

From Russia and beyond: the ICC global standing, while countries' resignation is getting serious

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London
January 5, 2017

ABSTRACT

*This article aims to critically examine the International Criminal Court, established in 2002 to complement domestic jurisdiction in prosecuting the gravest crimes (was crimes, crimes against humanity, genocide, and – most recently – crimes of aggression), in a multidimensional manner, assessing its place in relation to public international law, international criminal law and international human rights law. Simultaneously, it will problematize compatibility of the Rome Statute, the Court's founding treaty, with national jurisdictions of both Member and Non-member states to the ICC, and raise questions about the dynamics between the institution and the UN Security Council, which plays a crucial supranational role in the process of initiating and authorizing prosecutions of crimes committed on the territories, or by the nationals of Non-member countries. In the light of the recent *crisis* the ICC suffered in the form of African demarche (with South Africa, Gambia and Burundi declared their pull-out in November 2016), followed closely by Russia's signature withdrawal, and Kenyan, Ugandan and Filipino authorities expressing their significantly undermined trust in the judicial institution, the need to reflect on the relevance and feasibility of the initial hopes put in the Rome Statute comes particularly acute, as the international community is puzzled by the controversial question of how to improve the Court while managing to attract as many states (with often mutually-exclusive viewpoints on the principles of international law) to sign the Statute.*

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«You should start discussing this issue not with the signature revocation, but with the fact that we have not ratified the Rome Statute, which spoke volumes»¹

«The very states that are most likely to be implicated in serious international crimes are the least likely to grant jurisdiction over their nationals to an international court»²

On November 16, 2016, two days after the release of the Report on Preliminary Examination Activities³ by the Office of the Prosecutor (hereinafter: "OTP") and a day after the UN General Assembly's condemnation of Russia's 'temporary occupation of Crimea' during the Discussion of Human Rights Council's Report, President Putin signed a decree⁴, authorizing Russian Ministry of Foreign Affairs to notify the UN Secretary-General about withdrawing its signature from the Rome Statute (hereinafter: "the Statute") of the International Criminal Court (hereinafter: "the Court", "ICC") and thereby cutting all the obligations which tied the state to the international judicial institution⁵. An official statement from the Foreign Ministry — expressing solidarity with the African demarche, which it called 'understandable' — clarified that such a decision was invoked due to the failure of the Court 'to become a truly independent, authoritative international tribunal', drawing on its one-sided stance 'in different fora, including the United Nations General Assembly and the Security Council'⁶.

This is not a one-off instance of Russia's distrust towards international judicial bodies: in addition to never accepting the jurisdiction of the International Court of Justice (which can be acknowledged an international judicial body with the most supranational jurisdiction) as compulsory, in December 2015, following the Constitutional Court's previous ruling of the possibility to dismiss international courts' decisions if they contradict Russian constitution, an official law⁷ was adopted by the State Duma and signed by the President which gave Russian top court primary judicial authority (even over the European Court of Human Rights (ECHR), whose decisions Russia heretofore acknowledged binding)⁸. As a result, approximately at the same point in time when the withdrawal from the ICC was announced, both the Supreme and Constitutional Courts showed disregard of the ECHR decisions with the announcement of Navalny's case retrial and review of the ECHR verdict in the Yukos case respectively.⁹

¹ The Ministry of Foreign Affairs of Russian Federation (2016) *Briefing by Foreign Ministry Spokesperson Maria Zakharova*, Moscow, November 17, available online at: <http://bit.ly/2i1cW9L>, last accessed 23 December 2016

² MORRIS, Madeline (2001) *High Crimes and Misconceptions: The ICC an Non-Party States*, available online at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1200&context=icp>, last accessed 31 December 2016 [p. 13]

³ ICC OTP (2016) *Report on Preliminary Examination Activities*, Office of the Prosecutor, November 14, available online at: https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf, last accessed 13 December 2016

⁴ Ministry of Foreign Affairs of Russian Federation (2016) *Распоряжение Президента Российской Федерации "О намерении Российской Федерации не стать участником Римского статута Международного уголовного суда"* [*Decree of the President of Russian Federation 'About the intention of the Russian Federation not to become a member of the Rome Statute of the International Criminal Court'*], available online at: <http://bit.ly/2hfizzW>, last accessed 23 December 2016

⁵ Sputnik (2016) 'Russia pulls out from International Criminal Court (ICC)', *Sputnik News*, November 16, available online at: <https://sputniknews.com/world/201611161047495135-russia-rome-statute-icc/>, last accessed 27 December 2016

⁶ Ministry of Foreign Affairs of Russian Federation (2016) *Statement by the Russian Foreign Ministry*, November 16, available online at: <http://bit.ly/2i4Jvnz>, last accessed 23 December 2016

⁷ The State Duma (2015) *Федеральный Конституционный Закон о внесении изменений в Федеральный конституционный закон "О Конституционном Суде Российской Федерации"* [*Federal Constitutional Law on amendments to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation"*], November 18, available online at: [http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/7D281BD306AD3A1643257F0100219655/\\$FILE/931766-6_18112015_931766-6.PDF?OpenElement](http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/7D281BD306AD3A1643257F0100219655/$FILE/931766-6_18112015_931766-6.PDF?OpenElement), last accessed 28 December 2016

⁸ BBC (2015) 'Russia passes law to overrule European human rights court', *BBC News*, December 4, available online at: <http://www.bbc.co.uk/news/world-europe-35007059>, last accessed 28 December 2016

⁹ MERCOURIS, Alexander (2016) 'Russia distances itself from the European Court of Human Rights', *The Duran*, November 19, available online at: <http://theduran.com/russia-distances-itself-from-the-european-court-of-human-rights/>, last accessed 5 January 2017

Since Russia never ratified the Rome Statute or individual provisions thereof¹⁰, its signature withdrawal 'has no legal bearing'¹¹ on the prosecutor's investigations of crimes both in Georgia and Ukraine; yet, it is quite a symbolic move which, in the light of Russian sixteen-year-long signatory status, implies that the problems with the ICC are not (just) one-off agential misconducts but rather structural flaws which lie deep in the understanding of founding principles of the Statute, including but not limited to the outlined relations of the Court with other legal agencies, both international (United Nations and UN subsidiary bodies) and domestic (national legal systems/ Constitutions). Concerns regarding these inconsistencies, such as:

- questionable compatibility with domestic laws;
- peace-justice balance (used by Vitaly Churkin to justify Russian veto of the UNSC referral of the situation in Syria, where it was argued by the Russian side that peace should precede pursuit of justice^{12,13}); and
- the Court-Council relations in defining "aggression" following Kampala Agreements,

were all previously raised¹⁴. Nevertheless, as these issues continued to be ignored in the international agenda, the Government, which at initial stages showed (at least in theory) 'underlying commitment to accountability' with the Court, had its interest in the organization 'dissolved over the first decade of the Court's existence'¹⁵.

The aforementioned issue of compatibility with national jurisdictions, linked to the basic principle of complementarity of the 'last-resort' Court to 'supply the deficiencies of national criminal jurisdictions'¹⁶, appears like a red line bonding all three cases brought up *de facto* against Russia to one another as well as to the other ones analysed further on, and obstructing effective enforcement of the *ius cogens* (although, however paradoxical it sounds in the context of the current discussion, the Court was created to avoid inconsistencies associated with individual states' implementation of the international law). As a result, Court's dominant 'international legal personality' declared in the art. 4.1 of the Statute, is suffering serious credibility damage¹⁷, and only partially stands above the member-states due to the specifics of national constitutional provisions, making the overall judicial power within the Court selective and incomplete.

¹⁰ an interesting focus for another, more detailed, analysis is the '[t]he intervention of the parliament in the last stage of the international treaties' completion [which] satisfies the practical need to allow the parliament to prepare, case-by-case, the eventual amendments to the domestic legal framework, which are necessary to implement bindings and rights originating from the treaty itself. Sometimes, this action is not pursued: a fact leading to circumstances which may put the enforcement of the ratified treaty in danger. Just as an example, one can quote the case of Italy which, after having ratified with the relevant parliamentary act the ICC Statute adopted in 1998 (and in Rome!), has not fully complied with the relative obligations, and is still in deficit nowadays on those terms' – *infra*, note 122 [p. 117]

¹¹ DENBER, Rachel, and EVENSON, Elizabeth (2016) 'Moscow Holds International Justice in Contempt: Russia's Withdrawal of Signature From Rome Statute is a Symbolic Gesture', *Human Rights Watch*, November 17, available online at: <https://www.hrw.org/news/2016/11/17/moscow-holds-international-justice-contempt>, last accessed 29 December 2016

¹² UN (2016) 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', *United Nations Meetings Coverage and Press Releases*, SC/11407, May 22, available online at: <https://www.un.org/press/en/2014/sc11407.doc.htm>, last accessed 29 December 2016

¹³ KRAMER, Amanda (2015) 'Deconstructing the Security Council's Failure to Refer the Conflict in Syria to the International Criminal Court', *Queens Political Review*, available online at: <https://queenspoliticalreview.files.wordpress.com/2015/05/qpr-kramer.pdf>, last accessed 26 December 2016 [p. 52]

^{14, 15} KAYE, David (2012) *Some Thoughts on Russia and the International Criminal Court*, November, available online at: <http://councilandcourt.org/files/2012/11/Russia-and-ICC.pdf>, last accessed 3rd January 2017

¹⁶ KLEFFNER, Jann K. (2008) *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford: Oxford University Press; published online (2009), available from: <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199238453.001.0001/acprof-9780199238453>, last accessed 13 December 2016

¹⁷ for the detailed analysis of the ICC as an international justice organization having international legal personality see: *infra*, note 133 [pp. 82-83]

GEORGIA and SOUTH OSSETIA – (Inter)national Jurisdiction?

The first case to exacerbate tensions between Russia and the Court, driven by the stated above issue coupled with the perceived Western bias of the Court (considering that Russia was the first non-African country¹⁸ to be examined on the subject of crimes committed during an inter-state conflict), was opened with the aim of scrutinizing alleged war crimes and crimes against humanity committed in the July-October 2008 conflict with Georgia, and is currently undergoing the *motu proprio* investigation stage, centered on South Ossetia¹⁹ (a South-Caucasian region that "enjoys" a position of extreme uncertainty, defined either as a 'a part of Georgia'²⁰ in Western sources, simultaneously being a 'partially-recognized state' by Russia) one of the four "frozen conflict" zones²¹ in the Black Sea-South Caucasus area along with Transnistria, Abkhazia and Nagorno-Karabakh²².

According to the statement by the Ministry of Foreign Affairs above, one of the reasons for Russian discontent with the Court was that 'investigation of actions and orders of Georgian officials was left to the discretion of the Georgian justice and remains outside of the focus of the ICC Prosecutor's office attention'²³. To a certain extent, Russia's accusations are reasonable: first of all, since the European Commission already stated that the conflict was started by Georgia, Court's interference could trigger further conflict in the region, offsetting the mentioned peace-justice balance. Secondly, although it was claimed by the OTP that all 'three parties involved in the armed conflict – the Georgian armed forces, the South Ossetian forces, and the Russian armed forces' – would be investigated, independently and impartially, on the subject of the alleged crimes²⁴, the Court was not prompt to intervene according to the clauses 1a and 2b, art. 17 of the Statute even after 'in March 2015, national proceedings in Georgia were indefinitely suspended'²⁵. Russia is thus calling into question the complementarity principle, indirectly juxtaposing it to the universal-jurisdiction one, by blaming the Court for the lack of impartiality. This position was reiterated by Maria Vladimirovna Zakharova, official representative of the Foreign Ministry, who said with regards to Russia's withdrawal from the Rome Statute that 'a combination of political bias and unprofessional conduct is a very dangerous thing'²⁶.

To catch the sense of frustration from the Russian side, it is important to keep in mind a broader pattern of growing divergence of Russian already-highly-independent national legal system, with its traditionally dualist approach to the implementation of international law²⁷, from the universal legislation despite the state's historical position at the forefront of reforming 'relationship between the international and domestic laws', with the 1994 Constitution 'accord[ing] a higher hierarchical status' to the former at the beginning of the post-Soviet space democratization after the USSR collapse²⁸. This divergence has been all along illustrated by the clash of some provisions of the Rome Statute with Russia's Constitution.

¹⁸ BBC (2016) 'ICC authorises Russia-Georgia war crimes investigation', *BBC News*, January 27, available online at: <http://www.bbc.com/news/world-europe-35422437>, last accessed 25 December 2016

¹⁹ ICC OTP (2016) *Situation in Georgia*, ICC-01/15, available online at: <https://www.icc-cpi.int/georgia>, last accessed 23 December 2016

²⁰ BBC News (2016) *South Ossetia profile*, available online at: <http://www.bbc.co.uk/news/world-europe-18269210>, last accessed 27 December 2016

²¹ SOCOR, Vladimir (2004) 'Frozen conflicts in the Black Sea-South Caucasus region', *IASPS Policy Briefings: Geostrategic Perspectives on Eurasia* n. 52, Washington D.C.: Institute for Advanced Strategic & Political Studies

²² for a more detailed and historical perspective on South Ossetia, refer to *Contested Borders in Caucasus* (1996) by ZVEREV

²³ *supra*, note 6

²⁴ ICC OTP (2016) *Situation in Georgia*, ICC-01/15, available online at: <https://www.icc-cpi.int/georgia>, last accessed 23 December 2016

²⁵ YouTube (2016) *Authorisation Office of the Prosecutor to commence investigation into Situation of Georgia*, January 27, available online at: <https://www.youtube.com/watch?v=ll8xEc8JLOk>, last accessed 25 December 2016

²⁶ *supra*, note 1

²⁷ for more on monism and dualism in international law see: http://www.zaoerv.de/72_2012/72_2012_2_a_223_260.pdf

²⁸ DANILENKO, Gennady M. (1999) 'Implementation of International Law in CIS States: Theory and Practice', *European Journal of International Law*, 10(1): 51-69, available online at: <http://ejil.org/pdfs/10/1/578.pdf>, last accessed 26 December 2016

One of them is ‘the right to sue heads of state and government figures’²⁹, aimed at strengthening ‘individual criminal responsibility [...] of those holding positions of State leadership with respect to serious crimes under international law’ (identified in *Princeton Principles of Universal Jurisdiction*³⁰), which contradicts art. 91 of the Russian Constitution. A worrying bell for Russia could have been the Court’s enforcement of its supranational jurisdiction with regards to the art. 27 of the Rome Statute, which states that,

‘[i]n 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. [...] 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’.³¹

Specifically, this was evident in the 2011 statement by the Pre-Trial Chamber (PTC) addressed to Malawi on the failure to arrest Omar al-Bashir, where, among others things, we read that the diplomatic immunity principle ‘cannot be invoked to oppose a prosecution by an international court [which] is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction’ and that ‘initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice’³².

Just as Malawi, several African states (then members of the Court, e.g. South Africa, Gambia) failed to comply with the above-stated article of the Statute and adhere to the arrest warrant for the Sudanese president³³, charged with a) war crimes and crimes against humanity (2009)³⁴, and b) genocide (2010)³⁵. A unanimous agreement to put immunity principle before the Rome Statute, reached at the XXIII Ordinary Session of the African Union’s Assembly (art. 46A *bis* of the Protocol of Amendments³⁶), in addition to showing solidarity in acceptance of the ‘targeted-by-the-Court Africa’ rhetoric among the African leadership was, to use Tim Sebastian’s words³⁷, a huge blow to the ICC’s credibility and to the Prosecutor’s persona, for losing the support of her country (despite her impartiality as a representative for all member-states to the Statute). Limited powers to physically enforce its warrants and dependency on states’ cooperation, more obvious than ever before, possibly marked a new stage in the institution’s authority crisis.

²⁹ GORKA, Alex (2016) ‘Why Russia Quit International Criminal Court’, *Strategic Culture Foundation*, November 19, available online at: <http://www.strategic-culture.org/news/2016/11/19/why-russia-quit-international-criminal-court.html>, last accessed 26 December 2016

³⁰ see: principles 2.1 & 5 in *Princeton Principles of Universal Jurisdiction* (2001), Program in Law and Public Affairs and Woodrow Wilson School of Public and International Affairs, Princeton University, available online at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf, last accessed 26 December 2016

³¹ ICC (2011) *Rome Statute of the International Criminal Court*, July 17, 1998, available online at: <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>, last accessed 26 December 2016

³² ICC PTC-1 (2011) ‘Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir’, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, December 12, available online at: https://www.icc-cpi.int/CourtRecords/CR2011_21722.PDF, last accessed 27 December 2016

³³ on the Sudanese case see also: VECCELLIO SEGATE (<http://www.ilcaffegeopolitico.org/33956/sudan-diritti-diritto>)

³⁴ ICC PTC-1 (2009) Public Document: ‘Warrant of Arrest for Omar Hassan Ahmad Al Bashir’, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, available online at: https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF, last accessed 30 December 2016

³⁵ ICC PTC-1 (2010) Public Document: ‘Second Decision on the Prosecution’s Application for a Warrant of Arrest’, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, available online at: https://www.icc-cpi.int/CourtRecords/CR2010_04826.PDF, last accessed 30 December 2016

³⁶ AU (2014) *Protocol of Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, June 27, available online at: <http://bit.ly/2i6c3Ka>, last accessed 31 December 2016 [pp. 38-39]

³⁷ DW (2016) *13 years, 1 billion dollars, 2 convictions: Is the International Criminal Court worth it?*, available online at: <http://www.dw.com/en/13-years-1-billion-dollars-2-convictions-is-the-international-criminal-court-worth-it/a-19006069>, last accessed 2nd January 2016

This (arguably ineffective where the effect was most needed) attempt of assertiveness shows a dynamic within the Court to revive the undermined credibility of the Responsibility to Protect (R2P) principle³⁸, which could also alienate Russia, despite its non-membership to the Statute, as a move antithetical to its traditional vision of the Court as a supplementary judicial body — a vision similar to that by the People's Republic of China (hereinafter: "PRC"), with both countries claiming for the 'priority of the UN over the ICC jurisdiction'³⁹ to be clarified in the Statute, arguably to preserve defense and interest-protection mechanisms against international prosecution coming from their P5 position within the Security Council and the limited-to-states (and not individuals) mandate of the International Court of Justice⁴⁰ (hereinafter: "ICJ").

Thus, to summarize and restate, it is the (claimed yet inconsistent) ICC interference with sovereignty and domestic jurisdiction that distances Russia, Africa⁴¹ and China from the institution. If the Court's empowerment of Georgia to use its territorial jurisdiction 'to prosecute perpetrators of crimes committed on [its] territory, regardless of the nationality of the perpetrator or the victim'⁴², while also investigating crimes committed by the Russian nationals in Georgia as its member state, is to be interpreted as based on the international acknowledgement of South Ossetia as an integral part of the state, then, in the light of South-Ossetian recent claims of a prospective 'special referendum' to join Russia⁴³, international community faces a much more complicated yet not uncommon problem in the form of the South-Ossetian self-determination v. Georgia's sovereignty and territorial integrity.

UKRAINE: chasing the "Ghost Army"

Although different from Georgia in many aspects, such as a more complex relationship with Russia derived from the shared history of their often-claimed "brotherhood"⁴⁴, Ukrainian case encapsulates some similarities to the former in its international-conflict dynamics in the post-Soviet space with distinct implications for sovereignty and autonomy of Ukraine and its parts — as currently seen from the examples of Crimea as well as the eastern Ukrainian Donbass region.

Ukraine, however, as opposed to Georgia, has not ratified the Rome Statute yet, and its request in April 2014 for an investigation of the crimes was made as an ad hoc acceptance of Court's jurisdiction. A decisive factor for Russia in this investigation was the outcome of the question, outlined in the section on Ukraine in the preliminary examination report, namely of 'whether the alleged crimes occurred in the context of an *international* or a *non-international* armed conflict' (emphasis added). The conclusion by the Prosecutor that 'the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation' (pointing as evidence to the deployment of Russian troops in the peninsula from February 2014 against the will of the Ukrainian Government and 'detention of Russian military personnel by Ukraine and vice versa' in eastern Ukraine⁴⁵) made the perspective of prosecuting Russian nationals (which, according to the then official

³⁸ AINLEY, Kirsten (2015) 'The Responsibility to Protect and the International Criminal Court: counteracting the crisis', *International Affairs*, 91(1): 37-54, available online at: https://www.chathamhouse.org/sites/files/chathamhouse/field/field_publication_docs/INTA91_1_03_Ainley.pdf, last accessed 29 December 2016

³⁹ *supra*, note 29

⁴⁰ for the comparison of the ICC and ICJ in the field of human rights' violations see: <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1404&context=cjil> and http://www.questionegiustizia.it/rivista/pdf/QG_2015-1_17.pdf

⁴¹ for more information about the history and juridical dynamics of the ICC-Africa relations: <http://unipd-centrodirittiumani.it/it/dossier/La-Corte-penale-internazionale/35>

⁴² HOOVER, Dalila V. (2011) 'Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court', *Cornell Law School Inter-University Graduate Student Conference Papers*, paper 52, available online at: http://scholarship.law.cornell.edu/lps_clacp/52, last accessed 24 December 2016 [p. 4]

⁴³ RT (2016) *South Ossetia, former part of Georgia, to hold "special referendum" to join Russia*, February 20, available online at: <https://www.rt.com/news/333069-south-ossetia-russia-referendum/>, last accessed 29 December 2016

⁴⁴ LADA, Akos (2014) 'Russia vs. Ukraine: A clash of brothers, not cultures', *Washington Post*, available online at: <https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/04/russia-vs-ukraine-a-clash-of-brothers-not-cultures/>, last accessed 5 January 2017

⁴⁵ ICC OTP (2016) *Report on Preliminary Examination Activities*, November 14, available online at: https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf, last accessed 13 December 2016

statements⁴⁶, engage in the fight on the basis of self-initiation, not following a central order, thus constituting what appears as Kremlin's "Ghost army"⁴⁷). In the view of the extended temporal scope of the investigation from February 20, 2014 onwards (covering the annexation of Crimea), several points of contention arise, which already are or potentially can be used by Kremlin to counter the ICC legal authority:

- 1) Regarding the Crimean question, the 2014 referendum as an act of the peninsula's self-determination⁴⁸ 'based on the will of the Crimean people and supported by an overwhelming majority',⁴⁹ Russia — according to its national law (which, as we saw, is being actively promoted superior to the international legal principles) — can and already does claim territorial jurisdiction; hence, facing hypothetical arrest warrants for Russian nationals, it can as a gesture of disregard for Court's supranational powers prioritize art. 61.1 of its Constitution, which protects Russian citizens from being 'deported from Russia or extradited to another State' in a similar manner to African leaders' disregard for previously examined Bashir's arrest warrant.⁵⁰
- 2) Additionally, rejecting initial attempts of the later-self-proclaimed independent republics of Donetsk and Luhansk to join Russia, the latter has — in a rather smart move — rid itself of any future responsibility for the potential crimes committed by the fighters from the two entities against the citizens of Ukraine, thus maintaining the distinction between the *Russian* and *pro-Russian* fighters in the region rather obscure in order to keep the former beyond the reach of international justice. As '[t]he Statute does not impose any obligations on or create any duties for non-party states' yet still has a mandate to prosecute its *nationals*⁵¹, then, in the event of further steps taken by the OTP against specific Russian individuals, mechanisms by either international or Ukrainian national law enforcement agencies of effectively, case-by-case, identifying formal nationality and the leadership of the "little green men" in the east part of the country remain to be efficiently elaborated.

According to the statement by the OTP, 'Ukraine may be a challenge, but it also represents a big opportunity for the developing global justice system'.⁵² By no means unimportant, it is questionable, however, how fruitful the results of this challenge for the prospects of future cooperation with Russia will be, taking into account that, along with other actions by the Ukrainian government (e.g. the UNCLOS case against Russian violation of Ukrainian waters in the Black Sea, the Sea of Azov and the Kerch Strait, or preparations of an accusation of supporting terrorism to the ICJ), the ICC seems just another avenue for the ideological confrontation between the two countries in an attempt to hold Russia accountable internationally.⁵³

⁴⁶ RT (2014) *Russia has no intention to send troops into Ukraine – Lavrov*, March 29, available online at: <https://www.rt.com/news/lavrov-interview-ukraine-russia-065/>, last accessed 3rd January 2017

⁴⁷ see: BACZYNSKA, Gabriela (2015) 'Russia says no proof it sent troops, arms to east Ukraine', *Reuters*, January 21st, available online at: <http://www.reuters.com/article/us-ukraine-crisis-lavrov-idUSKBN0KU12Y20150121>, last accessed 3rd January 2017; VICE News (2015) *Russia's Ghost Army in Ukraine*, March 6, available online at: <https://news.vice.com/video/russias-ghost-army-in-ukraine-full-length>, last accessed 3rd January 2017

⁴⁸ Crimean case, besides raising numerous arguments about the legality of the referendum procedure itself, along with other post Cold-war cases of self-determination (e.g. above-mentioned South Ossetia) directly questions the relevance of Badinter Principles (designed to resolve territoriality issues in former Yugoslavia republics), which actively promote ethnic self-determination within nations and are thus a target of the proponents of the territorial integrity principle. For more on the history of the Badinter Principles and the analysis of Crimean territoriality see: NAVARI, Cornelia (2014) <http://onlinelibrary.wiley.com/doi/10.1111/1468-2346.12171/epdf>

⁴⁹ *supra*, note 46

⁵⁰ *The Constitution of the Russian Federation* (1994) translated by "Garant-Service" (Moscow), 2001, available online at: <http://www.constitution.ru/en/10003000-01.htm>, last accessed 31 December 2016

⁵¹ AKANDE, Depo (2003) 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', *Journal of International Criminal Justice*, 1: 618-650 [p. 620]; for further analysis of the contentious international legal responsibility of the individual see: WOETZEL, Robert K. 'Criminal responsibility of the individual under international law' in STONE, Julius and WOETZEL, Robert K. (1970) *Toward a feasible International Criminal Court*, Geneva: World Peace Through Law Center

⁵² ICC (2014) 'Ukraine: Rome Statute ratification as commitment to global justice' — Statement by Mr. Roman Romanov, Human Rights and Justice Program Director, XIII Assembly of States Parties, December 8-17, available online at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-IRF-Ukraine-ENG.pdf, last accessed 31 December 2016

⁵³ for a more detailed analysis of the cases claimed as being under revision/ already brought up by Ukraine against Russia, see: <http://www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/>

SYRIA and Peace-Justice Controversy

As observed by AINLEY, the "de-structured" (multi-dimensional, multi-actorial and multi-factorial) Syrian conflict,⁵⁴ with death tolls considerably higher than in the referral cases of Libya and Darfur⁵⁵ (according to the most modest UN estimates), is 'the most pressing example of R2P and ICC failure'.⁵⁶ Yet, considering the unlikelihood of the Syrian government's ad hoc acceptance of the Court's jurisdiction to avoid prosecution for the atrocities against opposition groups, the fact that non-party to the Statute Syria can only be approached by the Court through the Security Council's referral means that the latter is to blame for this failure.⁵⁷ It came in the form of the vetoed by the People's Republic of China and Russia resolution⁵⁸ in 2014, with the former showing its traditional 'reluctance to breach norms of state sovereignty [as well as the complementarity principle - added by us] under just about any circumstances',⁵⁹ reiterated by the China's ambassador to the UN Wang Min in the SC meeting⁶⁰; the decision reflected PRC's long concerns regarding the Statute's definition of crimes against humanity without 'war nexus', with a general argument that 'many actions listed under that heading of the crimes against humanity belong to the area of human rights law rather than international criminal law'.⁶¹ However, in addition to the reluctance to participate in something that could have set a precedent for international interference into human rights' violations in China⁶², there are more specific and down-to-earth reasons for the country to prevent Syrian case being brought up in the Court, mostly centered on the oil industry.⁶³ Regarding Russia, an already-referred-to rhetoric of peace-justice balance (although, as stated by the French ambassador, there was 'no peace process to threaten'⁶⁴) serves as a facade to its important strategic interests in maintaining Syria and Iran as Russia's 'last remaining footholds in the Middle East'.⁶⁵

In the light of such a stance (which is unlikely to change in the nearest future) the only currently feasible solution for the Court in Syria is the prosecution of foreign criminals, who are nationals to the ICC member-states.

⁵⁴ as LATTIMER et al. argue, this multidimensional nature is conditioned by the overlap of the 'aspects of international human rights, international humanitarian law and international criminal law' – see for reference: note 50.

However, the debates among scholars on whether human rights are universal or international only, and where the border between the international human rights law and international criminal law, are open. See e.g.:

RAMCHARAN, Bertrand G. *How Universal Are Human Rights?* (<http://library.fes.de/pdf-files/ipp/ippg-1998-4/debate.pdf>)

BELLAMY, Alex J. (2016) 'Humanitarian Intervention', in Collins, Alan (ed) *Contemporary Security Studies* (4th edition), Oxford: Oxford University Press [p. 333] & works by Simon CHESTERMAN, Norrie MACQUEEN, Jennifer WELSH and Michaelene COX

⁵⁵ *supra*, note 12 [p. 49]

⁵⁶ *supra*, note 37

⁵⁷ *supra*, note 12

⁵⁸ UNSC (2014) *Draft Resolution S/2014/348*, May 22, available online at: http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_348.pdf, last accessed 3rd January 2017.

⁵⁹ *supra*, note 41

⁶⁰ *supra*, note 12

⁶¹ ZHU, Dan (2014) 'China, the International Criminal Court, and International Adjudication', *Netherlands International Law Review*, 61(1): 43-67, available online at: <http://bit.ly/2hM4N4V>, last accessed 31 December 2016 [p. 56]

⁶² it is also insightful to put human rights' situation in China into a broader regional framework and analyze against the background of other Asian regimes; e.g. on human rights violations in North Korea see CELENTANO (<http://www.ilcaffegeopolitico.org/39303/la-corea-del-nord-e-la-sfida-alla-comunita-internazionale>)

⁶³ *supra*, note 13 [p. 53]

⁶⁴ *supra*, note 12

⁶⁵ *supra*, note 13

However, since the Prosecutor focuses on more grave crimes, the Court would overlook "low-level" fighters⁶⁶ and therefore will not be able to seek justice 'unless a high-ranking foreign member of an extremist group or a senior Syrian official with dual nationality comes under [its] jurisdiction'.⁶⁷ This deems the solution more harmful than beneficial as it might make a negative impression of "judicial selectivism"⁶⁸, which overlooks those more responsible (e.g. members of current Syrian government) and leaves them at large, further undermining the ICC in the eyes of Syrian population⁶⁹ and compromising chances of the country's potential membership in the future. It remains to be seen whether a fragile agreement between the Syrian government and moderate opposition groups (already threatened by the clashes between Ahrar al-Sham and government troops), which came into force on midnight December 30, 2016⁷⁰ as announced by Putin along with a commitment to reduce Russian military deployment in the region, will lead to an internal appeasement with subsequent withdrawal of foreign militia, such as Hezbollah from Lebanon. However, since the deal – sidelining the US and other coalition members – was reached by Turkey and Russia, it is difficult to say what the post-war Syrian government would look like given the two guarantors' completely opposite stances towards the Assad regime. If the latter prevails, the vicious circle of the SC future referrals—Russian-Chinese veto remains locked, leaving the core problems behind the migration⁷¹ crisis unaddressed as well.

PALESTINE (vs. ISRAEL)

The case of Palestine serves as another good example of underlying paradoxes in the ICC structure – particularly, akin to the case of Russia, showing contradictions between the limiting complementary nature of the Court and universal jurisdiction rhetorically used by its proponents, specifically regarding legal relations with the UN and its agencies on the concept of statehood and territoriality.⁷² Apparent dynamics of negatively-connoted judicial activism of the Prosecutor can also be observed in the semi-independently initiated acceptance of Palestine as a *state* under the Statute. All these points will be critically examined against the background of Palestinian struggles for recognition and reconciliation through international law and justice.

⁶⁶ an exceptional example of this fallacy is Tunisia which has the highest number of foreign fighters in Syria/Iraq (<http://www.telegraph.co.uk/news/2016/03/29/iraq-and-syria-how-many-foreign-fighters-are-fighting-for-isil/>) and extremely worrying levels of rising jihadist terrorism (http://www.counterextremism.com/sites/default/files/country_pdf/TN-04192016.pdf ; <https://www.icct.nl/download/file/ICCT-Gartenstein-Ross-Moreng-Soucy-Raising-the-Stakes-ASTs-Shift-to-Jihad-Feb-2014.pdf>). Despite their state being a party to the ICC, none of the Tunisian nationals fighting for the IS has been prosecuted; one reason is, as mentioned above, the low level of crimes that the Court does not want to get involved with, leaving it to national or regional jurisdiction; another – complicating secondary factors obstructing implementation of international law, especially for the ISIL-claimed terrorism in Europe with many, including Tunisian, perpetrators coming under the guise of asylum seekers without proper identity papers, which obscures the formal process of establishing their nationality (e.g. German Christmas market attack by a failed Tunisian asylum seeker Anis Amri in December 2016). With the expected four hundred Tunisian jihadists being in Europe now, according to the country's Interior Minister (<http://www.efe.com/efe/english/portada/400-suspected-tunisian-jihadists-across-europe-interior-minister-warns/50000260-3139240>), the situation will remain a challenge for both the security and legal institutions in Europe and internationally

⁶⁷ LATTIMER, Mark, MOJTAHEDI, Shabnam, and TUCKER, Lee Anna (2015) *A Step towards Justice: Current accountability options for crimes under international law committed in Syria*, The Hague: Syria Justice and Accountability Centre, available online at: <https://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf>, last accessed 30 December 2016

⁶⁸ additionally to the stressed-above African bias, for the accusations for judicial selectivism see: in relation to R2P (https://www.globalpolicy.org/images/pdfs/images/pdfs/In_whose_name_web.pdf, pp. 24; 35-36); Bosnian case (<https://www.icrc.org/eng/assets/files/other/irrc-867-dukic.pdf>, p. 714)

⁶⁹ *supra*, note 67

⁷⁰ PINCHUK, Denis, and KARADENIZ, Tulay (2016) 'Syria Cease-Fire To Take Effect At Midnight On Dec. 30', *Reuters*, December 29, available online at: http://www.huffingtonpost.com/entry/syria-ceasefire_us_5864f6b3e4b0eb5864883e71, last accessed 29 December 2016

⁷¹ for more on the Mediterranean sea crisis, see VECCELLIO SEGATE (<http://bit.ly/2hVBzG1>)

⁷² PHILIPPE, Xavier (2006) 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?', *International Review of the Red Cross*, 88(862): 375-398

Following the initial reluctance⁷³ to accept Palestinian *Declaration recognizing the Jurisdiction of the International Criminal Court*⁷⁴ by the then-Prosecutor Luis Gabriel Moreno-Ocampo on the grounds that he does not have jurisdiction without General Assembly's acceptance of Palestine as a non-member observing state⁷⁵, and conflictual responses from the UN bodies, whom it sought recognition from in the aftermath of the Israeli 2014 military incursion in Gaza, on 29 November 2012 the UNGA resolution A/RES/67/19⁷⁶ finally gave Palestine the status of a non-member observing *state*. The resolution, however, akin to the admission to UNESCO⁷⁷ in 2011, was not legally binding for other organization's bodies. This could be seen from the rejection on December 30, 2014 of Palestine's UN membership application⁷⁸ by the US veto⁷⁹ in Security Council on the grounds that Palestine did not fully constitute a state, thus failing to meet requirements of the UN Charter art. 4.⁸⁰ Such uncertain prospects of gaining membership as a key to 'engage' international judiciary left few other ways, compatible with the Rome Statute, open for the case to be brought up in the Court. One of them, referral by the UNSC to the OTP, has always been a bleak perspective, taking into account the likelihood of the aforementioned veto power, exercised by another P5 member and Israel's ally, the US.⁸¹ A more feasible solution for Palestine at that point was a *motu proprio* investigation in an ad hoc (case-based) acceptance of the Court's jurisdiction by a non-member state.⁸²

The situation changed when a second *Declaration*,⁸³ signed by President of the State of Palestine Mahmoud Abbas⁸⁴ (simultaneously a head of the Palestinian National Authority and Palestine Liberation Organization⁸⁵), was submitted in December 2014, and approved by the newly-appointed Prosecutor, Fatou Bensuda, who took a more independent stance in the recognition of the state of Palestine following the aforementioned General Assembly

⁷³ this action could be regarded as an example of judicial restraint behaviour on the grounds of the UN predominant 'competence for determining the term "State". See: ICC OTP (2012) *Situation in Palestine*, Office of the Prosecutor, April 3, available online at: <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>, last accessed 27 December 2016 [p. 2]

⁷⁴ ICC OTP (2009) *Declaration recognizing the jurisdiction of the International Criminal Court*, January 21, available online at: <https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>, last accessed 24 December 2016

⁷⁵ Al Arabiya (2012) 'ICC rejects Palestinian request to investigate crimes within its territories', April 3, available online at: <https://www.youtube.com/watch?v=rp8SfQUWTus>, last accessed 23 December 2016

⁷⁶ UNGA (2012) *Resolution 'Status of Palestine in the United Nations'*, A/RES/67/19, December 4, available online at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19, last accessed 21 December 2016

⁷⁷ UNESCO (2011) *General Conference admits Palestine as UNESCO Member State*, November 2, available online at: http://portal.unesco.org/geography/en/ev.php-URL_ID=14862&URL_DO=DO_TOPIC&URL_SECTION=201.html, last accessed 29 December 2016

⁷⁸ Application of Palestine for admission to membership in United Nations: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IP%20S2011%20592.pdf>,

⁷⁹ UN, *Charter of the United Nations*, October 24, 1945, 1 UNTS XVI, available online at: <http://legal.un.org/repertory/art1.shtml>, last accessed 29 December 2016 [art. 27]

⁸⁰ *ibid.* Ch. 2

⁸¹ Chatham House (2014) 'Milestones in International Criminal Justice: The ICC and Palestine' — International Law Programme Meeting Summary, available online at: https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20141202ICC_Palestine.pdf, last accessed 29 December 2016

⁸² *ibid.*

⁸³ ICC OTP (2014) *Declaration Accepting the Jurisdiction of the International Criminal Court*, December 31, available online at: https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf, last accessed 26 December 2016

⁸⁴ known in Italy and elsewhere as Abu Mazen

⁸⁵ for the difference between PNA and PLO, and the political structure of Palestinian government see Mazen MASRI: <http://transparency.aljazeera.net/files/4698.PDF>

resolution. Palestine thus formally acceded to the Rome Statute on January 2, 2015,⁸⁶ raising both appraisals⁸⁷ and criticisms — the reaction from the Israeli government being, of course, an example of the latter, with Benjamin Netanyahu⁸⁸ blaming the ICC for ignoring international law and restating (with an apparent reference to Oslo Accords 1993-1995) two-state solution as the only valid means for Palestine to claim its statehood.⁸⁹ Consequently, and despite Israel's opposition, we can see the ongoing preliminary examination⁹⁰ on the subject of crimes under ICC jurisdiction committed by both sides of the Israeli-Palestinian conflict, initiated on January 16, 2015 by Fatou Bensuda and the Office of the Prosecutor. While the situation is being investigated, two questions arise with regards to the Palestinian statehood issue: firstly, '[w]hether under a purposive interpretation of art. 12.3, declarations should also be admitted from quasi-states such as the PNA' (which can attract criticism of the ICC's "teleological approach" to the statehood in 'an attempt to transform this Court into one of Universal jurisdiction'⁹¹); and secondly, if they are admitted, whether the Gaza strip, currently under Hamas control – perceived by many Westerners as a terrorist organization – can be considered the territory governed by the Palestinian National Authority.⁹²

Both points remain problematical, since, first and foremost, Palestine's international legal status remains controversial, notwithstanding relatively wide informal acceptance in the international community. Implicit *recognition* by 138 UN members — yet not *statehood through membership* in the organization itself or Security Council —, while not changing the fact of Palestine's existence as a political entity capable of self-government over self-identifying Palestinian subjects, implies the need for binding multilaterally-endorsed legislation to clarify circumstances of applying punitive mechanisms and repressive measures for violation of territorial integrity, denial of Palestinian State rights, and crimes against — ...and by! — its citizens.⁹³

The territoriality issue of the Gaza Strip and other disputed areas arguably gained unprecedented relevance with the introduction of Kampala amendments⁹⁴ which proposed adoption of the revised definition of aggression as the fourth type of crime under the Court's scope of authority. Broadly defined according to the General Assembly Resolution 3314 as 'the use of armed force by a State against the sovereignty, territorial integrity or political

⁸⁶ UN (2015) *Depositary Notification: 'Rome Statute of the International Criminal Court, State of Palestine: Accession'*, January 6, available online at: <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>, last accessed 4 January 2017

⁸⁷ Amnesty International (2015) *Public Statement: Retaliation against Palestine's welcome accession to ICC must stop*, available from: http://www.amnesty.eu/content/assets/public_statements/retaliation_against_Palestines_welcome_accession_to_ICC_must_stop.pdf, last accessed 4 January 2017

⁸⁸ PMO (2015) *Statement by Prime Minister Benjamin Netanyahu*, Prime Minister's Office, January 17, available online at: <http://www.pmo.gov.il/English/MediaCenter/Spokesman/Pages/spokehage170115.aspx>, last accessed 26 December 2016

⁸⁹ notwithstanding, comparably, the historical recognition of Israel by individual states (e.g. British Government in 1950) and the UN itself in 1949 without agreement on its capital, territorial boundaries or full sovereignty. See: FEAN, Vincent (2015) 'Israel/Palestine – does recognising both states make a difference?', *LMEI Lecture at SOAS*, January 20, available online at: <https://www.soas.ac.uk/lmei/events/cme/file98860.pdf>, last accessed 21 December 2016; WÄHLISCH, Martin (2012) 'Beyond a Seat in the United Nations: Palestine's U.N. Membership and International Law', *Harvard International Law Journal*, 53: 226-268, available online at: http://www.peacemediation.de/uploads/1/0/1/7/10172313/hilj-online_53_wahlisch1.pdf, last accessed 26 December 2016 [p. 241]

⁹⁰ ICC OTP (2015) Press Release 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine', January 16, available online at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>, last accessed 26 December 2016

⁹¹ ICC (2010) 'NGO Monitor Submission to the International Criminal Court Office of the Prosecutor Regarding the "Situation in Palestine"', *NGO Monitor*, October 20, available online at: <https://www.icc-cpi.int/nr/rdonlyres/d3c77fa6-9dee-45b1-acc0-b41706bb41e5/282590/otp2010000035614ngomonitorsubmissiontootp201012.pdf>, last accessed 26 December 2016

⁹² RONEN, Yaël (2010) 'ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-state Entities', *Journal of International Criminal Justice*, 8(1): 3-27 [pp. 6-7]

⁹³ CRAWFORD, James Richard (2007) *The Creation of States in International Law*, Oxford: Oxford University Press, published online (2010), available from: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228423.001.0001/acprof-9780199228423-chapter-1#pageid_19 [pp. 26-27]

⁹⁴ UNSG (2016) Resolution RC/Res.6, *The Crime of Aggression*, June 11, available online at: <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>, last accessed 13 December 2016

independence of another State⁹⁵, it brought a prospective approach to war into consideration. In the case of Palestine — which quite symbolically was the thirtieth member to ratify the agreements on June 26, 2016⁹⁶ — uncertainties around who in fact controls Gaza, West Bank and East Jerusalem; how precisely the control is split between Hamas and Fatah over the Palestinian territories; and whether Hamas should be recognized as a legitimate body under PLO, cause cautiousness of the OTP to push for more decisive actions in response to both Israel's violation of Palestine's territorial integrity and the consequent crimes committed on both sides.⁹⁷ Secured by the Oslo II Accord (*The Interim Agreement on the West Bank and the Gaza Strip*) Israel's jurisdiction over the issues of 'Jerusalem, settlements, military locations and Israelis' in the West bank and Gaza strip⁹⁸, coupled with defiance to ratify the Statute in 2000, practically guarantees immunity for Israel's nationals from the ICC according to the art. 34-38, section IV of Vienna Convention on the Law of Treaties.⁹⁹ In other words, a potential problem and, consequently, a goal for the OTP is to find persuasive evidence that Israel fails to fulfill its responsibility to enforce the rule of law and investigate instances of the four crimes in those territories.

If such reluctance from Israel's judiciary is not definitely confirmed as a result of the preliminary examinations; Palestinian territoriality — and therefore the definition of Palestinian nationals — remains vague and agreement is not reached with Hamas, which controls the Gaza strip independently from the officially internationally representative PLO and PNA; and Security Council fails to enforce supranational-level investigations, an alternative solution is for the Prosecutor to exercise nationality jurisdiction (according to the implicit interpretation of the art. 2b of the Rome Statute) through the dual citizenship of Hamas and the Israeli Defense Forces members if they are also nationals of the ICC Member-state.¹⁰⁰ Nonetheless, even in the case this mechanism of nationality-based prosecution is implemented, similarly to the Syrian case, in addition to the fact that *it will only reach a small segment of the perpetrators* — and thus will address the problem partially and inconsistently in a similar to the Syrian case manner —, it will also be exacerbated by the *limited retroactive jurisdiction*, which the ICC is bound to by the Second Palestinian Declaration that, invoking art. 13.3 of the Rome Statute, recognizes Court's jurisdiction for the crimes committed after June 13, 2014.

Despite all the negative points, this case also presents some achievements for the future of international law. For instance, judicial activism of the Prosecutor, who shifted conceptual grounds for defining statehood herself following the GA resolution in response to the criticisms of her predecessor's actions¹⁰¹, should not be considered *a priori* negative in itself, as usually assumed in the theory of law.¹⁰² In general, as a mode of behaviour in the process of interpretation of the Rome Statute, it contextualized a step forward for the international-level justice. For Palestine it has — so far — borne fruitful results with the adoption of a functional approach, based on a more nuanced and flexible interpretation of the "treaty object" (according to the above-referenced Vienna Convention on the Law of Treaties, art. 31.1), which overall allowed to better exercise the Court's jurisdiction, even though only at the initial level so far. More generally, arrest warrant for Omar al Bashir on charges of genocide, crimes against humanity and

⁹⁵ WILMSHURST, Elizabeth (2008) *Definition of Aggression*, United Nations Audiovisual Library of International Law, available online at: http://legal.un.org/avl/pdf/ha/da/da_e.pdf, last accessed 31 December 2016

⁹⁶ UNSG (2016) Depositary Notification, *Ratification by the state of Palestine of the Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court*, June 26, available online at: <https://treaties.un.org/doc/Publication/CN/2016/CN.452.2016-Eng.pdf>, last accessed 13 December 2016

⁹⁷ UNGA Human Rights Council (2015) *A/HRC/29/52 Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict*, June 24, available online at: <http://www.ohchr.org/EN/HRBodies/HRC/ColGazaConflict/Pages/ReportColGaza.aspx>, last accessed 29 December 2016

⁹⁸ *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo Accord II)* (1995): <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx>

⁹⁹ *Vienna Convention on the law of treaties*, May 23, 1969 (registered *ex officio* on January 27, 1980), *United Nations Treaty Series*, available online at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>, last accessed 13 December 2016 [p. 341]

¹⁰⁰ *supra*, note 51

¹⁰¹ WOLDEGIORGIS, Fnaan (2014) *Justice, Politics and the ICC in Palestine: A normative analysis of the Palestinian Declaration to the International Criminal Court*, Master thesis, University of Amsterdam: GSSS Graduate School of Social Science, available online at: <http://scriptiesonline.uba.uva.nl/document/550301> [p. 25]

¹⁰² SCHABAS, William Anthony (2008) 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', *Journal of International Criminal Justice*, 6(4): 731-761, available online at: <http://jicj.oxfordjournals.org/content/6/4/731.short>, last accessed 21 December 2016

war crimes in Darfur, and preliminary examinations in Afghanistan, Georgia, *Côte d'Ivoire*, and Chad –together with the system of internal checks and balances¹⁰³ – serve as a 'signal towards more ethical and law-based international relations'.¹⁰⁴

At the same time, notwithstanding this initial progress, international community's support can be negatively affected by the deep socio-political divisions within the Palestinian society, which will further undermine the likelihood of a strong state in the aftermath of the failed attempts to reach an agreement between Fatah and Hamas through the unity government (which, if we are to strictly adhere to national jurisdictions, was not even approved by the Palestinian Legislative Council and thus did not, according to the art. 66 of the 2003 Amended Basic Law¹⁰⁵, bear any legitimacy), especially in the face of declining support for Mahmud Abbas.¹⁰⁶ Palestinian situation thus remains obscure, as seen from the concluding remarks of the respective section in the Report on Preliminary Examination Activities that the OTP will continue 'to engage in a factual and legal assessment of the information available [...] to establish whether there is a reasonable basis to proceed with an investigation'.¹⁰⁷ The outcome thereof – or the failure to proceed because of the reported above constraining factors, – as stated by Jeff Halper¹⁰⁸, co-founder and executive director of the Israeli Committee Against House Demolitions, could be 'the test case of whether or not international law really has any relevance'.¹⁰⁹ Currently, the absence of wider Middle-Eastern support for the Court except for Jordan leaves us with the fact that the Assembly of States Parties, 'dominated by European, African [already in decline¹¹⁰ – added by us] and Latin American states', is 'hardly indicative of a global consensus which would guarantee [ICC's] power and legitimacy'.¹¹¹

IRAQ: Yazidis' grievances and the US interests.

The case studied below is quite abstract yet links closely to the previous one in illustrating limited ICC powers to respond to the situation complicated by the statehood issue; it is that of the potential (depending on the

¹⁰³ a special mentioning deserves a retreat procedure, already implemented twice to improve 'efficiency and effectiveness' of the Court and address 'issues related to evidence, witness testimony and legal representation of victims'; see: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1249%E2%80%8B>, <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/news-brief/the-hague-institute-hosts-debriefing-of-icc-retreat-on-performance-indicators/>

¹⁰⁴ AINLEY, Kirsten (2011) 'The International Criminal Court on Trial', *Cambridge Law Review*, 28(3): 309-333, available online at: http://eprints.lse.ac.uk/42694/1/Libfile_repository_Content_Ainley%2C%20K_Ainley_International_%20Criminal_%20Court_2011_Ainley_International_%20Criminal_%20Court_2011.pdf, last accessed 26 December 2016

¹⁰⁵ The Palestinian Basic Law (2008) *2003 Amended Law*, available online at: <http://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>, last accessed 28 December 2016

¹⁰⁶ Palestinian Center for POLICY and SURVEY Research, Palestinian Public Opinion Poll n. 58, available online at: <http://www.pcpsr.org/sites/default/files/poll%2058%20full%20English.pdf>, last accessed 31 December 2016

¹⁰⁷ *supra*, note 3 [p. 32]

¹⁰⁸ for Jeff Halper's views on the two-state solution see: <https://ceasefiremagazine.co.uk/jeff-halper-the-two-state-solution-longer-viable-stop-talking-it/>; a similar position has been recently expressed by the US Secretary of State John Kerry: <https://www.state.gov/secretary/remarks/2016/12/266119.htm>

¹⁰⁹ RT (2012) '*Not a country*: ICC blocks Palestine war crimes probe', *Russia Today*, April 4, available online at: <https://www.youtube.com/watch?v=fUBbT2Hy22E>, last accessed 21 December 2016

¹¹⁰ on the AU's withdrawal see also: VECELLIO SEGATE (<http://www.ilcaffegeopolitico.org/39352/unione-africana-nella-conflict-resolution>); from the same online review, cfr. PENNETTA (<http://www.ilcaffegeopolitico.org/49577/la-crisi-della-corte-penale-internazionale>) and ROCCO (<http://www.ilcaffegeopolitico.org/49366/sudafrica-ritiro-corte-penale-internazionale>)

¹¹¹ *supra*, note 104

extent of international recognition¹¹²) *genocide* of the Iraqi Yazidis by the Da'esh (hereinafter also: "self-proclaimed Islamic State"; "IS"; "ISIL", "ISIS") in a Sinjar massacre (and beyond). The problem here is extremely exacerbated, because both the perpetrator and the victim sides are not proper *states* according to the public international law.

Acceptance ISIL's statehood as the approach to create the grounds for a referral to the ICC can be redundant from the very beginning: in addition to the not having a distinct formal territory and claiming to observe Sharī'ah [Sharia] law (with a pseudo/radical religious value basis in active opposition to its secular Western counterpart), the terrorist group's "evilness" is a subject of an almost universal consensus among the international community to be eliminated as a direct threat to the values of democracy, multicultural coexistence, basic human rights etc. Besides, due to:

- the context of an ongoing war;
- non-membership of either Iraq or analyzed-above Syria, whose territories are partially seized by the ISIL, to the Rome Statute,

Yazidis (and other victim groups) face dim prospects of justice in reconciliation. Trying to approach the problem from the victim side is also intricate: a Kurdish-speaking closed monotheistic community, professing a religion encompassing elements of Islam, Christianity and Zoroastrianism; victims, like Kurds and other minorities, of Hussein's Arabization policies;¹¹³ and, in their majority (those who have suffered hostilities), inhabitants of the disputed between Baghdad and Kurdistan Regional Government Sinjar, Yazidis present a challenging case as the subject of defense by the international justice. Not particularly welcomed by the Iraqi government on religious grounds, neither are they likely to be protected by the national jurisdiction, nor would Baghdad accept ICC's ad hoc investigation, which would 'put its own leaders in jeopardy'¹¹⁴ in addition to giving the Court mandate over the whole situation in Iraq, potentially resulting in prosecutions of the prominent Iraqi ISIS fighters.

Theoretically, if the Security Council referral were to take place (it is unlikely, however, for the reasons outlined below), the Hague institution, which does not have its own military force¹¹⁵, would need cooperation from the international community in both detaining (numerous) perpetrators, and enforcing its policies and verdicts, which as a general framework looks more appropriate for a specific criminal tribunal given the wide scope of individual crimes. However, as was said earlier, complicated interest struggles of foreign actors on the ground make the implementation of the referral procedure an unlikely option in Iraq, despite the pronounced human rights NGOs'

¹¹² on the difference between crimes against humanity and genocide see COALSON (<http://theatlantic.com/2016/03/17/politics/us-iraq-syria-genocide/index.html>); ISIS acts against the Yazidi communities have been recognized as genocidal by the UNHRC (http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf), US Government (<http://edition.cnn.com/2016/03/17/politics/us-iraq-syria-genocide/index.html>); European Union (<http://bit.ly/1nQh1x4>), UK Parliament (<https://hansard.parliament.uk/Commons/2016-04-20/debates/16042036000001/DaeshGenocideOfMinorities>) and others. Disputes, however, remain on the subject of the Daesh intent behind the atrocities committed, which some link more to their military geo-political strategy, per se (even if it includes acts of mass murder) lacking intent to exterminate a religious, ethnic or national commonality to be classified as genocide (*infra* note 114).

Recognizing contentiousness of identifying intent and careful of interpreting views expressed in the ISIS media with regards to the organization's centralized policy (if there is one at all) – the Authors refer the reader to the article 'The Revival of Slavery Before the Hour' from *Dabiq*, available from: <https://azelin.files.wordpress.com/2015/02/the-islamic-state-e2809cdc481biq-magazine-422.pdf> [pp. 14-17], which depicts Yazidis as devil worshippers to be exterminated, or enslaved (women and children) and consequently converted.

¹¹³ ASHER-SCHAPIRO, Avi (2014) 'Who Are the Yazidis, the Ancient, Persecuted Religious Minority Struggling to Survive in Iraq?', *National Geographic News*, available online at: <http://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isil-religion-history/>, last accessed 4 January 2017

¹¹⁴ WATERS, Timothy William (2016) 'Yezidis vs. Isis at the ICC', *Foreign Affairs*, March 29, available online at: <https://www.foreignaffairs.com/articles/iraq/2016-03-29/yezidis-vs-isis-icc>, last accessed 5 January 2017

¹¹⁵ WENQI, Zhu (2006) 'On co-operation by states not party to the International Criminal Court', *International Review of the Red Cross*, 88(681): 87-110, available online at: https://www.icrc.org/eng/assets/files/other/irrc_861_wenqi.pdf, last accessed 4 January 2017 [p. 97]

requests¹¹⁶ to open a preliminary investigation¹¹⁷. One veto to be expected is, once again, that of Russia (and, complementarily, China): reluctance to endorse opening an investigation into the crimes committed either by the Iraqi fighters of ISIS or against the Yazidis living within the Iraq's territories is explained by the fear that the investigation might have a spill-over effect on Syria. The state's position will therefore depend on 'whether or not Russia trusts the ICC prosecutor to limit her investigation to ISIS perpetrators'¹¹⁸, without potential projection of the investigation through the territorial ISIS-link further onto Syrian Government. For the UK/France/US the problem is mirrored: the informal alliance is 'unlikely to support any referral that would potentially put Syrian rebel groups or the Iraqi forces under the ICC's microscope', with the US especially interested in the situation not leaking into a wider investigation of the crimes committed on the territory of Iraq.¹¹⁹ One solution to both issues based on contradictory political interests could be 'draft[ing] a Security Council resolution that narrowly circumscribes an ICC referral to crimes committed against the Yazidis'¹²⁰; yet, this would be difficult to agree upon given the uncertainty of whether the Court, which is *de facto* an independent judicial body, will strictly follow the lines of initial referral arrangements and not take the initiative further once authorized to take an action.

On this point it should be noted that the relations between the US and the Court have always been strained, to say the least: in fact, despite any kind of paternalistically-shaped rhetoric identifying the US as the "global security provider" – or (more probably) exactly on the same line with this US declining but still recognizable *de facto* special status –, Washington has always tried not only to distance itself from the ICC, but, even worse, to tear down the Court foundation's project since its very beginning. Once the failure of this original intention was evident, the only way for the American administration was to substantially dictate to the international community some exceptional provisions for the Rome Statute. Indeed, George Walker Bush Jr. was arguably the most influential global leader ever to counteract the idea of an international, universally-designed criminal tribunal.¹²¹ There he appears on the backstage of the 'bilateral exceptions agreements signed by the US [...] with around 100 countries, which include the obligation for the territorial state not to extradite or anyhow transfer the US citizens present within its borders to the International Criminal Court without the United States' consent'.¹²² Basically, the US, knocking the door country-by-country, have forced the international community to arrange special provisions for the American citizens¹²³, circumventing the Rome Statute and threatening the traditional allies with fund-cuttings in military protection and developmental aid. It is the worst case of explicit politicization of the public international law in contemporary history, even though not surprising when one considers the number of occurrences of the US eluding international norms or claiming "special arrangements" for themselves, in compliance with a biased, not-self-evident supremacy of *primus inter pares* entity within the international order. More diplomatically, it is recalled by TANZI as a 'unilateral and hyper-assertive attitude of the American administration in those years'.¹²⁴ A couple of decades later, we can confirm that

¹¹⁶ see, for instance: Global Justice Center (2015) *Re: Letter in Support of Filing OTP-CR-397/15*, December 17, available online at: <http://globaljusticecenter.net/documents/GJC.AmicusLetter&Annex.ICC.12.17.2015.pdf>, last accessed 3rd January 2017

¹¹⁷ this brief reference to the implied role of NGOs in speeding or encouraging the ICC procedures, which dates back to the establishment of '[a] particular kind of relation [with governments] during both the 1998 Rome Conference to elaborate the ICC Statute, and the follow-up negotiations within the Preparatory Commission for the ICC', raises another important question to consider when reforming the institution: whether the ICC credibility is it in danger in the eyes of governments only, or the "international civil society" has lost its dream as well, which will have more long-term implications for regaining public trust in the Court. See: *infra*, note 122 [p. 215]

¹¹⁸ GLODBERG, Mark Leon (2016) 'UN Panel Says Attacks on Yazidis is a Genocide. Now What?', *UN Dispatch*, June 16, available online at: <http://www.undispatch.com/un-panel-says-attacks-yazidis-genocide-now/>, last accessed 5 January 2017

¹¹⁹ KERSTEN, Mark (2015) 'Is the ICC the right response to the ISIS crisis?', *Justice Hub*, April 21, available online at: <https://justicehub.org/article/icc-right-response-isis-crisis>, last accessed 5 January 2017

¹²⁰ *supra*, note 118

¹²¹ see e.g. BENZING (http://www.mpil.de/files/pdf1/mpunyb_benzing_8.pdf), MCKAY (<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1528&context=cilj>), and KING (<http://www.victoria.ac.nz/law/centres/nzcpl/publications/nz-journal-of-public-and-international-law/previous-issues/volume-42,-december-2006/king.pdf>).

¹²² TANZI, Attila Massimiliano Enrico (2013) *Introduzione al diritto internazionale contemporaneo* [English translation: *Introduction to the Contemporary International Law*] (4th edition), Padua: CEDAM, [p. 76]; translations by the Authors of this paper.

¹²³ for more information about the US Bilateral Immunity Agreements (BIAs), list of countries and media coverage see: <http://www.amicc.org/usicc/biacampaign>

¹²⁴ *supra*, note 122 [p. 75]

nothing changed; paradoxically, it turned even more serious, despite the 'leading from behind' approach kept by the two Obama's administrations.¹²⁵

Meanwhile, as 'U.S. planes still fly above the caliphate [...] [,] Washington's policy remains unaltered', 'enslavement, rape, and extermination continue' and the world public is waiting too see whether the above-discussed dynamics of hype-assertiveness, expressed in the rhetoric of the new president-elect will prove true in the reality of the uniformly-Republican makeup of the US Congress, prospects of regaining existentially important for Yazidis' (and Yazidism's!) future survival territories in Northern Iraq seem temporarily – at least for the uncertain duration of the war – suspended.¹²⁶

CONCLUSION

Examples above, hopefully, showed limitations of attempts to implement universal jurisdiction in a complex context of flawed foundation of the Court, and the Security Council's functions of referral and deferral, called by WOLDEGIORGIS 'a backdoor entrance to the system of the ICC'.¹²⁷ These controversies make mutual independence of the two bodies appear more rhetorical than pragmatic, undermining the first prosecutor's pledges about the ICC principles of *neutrality* and *positive complementarity*¹²⁸. On the other hand, increased independent intervention of the Prosecutor into national jurisdictions and thus in states' judicial sovereignty can foreshadow an overlap of powers¹²⁹ and dual legitimacy issue, whereby 'the Court risks undermining what is seen as the established roles of the [Security] Council'.¹³⁰

Thus a further question arises: do the benefits of having a *slightly* more independent from the political institutions Court outweigh the costs of dealing with the inconsistencies and permanent issues of its nature as a secondary, *complementary* source of rules? Is it not better, in a response to the issue of insufficient mechanisms for the ICC to be 'a court for interstate dispute adjudication'¹³¹, to come back to the 'tradition of referring inter-state disputes to binding arbitration, on an ad hoc basis, or to the temporary standing bodies', to ensure a more nuanced approach to each case in the modern context of complexifying 'institutionalization of international legal relations'?¹³²

Abandoning the project, already so heavily invested in, however, does not appear a practically and ethically sound solution. Therefore, in a (hypothetical) attempt to address its drawbacks, we can:

- 1) **take "judicial restraint" as a prescribed mode of Prosecutor's behaviour** and agree on the predominant position of the Security Council (since 'the UN Charter does not contain an explicit recognition of [the ICC] international legal personality' in any case¹³³) over the semi-independent Court, which 'augments the collective security system of the UN Charter' with an established collective system of criminal justice, and these systems

¹²⁵ on the concept of "leading from behind", see ZUCCARELLI, Simone (2016) *L'evoluzione dell'orientamento strategico degli Stati Uniti: dal "momento unipolare" al "leading from behind"*, OPI Research Paper n. 47, Milan: Osservatorio di Politica Internazionale

¹²⁶ *supra*, note 113

¹²⁷ *supra*, note 101

¹²⁸ MORENO-OCAMPO, Luis Gabriel (2003) *Statement made by Mr. Luis Moreno-Ocampo*, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, The Hague: The Peace Palace, available online at: https://www.icc-cpi.int/nr/rdonlyres/d7572226-264a-4b6b-85e3-2673648b4896/143585/030616_moreno_ocampo_english.pdf, last accessed 3rd January 2017 [p. 3]

¹²⁹ *supra*, note 13

¹³⁰ *supra*, note 14

¹³¹ *supra*, note 2 [p. 15]

¹³² THIRLWAY, Hugh (2014) 'The Sources of International Law', in EVANS, Malcolm David (ed.) *International Law* (4th edition), Oxford: Oxford University Press [pp. 93.94]

¹³³ LÜDER, Sascha R. (2002) 'The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice', *International Committee of Red Cross IJRC*, 84(845): 79-92, available online at: https://www.icrc.org/eng/assets/files/other/079-092_luder.pdf, last accessed 24 December 2016

constitute the key components of an international legal order devoted to the maintenance of peace.¹³⁴ Nonetheless, there are obvious dangers of such an empowerment of the Security Council: one of them lies in the insufficiently elaborated instructions for exercising referral function by the latter, as observed by Moss, who maintains that it is unclear under what circumstances the Court should be given the authority to investigate a case (or, alternatively, an ad-hoc international or hybrid criminal tribunal has to be established).¹³⁵ As similarly noted by TANZI, the politicization of the Court and its "political dependence" on the UN Security Council resolutions can be traced back to the lack of a specific provision concerning the international criminal tribunals within the UN Charter and consequently the UNGA ordinary agenda.¹³⁶ As a result, undermining ICC status down to the UN judicial sub-agency (thus stripping it from its international subjectivity and making its role akin to that of international tribunals) will only exacerbate political bias of national interests in the Council's voting (examples of which were showcased above), thus dangerously mixing politics with justice.¹³⁷

- 2) **change the referral process** within the latter. Certain suggestions were made as to the form this change should take, some outlined in the *International Law Meeting Summary* of the Royal Institute of International Affairs.¹³⁸ One of them, which could potentially address concerns and frustrations of the international community over the interest-based alliances within the P5 (eg China's and Russia's vetoing resolutions criticizing the Syrian government, and the US/UK/France in response vetoing Russia's draft statement on humanitarian pause in Aleppo¹³⁹), is the P5 refraining from veto power when the case concerns core atrocities under the Statute, suggested by Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland (also known as the Small Five S5 group) in a resolution¹⁴⁰ to the UNGA, likely based on the art. 6.20 of the ICISS 2001 Report on *the Responsibility to Protect*.¹⁴¹ If implemented, it could potentially give the Court more power to prosecute crimes committed within, or by the nationals of non-member states. Well-designed in theory, it is, however, 'highly unlikely that the Council would consider any such criteria as part of its internal decision making process' given the dictates of its politics¹⁴², which was already clearly seen from the P5 pressure on the resolution's initiators to preserve their special powers within the body.¹⁴³ Keeping in mind that three major members of the P5 group — the US, Russia and China — are non-parties to the Rome Statute (which already considerably undermines its authority), the proposition, if pushed into realization, could repel all three powers, of which the latter has

¹³⁴ *ibid.* [p. 82]

¹³⁵ Moss, Lawrence (2012) 'The UN Security Council and the International Criminal Court Towards a More Principled Relationship', *International Policy Analysis*, available online at: <http://library.fes.de/pdf-files/iez/08948.pdf>, last accessed 3rd January 2017

¹³⁶ *supra* note 122 [pp. 439-440]

¹³⁷ *supra*, note 13 [p. 47]

¹³⁸ Chatham House (2012) 'The UN Security Council and the International Criminal Court' — International Law Meeting Summary, available online at: <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/160312summary.pdf>, last accessed 28 December 2016; for further discussion of possible Security Council reforms see: http://cic.nyu.edu/sites/default/files/pathways_sc_reform_final.pdf

¹³⁹ TASS (2016) 'Russia-proposed statement on humanitarian pause in Aleppo blocked in UN Security Council', *TASS Russian News Agency*, October 19, available online at: http://tass.com/world/907415?_ga=1.238280448.1857272677.1476511993, last accessed: 28 December 2016

¹⁴⁰ UNGA (2012) *Resolution 'Enhancing the accountability, transparency and effectiveness of the Security Council'*, A/66/L.42/Rev.1, May 3rd, available online at: http://www.un.org/ga/search/view_doc.asp?symbol=A/66/L.42/Rev.1, last accessed 28 December 2016

¹⁴¹ ICISS (2001) Report on 'The Responsibility to Protect', *International Commission on Intervention and State Sovereignty*, available online at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, last accessed 28 December 2016

¹⁴² *supra*, note 138 [p. 4]

¹⁴³ VOLGER, Helmut (2012) 'Five Lightweights' Fight to Reform the Security Council', *Global Policy Forum*, July 2nd, available online at: <https://www.globalpolicy.org/security-council/security-council-reform/51731-five-lightweights-fight-to-reform-the-security-council.html?itemid=id>, last accessed 28 December 2016

announced its accession to the Statute a distinct possibility¹⁴⁴, and thus damage the ICC goal of gradual inclusion of more states to reach its universality.

- 3) **"remove" universal jurisdiction from individual States** under the mandate of the International Criminal Court to ensure fair enforcement of the uniform laws.¹⁴⁵
- 4) as a response to African dissatisfaction (although, as stated above, the claim of anti-African bias within the ICC is a controversial point since a number of cases have been self-referred to the Court by the governments of respective states) — follow the AU Forum guidelines and **establish a regional judicial body**¹⁴⁶ (or empower African Court of Justice and Human Rights with a comparable mandate?) to implement prosecution on a more domestic level since 'justice is better served closer to home'.¹⁴⁷

As can be seen, the situation does not leave (even a highly competent in the international law) observer with a clear idea of how to cure the problem. Adding to the amount of controversy, recently another policy paper¹⁴⁸ has been published by the OTP (possibly interpreted under the same judicial-activism paradigm as an act of soft-law making), of which art. 41 and 46 deserve special attention as expressing the Court's initiative to prioritize, in addition to the "conventional" crimes under its jurisdiction, acts of environmental destruction, illegal exploitation of natural resources and land-grabbing as well as human rights abuses ('traditionally under-prosecuted [...] crimes against or affecting children[,] rape and other sexual and gender-based crimes'¹⁴⁹). Possibly designed to bring the globally-prominent environmental (and gender) issues as an alternative platform to reach unanimity between the world leaders and thus restore their lost support, this strategy can, nonetheless, backfire, as many of these figures are themselves involved in the environmentally destructive activities; specifically, this can cause a "pivot to South-East Asia and Latin America", with Cambodian and Brazilian economic leaders at high risk to be investigated. Signifying thereby further dispersion of the ICC in its ambitious attempts of embodying a commonly-dreamt-about universal Court, it could only appear for those suspicious of the organization as further proof that the project, jointly designed and invested in, is moving in a wrong direction. It is easily imaginable, for instance, how both the environmental and human-rights focus would turn off China, considering its current activities to satisfy the needs of industrialization and a historical stance on the second point, discussed above. In addition, there will be clear challenges of allocating individual responsibility for environmental abuses in a corporation framework, which, coupled with the old issues of restricted jurisdiction over non-member states and limited time scope will in the best-case scenario not improve the ICC image; in the worst — signal for China and the rest a moment of giving up on their dreams and opting for a more reliable regional or national jurisdiction.

Overall, widely-expressed disapproval, either in an implicit (such as complete absence of any mentioning of the Court by Antonio Cassese, the eminent Italian academic lawyer, in his *I diritti mani oggi*, despite the author's involvement in public international law as the first President of the International Criminal Tribunal for the former Yugoslavia and Special Tribunal for Lebanon, as well as a Chairperson for the International Commission of Inquiry

¹⁴⁴ JIA, Bing Bing (2006) 'China and the International Criminal Court: Current Situation', *Singapore Year Book of International Law and Contributors*, available online at: <http://councilandcourt.org/files/2012/11/Journal-Article-China-and-ICC-1.pdf>, last accessed 28 December 2016

¹⁴⁵ *supra*, note 38

¹⁴⁶ for further analysis of the implications of establishing an African criminal court see: *Vers la création d'une cour pénale africaine?* (<http://www.irinnews.org/fr/report/95652/analyse-vers-la-cr%C3%A9ation-d%E2%80%99une-cour-p%C3%A9nale-africaine> – also available in English)

¹⁴⁷ Press TV (2013) *AU vs. ICC: Who is on trial?*, July 10, available online at: <https://www.youtube.com/watch?v=4t2teoEoZFJ>, last accessed 31 December 2016 [6:34]

¹⁴⁸ ICC-OTP (2016) *Policy Paper on Case Selection and Prioritisation*, September 15, available online at: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, last accessed 31 December 2016. For further reference see: <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>; <https://www.opendemocracy.net/openglobalrights/richard-j-rogers/icc-will-investigate-environmental-destruction-as-well-as-war-crim>; <http://www.ipsnews.net/2016/10/environmental-crimes-could-warrant-international-criminal-court-prosecutions/> and <http://www.reuters.com/article/us-global-landrights-icc-idUSKCN11L2F9>, as well as the book *Environmental Criminal Liability and Enforcement in European and International Law* (Leiden: Brill Publishers, 2015) by Ricardo PEREIRA, senior lecturer in Law at Cardiff University (UK)

¹⁴⁹ *ibid.*

on Darfur — to name just a few) or explicit manner is a crisis not just of the ICC as a judicial organization: it symbolizes a broader ideological schism in the world and, more importantly, the unwillingness of the political leaders in the absence of mutual trust and recognition to cooperate in getting out of this spiny swamp.

* * *

The Authors of this paper would like to thank Federica Franchetti, President of ELSA Bologna, for having accepted the intellectual challenge which brought this research to life. Olesya Dovgalyuk is also grateful to Dr Torsten Michel for kindling her interest in international conflicts and (implicitly) international criminal law, and Riccardo Vecellio Segate particularly remarks the precious humanitarian food-for-thought received during the passionate seminars of Gianni Rufini at the Institute for International Political Studies (ISPI) of Milan in 2015/2016.

This brief study is also dedicated to the memory of Gian Paolo Calchi Novati, inspiring professor and soul of the African studies in Italy, which in several scientific and popular contributions raised concerns about the AU's withdrawal from the ICC ([here](#), for instance). He deceased on January 2, 2017 after a long, outstanding teaching journey at both ISPI Milan and the University of Pavia.

Further readings:

- AMBOS, Kai (2012) 'Crímenes de lesa Humanidad y la Corte Penal Internacional', *Revista General de Derecho Penal*, 17: 1-30, available online at: http://perso.unifr.ch/derechopenal/assets/files/temas/t_20120808_02.pdf
- ARGIRÒ, Flavio (2006) *La Corte Penale Internazionale: organi, competenza, reati, processo*, Milano: Giuffrè Editore
- BENEDETTI, Fanny, BONNEAU, Karine, and WASHBURN, John (2014) *Negotiating the International Criminal Court: New York to Rome, 1994-1998*, Leiden: Martinus Nijhoff Publishers
- BOEGLIN, Nicolás, HOFFMANN, Julia and SAINZ-BORGO, Juan Carlos (2012) *La Corte Penal Internacional: Una perspectiva Latinoamericana*, San José, C.R.: Upeace University Press, available online at: <https://www.upeace.org/OKN/collection/cortepenal/La%20Corte%20Penal%20Internacional-Una%20perspectiva%20latinoamericana.pdf>
- BRUNO, Michele (2005) 'L'importanza del Diritto Penale Internazionale: i Crimini Internazionale e le Responsabilità della Comunità Internazionale e dei Signoli Stati (Luci ed ombre sull'ICTY, sull'ICTR e sull'ICC)', *Diritto penale*, available online at: <http://www.diritto.it/archivio/1/20009.pdf>
- BUCHAN, Russell, and TSAGOURIAS, Nicholas (2015) *Research Handbook on International Law and Cyberspace*, Cheltenham: Edward Elgar Publishing
- CHIGARA, Benedict, KELLY, J. Patrick, and RUDMAN, Annika (2014) *State Practice and International Law Journal*, 1: 1-182 [pp. 17-44]
- CONFORTI, Benedetto, FERRARI BRAVO, Luigi, SACERDOTI, Giorgio, FRANCONI, Francesco and RONZITTI, Natalino (2000) *The Italian Yearbook of International Law 1999*, The Hague: Kluwer Law International
- FERRAJOLO, Ornella (2007) *Corte Penale Internazionale: Aspetti di giurisdizione e funzionamento nella prassi iniziale*, Istituto di Studi Giuridici Internazionali, Milano: Giuffrè Editore
- GIFFARD, Camille, and TEPINA, Polona (2015) *Torture Reporting Handbook: How to document and respond to allegations of torture within the international system for the protection of human rights* (2nd edition), University of Essex: Human Rights Centre [pp. 11-38]
- GREPPI, Edoardo, and VENTURINI, Gabriella (2012) *Codice di diritto internazionale umanitario Copertina flessibile*, Torino: G. Giappichelli Editore
- InfoPal (2016) *Corte Penale Internazionale e Palestina: un caso di dubbia giustizia*, available online at: <http://www.infopal.it/85219-2/>
- KALDOR, Mary (2012) *A decade of the War on Terror and the 'responsibility to protect'*, in: KALDOR, Mary, MOORE, Henrietta, and SELCHOW, Sabine (eds.) *Global Civil Society 2012: Ten Years of Critical Reflection - Global Civil Society Yearbook*, London: Palgrave Macmillan
- LONG, Debra, and MURRAY, Rachel (2015) *The Implementation of the Findings of the African Commission on Human and Peoples' Rights*, Cambridge: Cambridge University Press
- LÓPEZ-JACOISTE, Eugenia (2015) 'La Guerra en Syria y las Paradojas de la Comunidad Internacional', *Revista UNISCI / UNISCI Journal*, 37: 73-97, available online at: <https://www.ucm.es/data/cont/media/www/pag-72478/UNISCIDP37-4LOPEZ-JACOISTE.pdf>
- LUZZATTO, Riccardo, and POCAR, Fausto (2013) *Codice di diritto internazionale pubblico* (6th edition), Torino: G. Giappichelli Editore
- MBOKANI, Jacques B. (2013) 'La Cour Pénale Internationale: Une Cour contre Les Africains ou Une Cour Attentive à la Souffrance des Victimes Africaines?', *Revue québécoise de droit international*, 26(2): 47-100
- NAREY, Oumarou (2015) 'La Cour pénale internationale et l'Afrique: Analyse des procédures en cours', *Afrilex*, available online at: http://afrilex.u-bordeaux4.fr/sites/afrilex/IMG/pdf/La_Cour_penale_internationale_et_l_Afrique.pdf
- PIVA, Daniele (2008) *Le sanzioni nello Statuto della Corte Penale Internazionale*, available online at: http://www.zis-online.com/dat/artikel/2008_3_221.pdf
- SPINELLI, Paolo (2002-2003) *La Corte 'penale Internazionale e i Rapporti con l'Organizzazione delle Nazioni Unite*, Università degli studi "Roma Tre", *Centro Studi per la Pace*, available online at: http://files.studiperlapace.it/spp_zfiles/docs/20050722121138.pdf
- WILLIAMSON, Jamie A. (2006) "An overview of the international criminal jurisdictions operating in Africa", *International Review of the Red Cross*, 88(861): 111-131, available online at: https://www.icrc.org/fr/assets/files/other/irrc_861_williamson.pdf
- Southern Africa Litigation Centre (2013) *Renforcement positif: Plaidoyer pour la Justice Pénale Internationale en Afrique*, available online at: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Postive-Reinforcement-French-version.pdf>