

THE ICC AT THE CENTRE OF AN INTERNATIONAL CRIMINAL JUSTICE SYSTEM: CURRENT CHALLENGES¹

Patrícia Galvão Teles²

pgalvaoteles@gmail.com

Professor of International Law at the Autonomous University of Lisbon (Portugal)
and Researcher at OBSERVARE.

Abstract

The International Criminal Court (ICC) has entered into its second decade of operations and has established itself at the centre of an international criminal justice system, comprising also domestic jurisdictions and other international courts and tribunals. However, many challenges continue to face the ICC and, indeed, such challenges are part of its own features and stem from the specificities of international law and relations. In this article, we shall discuss, in light of recent events, four of such challenges: 1) Universality; 2) Complementarity; 3) Cooperation; and 4) the Crime of Aggression. These challenges illustrate how the ICC and international criminal justice inhabit both the cultures of justice and politics and how these two aspects have to be taken into account in order for such challenges to be overcome, so that the mission of a permanent and central instrument for the fight against impunity, that historically started in Rome in 1998, becomes an inherent part of today's world.

Key-Words

International Criminal Court; International Criminal Justice.

How to cite this article

Teles, Patrícia Galvão (year). "The ICC at the centre of an international criminal justice system: current challenges". *JANUS.NET e-journal of International Relations*, Vol. 8, Nº. 1, May-October 2017. Consulted [online] on the date of last consultation, <http://hdl.handle.net/11144/3033>

Article received on January 13, 2017 and accepted for publication on February, 13 2017



¹ Article developed in the context of the research project "International Criminal Justice: a Dialogue between two Cultures" of OBSERVARE/UAL, coordinated by Mateus Kowalski and Patrícia Galvão Teles.

² The views expressed in this article are strictly personal.



THE ICC AT THE CENTRE OF AN INTERNATIONAL CRIMINAL JUSTICE SYSTEM: CURRENT CHALLENGES

Patrícia Galvão Teles

I. Introduction

In 2016, the International Criminal Court (ICC) witnessed an unprecedented level of judicial activity. This trend is expected to continue in 2017. Preliminary examinations are being conducted in 10 different situations in all regions of the world (including Afghanistan, Colombia, Iraq/UK, Palestine and Ukraine), there are 10 ongoing investigations (including Georgia) and 3 judgments were concluded in 2016.

At the same time, the ICC is experiencing a delicate moment from a political point of view, with the withdrawal from the Rome Statute of 3 African States (South Africa, Burundi and the Gambia) and antagonistic signals coming both from Russia and the new American administration.

Concurrently, due to the lack of universality of the Rome Statute and deadlock in the Security Council, some situations where serious international crimes are being committed cannot be brought before the ICC and *ad hoc* mechanisms continue to have to be created, in spite of the existence of a permanent criminal court, such as for the cases of South Sudan and possibly Syria.

As to the issue of complementary, the conclusion of the Malabo Protocol in the African Union context has raised the novelty of, besides national jurisdictions, a "regional" complementarity and the question of its compatibility with the Rome Statute.

On the cooperation front, difficulties continue and they affect the capacity of the Court to accomplish its mission given the high level of dependence from cooperation from Member States. This has been especially evident concerning the outstanding arrest and surrender of persons indicted by the Court, in particular of Omar Al-Bashir of Sudan, a sitting Head of State, highlighting the tension between the traditional law on immunities and international criminal justice.

Another element of tension that will resurface in 2017 is related to the crime of aggression, since a decision on the activation of the Court's jurisdiction with regard to this crime can now be taken and the crime of aggression has been a contentious element of the ICC Statute, in particular for the Permanent Members of the Security Council.

These four challenges continue to put on the spot the difficulties of operation of a judicial mechanism in a political environment. If all judicial work is done against this background, in no Court like the ICC this dichotomy of justice vs. politics seems more evident.



II. Current Challenges

1) Universality

The quest for universal ratification of the Rome Statute of the ICC has been a constant goal since the adoption of the Rome Statute. In 2016, 124 States were parties to the Statute, including the State of Palestine. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

In October/November 2016, South Africa, Burundi and the Gambia notified the Secretary-General of the United Nations (UN), who is the depositary of the Rome Statute, of their intention to withdraw from the ICC – a decision that, according to the Statute, only produces legal effect one year after notification. These countries have acted upon different reasons, including internal political reasons, but these decisions share an open criticism to the Court's functioning.³

In recent years, many African States developed a growing negative perception of the ICC, especially in view of the fact that the first cases brought before this Court were all concerning African situations, although most of them were sovereign self-referrals from the States themselves. This negative perception and concerns of selectivity were voiced in meetings of the African Union, of the UN General Assembly and Security Council and also at the Assembly of States Parties of the ICC.⁴

Though a mass exodus of the Rome Statute is not to be expected and while it may still be possible that these withdrawal decisions are reversed, they affect the credibility and legitimacy of the Court.

Another aspect that affects the credibility and legitimacy of the ICC and imperils its quest for universality, is the fact that out of the 5 Permanent Members of the UN Security Council (P5), only 2 are parties to the Rome Statute: France and the United Kingdom. The United States, Russia and China are not parties and this has made the ability of the Court to fully perform its functions very much dependent of the attitudes taken especially by the US and Russia in the context of the Security Council and more in general, which have varied over time, but risk at the moment to enter a particularly antagonistic phase.

Moreover, after the Bush years, the US may be headed toward a new showdown with the ICC. The ICC is reportedly launching an investigation into possible war crimes in Afghanistan that could include acts of torture committed by the US military from 2003-2014. Even if this does not materialize, given the signs given by the incoming President

³ For South Africa's full arguments see "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court" available at <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>.

⁴ Cf. N. Waddell and P. Clark, *Courting Conflict? Justice, Peace and the ICC in Africa*, The Royal African Society, 2008; A. Arieff *et al*, *International Criminal Court Cases in Africa: Status and policy issues*, Diane Publishing, 2010; E. Keppler, "Managing setbacks for the International Criminal Court in Africa", *Journal of African Law* (2012-56/1) 1-14; A. Guerreiro, *A resistência dos Estados Africanos à jurisdição do Tribunal Penal Internacional*, Almedina, 2012; and P. Galvão Teles, "The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference", *Janus.Net* (2014-2015-5/2).



on issues of foreign policy, the UN and human rights, a defensive and hostile position towards the ICC could be expected.⁵

Russia, on its part, has in November 2016 formally “withdrawn its signature”⁶ from the Statute of the International Criminal Court – as the US⁷ had done a few years earlier in 2002⁸ –, after the Court published a report classifying the Russian annexation of Crimea as an occupation. Besides the ongoing investigation into the crimes committed in Georgia in 2008, Russia may also be concerned about a possible criminal investigation in Syria, where its forces have been repeatedly accused of carrying out war crimes in recent months. Russia had signed the Rome Statute in 2000 and cooperated with the court, but had not ratified the Treaty and thus remained outside the ICC’s jurisdiction. This means that this move, though highly symbolic, will not change much in practice, but is a sign of a more hostile future attitude towards the Court.

Besides withdrawals and antagonist positions that threaten the universality aspiration of the Rome Statute, the fact that the Statute is not universally ratified entails that the necessity for continuing to create *ad hoc* mechanisms – as it was done in the past for the Former Yugoslavia, Rwanda, Sierra Leone, Cambodia or Lebanon – continues to be present. Although more difficult to implement, due to political and financial difficulties, it is possible that such *ad hoc* mechanisms will come into play in, at least, in two pressing situations: South Sudan and Syria.

Since December 2013, serious violations of international humanitarian law and human rights have been committed in South Sudan, with crimes including extrajudicial killings, ethnically targeted violence, rape and other forms of sexual and violence, and attacks on schools, places of worship, hospitals and United Nations and associated peacekeeping personnel. Calls for accountability have been made in numerous fora, including the Security Council, the Human Rights Council and the African Union Peace and Security Council, as well as by civil society. In August 2015 the parties to the conflict adopted an Agreement on the Resolution of the Conflict, in which they agreed to establish a Hybrid Court for South Sudan. The Hybrid Court shall be “an independent hybrid judicial court” and it “shall be established by the African Union Commission to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law” committed after 15 December 2013. In October 2015, the Security

⁵ Cf. United Nations University Center for Policy Research, “The UN in the Era of Trump”, available in <https://cpr.unu.edu/the-un-in-the-era-of-trump.html>.

⁶ In a communication received on 30 November 2016, the Government of the Russian Federation informed the Secretary-General of the following: “I have the honour to inform you about the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court, which was adopted in Rome on 17 July 1998 and signed on behalf of the Russian Federation on 13 September 2000. I would kindly ask you, Mr. Secretary-General, to consider this instrument as an official notification of the Russian Federation in accordance with paragraph (a) of Article 18 of the Vienna Convention on the Law of Treaties of 1969.” See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

⁷ In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: “This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.” See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

⁸ Legally, the act of “unsigneding” a treaty or “withdrawing the signature” does not exist. What Russia and the US have done is a communication of their intention not to become party to the Rome Statute, so as to avoid the good faith obligations that arise from signature as foreseen in Article 18 of the Vienna Convention on the Law of Treaties of 1969.



Council requested the Secretary-General to make available technical assistance for the establishment of the Hybrid Court. This is the first time the United Nations has been tasked with providing technical assistance to a regional organization in the establishment of a hybrid tribunal. The United Nations has a wealth of expertise in the establishment and operation of international and United Nations-assisted criminal courts and tribunals and is liaising with the African Union Commission to share lessons learned from past experiences.⁹

After a Security Council Resolution to submit the Syrian situation to the ICC was vetoed by Russia and China in 2014, the United Nations General Assembly on 19th December 2016 voted to establish a special team to "collect, consolidate, preserve and analyze evidence" as well as to prepare cases on war crimes and human rights abuses committed during the conflict in Syria. According to General Assembly Resolution A/RES/71/248, the team will work in coordination with the UN Syria Commission of Inquiry, which was established by the Geneva-based UN Human Rights Council in 2011 to investigate possible war crimes. The Commission of Inquiry, which has developed a confidential list of suspects on all sides who have committed war crimes or crimes against humanity, has repeatedly called for the UN Security Council to refer the situation in Syria to the International Criminal Court. The special team will "prepare files in order to facilitate and expedite fair and independent criminal proceedings in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes." A crackdown by Assad on pro-democracy protesters in 2011 led to civil war and Islamic State/Daesh militants have used the chaos to seize territory in Syria and Iraq. Half of Syria's 22 million people have been uprooted and more than 400,000 killed.¹⁰

The quest for universality of membership and for making the ICC the effective centre of the global international criminal justice will certainly continue in the future, despite recent setbacks. Nevertheless, it has to continue to be borne in mind that the ICC is only a court of last resort, for the most serious of the most serious international crimes and that it will never have the capacity, nor it was intended to replace national jurisdiction and States' primary responsibility for accountability for atrocity crimes. This is why complementarity – at the national level or eventually at the regional level – continues to be a fundamental feature of the international criminal justice, as it will be discussed at the next section.

2) Complementarity

The ICC is based on the principle of complementarity according to Article 17 of its Statute. It is a Court of last resort¹¹ that shall only intervene when the territorial or nationality State is "unable or unwilling" to prosecute the serious international crimes that may have been committed in its territory or by its nationals.

For the complementarity system to work, States have to have adequate national legislation and capable judicial institutions. This is, of course, a challenge on its own.

⁹ Cf. http://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS-ILC-statement-17-May-2016-EN-FR.pdf.

¹⁰ See <https://www.un.org/press/en/2016/ga11880.doc.htm> and <http://mobile.reuters.com/article/idUSKBN14A2H7?il=0>.

¹¹ E. Mendes, *Peace and Justice at the International Criminal Court: A Court of last resort*, Elgar, 2010.



Central African Republic and Sri Lanka are two countries now developing, with the assistance of the United Nations and other organizations, their ability to promote judicial accountability for the crimes committed during their civil wars.

But if complementarity was initially seen as complementarity between the ICC and national jurisdictions, the possible creation of an African Regional Criminal Court, has raised the issue of “regional” complementarity.¹²

In June 2014, the African Union (AU) Assembly of Heads of State and Government meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) and called on AU member states to sign and ratify it.¹³

The Malabo Protocol extends the jurisdiction of the African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes. The original plan for the ACJHR was a court with two sections - a general affairs section and a human rights section. The Malabo Protocol introduces a third section: the international criminal law section. Thus, if the Malabo Protocol comes into force, the ACJHR will have jurisdiction to try the following 14 crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.

Thus the international criminal law section of the ACJHR could serve as an African regional criminal court, with the same objectives of the International Criminal Court but within a narrowly defined geographical scope, and over an expanded list of crimes.

The adoption of the Malabo Protocol is apparently a step in the right direction. The regional criminal court could potentially play a positive role on a continent persistently afflicted by the scourge of conflict and impunity for international crimes. In recent and ongoing conflicts, thousands of civilians have lost their lives or have been maimed and displaced from their homes. There are many accounts of killings, torture, rape, mutilation of bodies, recruitment of child soldiers, and wanton destruction of property. Armed groups and government forces alike are responsible for the abuses and violations.

Impunity is a common denominator in Africa’s conflicts, with those suspected of criminal responsibility for crimes under international law rarely held to account. Often national governments are unwilling or unable to conduct prompt, independent, impartial, and effective investigations into allegations of international crimes and to bring all those suspected of criminal responsibility to justice in fair trials. A regional criminal court, as envisaged under the Malabo Protocol, has the potential to fill this accountability gap.

However, there are concerns about the motivations behind the proposal to establish the criminal chamber of the ACJHR. Some commentators¹⁴ have argued that the proposal is an attempt by the AU to shield African heads of state and senior state officials from being held to account when there are reasonable grounds to believe that they are criminally

¹² F. M. Jackson, “Regional complementarity: The Rome Statute and Public International Law”, *Journal of International Criminal Justice* (2016-14/5) 1061-1072.

¹³ On this issue see Amnesty International, *Malabo Protocol – Legal and institutional implications of the merged and expanded African Court*, 2016.

¹⁴ See, among others, <http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf> and <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.



responsible for crimes under international law. Furthermore, there are doubts as to the compatibility with the Rome Statute on the issue of complementarity, envisaged as a national complementarity, but also given the express provision on immunity of process regarding sitting heads of state, government or other seniors state officials.

An immunity clause is indeed considered to be the most controversial provision in the amended ACJHR Statute. The relevant provision (Article 46Abis) reads as follows: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."

So far the Malabo Protocol is not yet in force, having been signed only by 9 States and ratified by none. A possible expansion of the Malabo Protocol of the African Court on Human and People's rights should be achieved in a way that it ensures greater accountability, but does not undercut the ICC's contribution to criminal justice. Such an extension of the African Court must be developed in full respect and in conformity with the Rome Statute that does not foresee immunity from jurisdiction for sitting Heads of State. But it is precisely the issue of the irrelevance of the official capacity for criminal prosecution that is the most problematic aspect of the Rome Statute for African States, as it will be discussed in the next section.

3) Cooperation

Out of the 23 arrest and surrender requests issued by the ICC, 12 are still to be executed: (a) Ivory Coast: Simone Gbagbo, since 2012; (b) Democratic Republic of Congo: Sylvestre Mudacumura, since 2012; (c) Kenya: Walter Barasa, since 2013; (d) Lybia: Saif Al-Islam Gaddafi, since 2011; (e) Darfur (Sudan): Ahmad Harun and Ali Kushayb, since 2007; Omar Al Bashir, since 2009; Abdel Raheem Muhammad Hussein, since 2012; and Bahar Idriss Abu Garda, since 2014; (f) Uganda: Joseph Kony, Vincent Otti and Okot Odhiambo, since 2005.

The arrest and surrender of indicted persons depends on the cooperation of the States Parties to the ICC, but also on the overall UN Members in the cases submitted under Chapter VII of the UN Charter by the Security Council, as it was the case of Sudan and Libya, that are not State Parties to the ICC. The ICC has asked, without success, the Security Council to act upon the non-cooperation with regard to these two situations.

These outstanding arrests have also significantly affected the credibility of the Court and of the system designed by the Rome Statute.

The Bashir case has been the one where tensions have been more evident. In particular, in June 2015 while attending an African Union Summit in South African, President Bashir's arrest and surrender was object of an ICC request of cooperation to South Africa. The High Court of South Africa issued an order requiring that he should not be permitted to leave the country, but the South African government permitted him to do so before the High Court could consider the request on the merits and the High Court subsequently held that this was unlawful. Under Part IX of the Rome Statute, States Parties – including South Africa – have obligations to cooperate with the Court. This is also so regarding South African nation legislation implementing the Rome Statute.



South Africa's government¹⁵ has argued that there is an unresolved legal question arising from the fact that international law provides that serving heads of state are immune from criminal jurisdiction of other states, including immunity from arrest and personal inviolability. The question that arises is whether this immunity persists in cases in national authorities are asked to arrest a head of State wanted for prosecution by the ICC. The matter is further complicated when the head of state is that of a State not party to the ICC Statute, though the case has been brought by a Security Council Chapter VII Resolution.

According to South Africa, Article 27¹⁶ and Article 98¹⁷ of the Rome Statute represent the intersection of the law on immunities applying to Heads of State and Government, and the cooperation obligation of States Parties to the Statute. The relationship between State Parties and non-State parties continues to be governed by customary international law that bestows on a Head of State immunity *ratione personae*. Arrest of such a person by a State Party pursuant to its Rome Statute obligations, may therefore result in a violation of its customary law obligations.

This argument has been rejected by the ICC¹⁸ (though not in a fully consistent way in terms of the legal arguments), many States and scholars, arguing *inter alia* that Article 27 of the Rome Statute, following the Nuremberg precedent, has made irrelevant the official capacity and customary law immunities for the purposes of prosecution by international criminal tribunals for States Parties to the ICC. Moreover, since Sudan's situation was brought to the ICC by the Security Council in a binding Chapter VII Resolution, the obligations of cooperation arising out from this case would also be binding upon all and with regard to all UN Member States and not only ICC States Parties.¹⁹

These different legal views on this question have persisted and it has been suggested by commentators and even by the African Union that this matter should be the object of an

¹⁵ Cf., among others, "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court" available at <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>.

¹⁶ "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

¹⁷ "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

¹⁸ Cf. Decisions on Malawi (ICC-02/05-01/09-139-Corr of 13 December 2011), Chad (ICC-02/05-01/09-151 of 26 March 2013) and South Africa (ICC-02/05-01/09-242 of 13 June 2015).

¹⁹ Cf., among others, the discussions on this issue by D. Akande, "International Law Immunities and the International Criminal Court", *American Journal of International Law* (2004-98/3) 407-433; P. Gaeta, "Does President Al Bashir enjoy immunity from arrest?", *Journal International Criminal Justice* (2009-7/2) 315-332; and C. Jalloh, "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation in Africa", *African Journal of Legal Studies* (2014-7/1) 43-59.



advisory opinion of the International Court of Justice.²⁰ Even if this is not the case, it would be important legally and politically to clarify this question in a definitive and consensual manner in order to alleviate some of the current tensions relating to the ICC.

4) The Crime of Aggression

In the run-up and during the Rome Diplomatic Conference in 1998 the discussion was rather about the inclusion or not of the crime of aggression along the other 3 core international crimes: genocide, crimes against humanity and war crimes. The dispute was not so much about the possibility of criminally prosecuting aggression at the individual level, since there were post World War II precedents (namely Nuremberg and Tokyo) concerning the then called “crimes against peace”, but whether to include a more narrow crime covering only “wars of aggression” or a broader one relating to “acts of aggression” contained in the 1974 General Assembly Resolution adopted in the meantime. The other thorny issue was the relationship between the ICC and the Security Council, namely if the ICC should only prosecute crimes of aggression once the Security Council had determined the existence of such act, or not.²¹

During the Rome Conference, proposals were made for the inclusion of the crime of aggression by several delegations. Many States supported the inclusion of this crime in the jurisdiction of the Court, as long as it was possible to agree on a definition and on the conditions for the exercise of such jurisdiction. In order not to jeopardize the overall result and derail the negotiations, a compromise was found in Articles 5/1 and 2, to include the crime of aggression, but leave the definition and the conditions for the exercise of jurisdiction for later consideration, namely at the first Review Conference. A mixed outcome was there the possible compromise: the crime was in the Statute, but the Court could not exercise jurisdiction until further negotiations and agreement on the two tracks of definition and conditions for the exercise of jurisdiction.

Resolution F of the Final Act of the Diplomatic Conference confirmed that this was an issue to be continued and mandated the Preparatory Commission for the ICC, or Preparatory Commission, to further work on the issue of aggression. Resolution F mandated the Preparatory Commission to prepare proposals for a provision on aggression, including the definition and the elements of crimes, and the conditions under which the ICC shall exercise its jurisdiction. It also stated that the Commission should submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute.

Following the 1998 Rome Conference, the Preparatory Commission for the ICC (PrepComm, 1999–2002) and later the Special Working Group on the Crime of Aggression (SWGCA, 2003–2009) continued negotiations on the outstanding issues regarding the crime of aggression. In February 2009, the SWGCA found a consensus agreement on the definition of the crime of aggression. The 2010 Kampala Review Conference used that definition and could thus focus on other outstanding issues, i.e. the

²⁰ Cf. <http://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/> and http://au.int/en/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf.

²¹ See S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, 2012.



“conditions for the exercise of jurisdiction”. States Parties seized the historic opportunity and adopted Resolution RC/ Res.6 by consensus. The resolution amended the Rome Statute to include, inter alia, new Article 8bis containing a definition of the crime of aggression and new Articles 15bis and 15ter, containing complex provisions on the conditions for the exercise of jurisdiction. Notably, the compromise included a clause that prevented the Court from exercising jurisdiction over the crime of aggression immediately. Instead, the Assembly of States Parties would have to take a further one-time decision to activate the Court’s jurisdiction, no earlier than 2017, by a 2/3 majority of the States Parties. Also, one year must have passed since the 30th ratification, already accomplished in June 2016, before the Court could exercise its jurisdiction over the crime of aggression.²²

The Assembly of States Parties is thus now in a position to take a decision on the activation of the ICC regarding the crime of aggression. The Permanent Members of the Security Council, including ICC parties France and UK, have always questioned this crime, especially the relationship between the Security Council, who has the political prerogative of declaring that an act of aggression has been committed, and the ICC who will have to do a judicial, and not political, analysis. Although the Kampala Amendments have safeguarded many of the P5 concerns, it is expected that the activation of jurisdiction on the crime of aggression may bring another layer of tension in the ICC realm in the current political context. It is, therefore, of utmost importance that this process continues to be built upon a solid basis at the next Assembly of States Parties and that the Kampala compromise is not reopened.

III. Some Conclusions: Justice vs. Politics

The Rome Statute of the ICC was, undoubtedly, one of the most significant international treaties to be signed in the post cold war period, at a moment where international law and international institutions lived a very positive moment. It was at the centre of the political discourse in the reaction against the gravest atrocities committed since World War II, namely in the Former Yugoslavia and in Rwanda.

Today, it would most likely not be possible to repeat this feat and create on the most innovative institutions in the international arena, breaking away from the Westphalian model of sovereignty, but at the same time strongly anchored in that model, given the dependency on State voluntary participation and cooperation.

The ICC, together with States, strives to promote the rule of law, the respect for human rights and sustainable peace, in accordance with international law and the purposes and principles of the Charter of the United Nations.

With the increasing workload of the Court, all cooperation efforts are fundamental for the credibility of the Court and for the ICC to perform the role it was given by the Rome Statute, not only to ensure accountability of the perpetrators of the most serious crimes of concern to the international community as a whole, but also to assure that the rights of the victims prevail.

²² See C. Kreß and L. von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, *Journal of International Criminal Justice* (2010-8/5) 1179-1217 and S. Barriga and L. Grover, “A Historic Breakthrough on the Crime of Aggression”, *American Journal of International Law* (2011-105/3) 517-533.



It also has to be highlighted that the ICC has a complementary nature and was not created to replace States. Bringing those responsible for the most serious crimes to justice is, first and foremost, a responsibility of States and the Court should only act where national authorities fail or are not in a position to take the steps necessary to ensure accountability for such crimes.

However, one cannot forget that the ICC, though a judicial institution, inhabits the world of *realpolitik*. As it has been said: "This is a harsh environment for the delicate plant of international justice. But it is also a world where the demand and need for accountability has never been greater."²³

As we have briefly seen, the challenges are immense and the political moment a delicate one for the institution. But the ICC is here to stay and is becoming an inherent feature of today's world. Both aspects of justice and politics have to be taken into account in order for such challenges to be overcome, so that the mission of a permanent and central instrument for the fight against impunity, that historically started in Rome in 1998, becomes a definitive part of today's world.

References

- Akande, D. 2004, "International Law Immunities and the International Criminal Court", *American Journal of International Law* (2004-98/3), 407-433.
- Amnesty International 2016, *Malabo Protocol – Legal and institutional implications of the merged and expanded African Court*.
- Arieff, A. et al 2010, *International Criminal Court Cases in Africa: Status and policy issues*, Diane Publishing.
- Barnes, G. P. 2011, "The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir", *Fordham International Law Journal* (2011-34/6), 1584-1619.
- Barriga, S. and Grover, L. 2011, "A Historic Breakthrough on the Crime of Aggression", *American Journal of International Law* (2011-105/3), 517-533.
- Barriga, S. and Kreß, C. 2012, *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press.
- Bellelli, R., (ed.) 2010, *International Criminal Justice: law and practice from the Rome Statute to its review*, Ashgate.
- Blaise, N. 2012, "Les interactions entre la Cour Pénale Internationale et le Conseil de Sécurité : justice versus politique ? ", *Revue de la Faculté de Droit de L'Université de Liège* (2012-57/1-2) 61-98.
- Boas, G., Schabas, W. & Scharf, M. (eds.) 2012, *International Criminal Justice: legitimacy and coherence*, Elgar.
- Carter, L. et al 2016, *The International Criminal Court in an Effective Global Justice System*, Elgar.

²³ <http://blog.oup.com/2015/11/three-challenges-international-criminal-court/>.



- Cassese, A. 2008, *International Criminal Law*, Oxford University Press.
- Cronin-Furman, K. 2013. "Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity", *The International Journal of Transitional Justice*, 1-21.
- Gaeta, P. 2009, "Does President Al Bashir enjoy immunity from arrest?", *Journal International Criminal Justice* (2009-7/2), 315-332.
- Guerreiro, A. 2012, *A resistência dos Estados Africanos à jurisdição do Tribunal Penal Internacional*, Almedina.
- Jackson, M. 2016. "Regional complementarity: The Rome Statute and Public International Law", *Journal of International Criminal Justice* (2016-14/5), 1061-1072.
- Jalloh, C. 2014, "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation in Africa", *African Journal of Legal Studies* (2014-7/1), 43-59.
- Keller, L. M. 2008, "Achieving peace without justice: the International Criminal Court and Ugandan alternative justice mechanisms", *Connecticut Journal of International Law* (2008-23), 209-279.
- Keller, L. M. 2008, "The false dichotomy of Peace versus Justice and the International Criminal Court", *Hague Justice Journal* (2008-3/1), 12-47.
- Keppler, E. 2012, "Managing setbacks for the International Criminal Court in Africa", *Journal of African Law* (2012-56/1), 1-14.
- Kreß, C. and Holtzendorff, L. von 2010, "The Kampala Compromise on the Crime of Aggression", *Journal of International Criminal Justice* (2010-8/5), 1179-1217.
- Mendes, E. 2010, *Peace and Justice at the International Criminal Court: A Court of last resort*, Elgar.
- Piranio, C. et al, 2011, "Reflections on the Rome Statute", *Cambridge Review of International Affairs* (2011-24/3), 307-447.
- Roach, S. C. 2013, "Legitimising negotiated justice: the International Criminal Court and flexible governance", *International Journal of Human Rights* (2013-17/5-6), 619-632.
- Rothe, D. et al 2013, *The realities of international criminal justice*, Brill.
- Schabas, W. 2012, "The International Criminal Court: struggling to find its way", in A. Cassese (ed.), *Realizing Utopia: the future of International Law*, Oxford University Press.
- Sidiki, A. 2012, "La Cour Pénale Internationale : une justice à double vitesse ?", *Revue du Droit Public et de la Science Politique* (2012-128/4), 1013-1030.
- Stahn, C. (ed.) 2015, *The Law and Practice of the International Criminal Court*, Oxford University Press.
- Steinberg, R. (ed.) 2016, *Contemporary issues facing the International Criminal Court*, Brill.
- Teles, P. Galvão 2014, "The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference", *Janus.net* (2014-2015-5/2).



Trahan, J. 2013, "The relationship between the International Criminal Court and the UN Security Council: Parameters and best practices", *Criminal Law Forum* (2013-24), 417-473.

Waddell, N. and Clark, P. 2008, *Courting Conflict? Justice, Peace and the ICC in Africa*, The Royal African Society.

Wet, E. de 2008, "The relationship between the International Criminal Court and ad hoc criminal tribunals: competition or symbiosis?", *Die Friedens-Warte* (2008-83/4), 33-57.