-ref-208)
209. As per the Rome Statute of the International Criminal Court art. 15(1), July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002), available at http://un.org/law/icc/index [hereinafter Rome Statute] (“The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.”). According to Article 13, the Court may exercise jurisdiction over cases referred directly by a state party, referred by the Security Council acting under its Chapter VII powers, or when the ICC prosecutor initiates an investigation by his own volition. Id.art. 13(1)-(3). [↑](#footnote-ref-209)
210. This protest exists despite explicit language built into the legislation to prevent just such an occurrence. As for this, the reader is referred to ICC-01/09-19-Corr, paragraph 32; see also M. Bergsmo and J. Pejić, “Article 15”, in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court - Observer’s Notes, Article by Article, 2nd ed. (Munich etc.: C.H. Beck etc., 2008), page 591, which reads: “[…] the Chamber’s application of the “reasonable basis” standard should primarily be steered by the underlying purpose of paragraph 4, that of providing a judicial filter which will protect the Court from the damaging effects of frivolous or politically motivated charges.” Also on page 589 it reads: “Paragraph 3 [of Article 15], just as paragraph 4, aims in part at protecting the Court from frivolous or politically motivated charges.” [↑](#footnote-ref-210)
211. See Ian Black "Russia and China veto UN move to refer Syria to International Criminal Court." The Guardian 22 (2014) [↑](#footnote-ref-211)
212. See Mingzuan Gao and Junping Wang. Issues of Concern to China Regarding the International Criminal Court. International Centre for Criminal Law Reform and Criminal Justice Policy, 2007. [↑](#footnote-ref-212)
213. See QU Tao "Study on the source and countermeasure of conflicts between the International Criminal Court and China Sovereignty [J]." Journal of Guangxi Administrative Cadre Institute of Politics and Law 2 (2008): 005. [↑](#footnote-ref-213)
214. UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 57; Kepaar, Abidjan-Dakar: La presse pro-Gbagbo accuse “Ouattara candidat de l’étranger”, ICC-02/11-3-Anx5, page 124; Human Rights Watch, My Heart Is Cut”, Sexual Violence by Rebels and Pro-Government Forces in Côte d’Ivoire, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 71; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 221-222; UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 22; RDH, Côte d’Ivoire: It is Urgent to Prevent the Escalation to Civil War, March 2011, ICC-02/11-3-Anx4, page 22; UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, pages 56-57; Human Rights Watch, Côte d’Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, page 155. [↑](#footnote-ref-214)
215. United Nations Human Rights Council (UNHRC), Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, pages 57 – 58 [↑](#footnote-ref-215)
216. United Nations Security Council (UNSC), Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, pages 17-20; FIDH, Côte d’Ivoire: It is Urgent to Prevent the Escalation to Civil War, March 2011, ICC-02/11-3-Anx4, pages 298-300; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 223 - 225 and 234 - 243 [↑](#footnote-ref-216)
217. See W. Lyons Scott "Introductory Note to the International Criminal Court: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire." International Legal Materials 51.2 (2012): 225 - 267. [↑](#footnote-ref-217)
218. For background information on the situation in the Republic of Côte d’Ivoire, Case No. ICC-02/01, Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale (Apr. 18, 2003), available at http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf; Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/01, Confirmation de la Déclaration de reconnaissance (Dec. 14, 2010), available at http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf. Also see Situation in the in the Republic of Côte d’Ivoire, Case No. ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation Into the Situation in the Republic of Côte d’Ivoire, ¶ 24 (Oct. 3, 2011), available at http://www.icc-cpi.int/NR/exeres/9FAF2B34-FFB7-490A-A9DD-BE7623EDE9C3.htm [hereinafter Decision Pursuant to Article 15] and On February 22, 2012, the Pre-Trial Chamber issued a decision expanding its authorization for the investigation in Côte d’Ivoire to include crimes committed between September 19, 2002, and November 28, 2010. See Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/01, Decision on the “Prosecution’s Provision of Further Information Regarding Potentially Relevant Crimes Committed Between 2002 and 2010” (Feb. 22, 2012), available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0211/press%-20releases/pr768. [↑](#footnote-ref-218)
219. International Criminal Court. "Declaration by the Republic of Côte d'Ivoire Accepting the Jurisdiction of the International Criminal Court". 2003-04-18. [↑](#footnote-ref-219)
220. See Julia Graff "Corporate war criminals and the International Criminal Court: blood and profits in the democratic republic of Congo." Human Rights Brief 11 (2004): 23-67 [↑](#footnote-ref-220)
221. For a full discussion and investigation of this topic, see Manisuli Ssenyonjo, "Accountability of non-state actors in Uganda for war crimes and human rights violations: Between amnesty and the International Criminal Court." Journal of Conflict and Security Law 10.3 (2005): 405 - 434 [↑](#footnote-ref-221)
222. See Daniel A Blumenthal’s article "Politics of Justice: Why Israel Signed the International Criminal Court Statute and What the Signature Means, The." (2001): 593 that was written just after the initial signing. [↑](#footnote-ref-222)
223. See Statement by Alan Baker (Delegation of Israel) to the International Criminal Court, 53d G.A., 6th Comm., Agenda Item 153 (Oct. 22, 1998), in ISRAEL COMMUNIQUE, Oct. 22, 1998 [↑](#footnote-ref-223)
224. Kasaija Phillip Apuuli "The International Criminal Court (ICC) and the Lord’s Resistance Army (LRA) Insurgency in Northern Uganda." Criminal Law Forum. Vol. 15. No. 4. (Springer Netherlands, 2004) [↑](#footnote-ref-224)
225. For example the reader is referred to the work by Nouwen and Werner (Sarah MH Nouwen and Wouter G. Werner. "Doing justice to the political: The international criminal court in Uganda and Sudan." European Journal of International Law 21.4 (2010): 941 - 965) for a comprehensive overview [↑](#footnote-ref-225)
226. See Alexander KA Greenawalt "Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court." Virginia Journal of International Law 50.107 (2009) for a more explicit investigation of how complementarity worked and did not work in the case of Uganda [↑](#footnote-ref-226)