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THE GLOBAL FIGHT AGAINST IMPUNITY: THE INTERNATIONAL CRIMINAL COURT AND DUTCH FOREIGN POLICY

Exploratory Study of the Current Problems and Prospects of the International Criminal Court, ICTY and the STL and the Dutch Foreign Policy Efforts in Support of these Courts and the Global Fight against Impunity

The Policy and Operations Evaluation Department of the Dutch Ministry of Foreign Affairs has commissioned this Study for the purpose of its Evaluation of the Dutch foreign policy in promoting the international legal order. This paper's purpose is twofold. On the one hand, it sketches the current problems and prospects of the International Criminal Court, the Yugoslavia Tribunal and the Special Tribunal for Lebanon and the global fight against impunity. On the other hand, it offers an overview of Dutch foreign policy regarding the ICC, ICTY and STL and the global fight against impunity more broadly.

CONTENTS

1. INTRODUCTION

The Netherlands has a constitutional obligation to 'promote the international legal order.[1] This obligation has been translated into Dutch foreign policy through a firm commitment to the global protection of human rights and the international rule of law. On a general level, the promotion of the international legal order is reflected by active membership of international organizations, the stimulation of the development of- and compliance with international law, the support for- and strengthening of the international protection of human rights, spreading the rule of law and the promotion of international security.[2] Strengthening the international legal order and protecting human rights is a central component of Dutch foreign policy, as reflected in policy article 1 of the Explanatory Memorandum to the budget of the Ministry of Foreign Affairs (MFA).[3]

This paper presents the findings of an exploratory study that has been conducted for the purpose of a policy evaluation that will be completed by the Policy and Operations Evaluation Department of the Dutch MFA in 2015. The Evaluation pertains to the Dutch foreign policy in the area of the 'promotion of the international legal order'. Given the breadth of that topic, this study will focus on one area in particular, which is the global fight against impunity for international crimes. In that regard, the primary focus is on the International Criminal Court (ICC), and the ways in which the Netherlands provides support to the work of the Court through its foreign policy. Policy towards the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Tribunal for Lebanon (STL) are also discussed, but more on a general level. As such, the purpose of the study is twofold. On the one hand, it intends to sketch several current problems concerning the global fight against impunity, with a particular focus on the ICC and its effective functioning in the international legal order. The findings concerning these questions are presented in Part I of this paper. On the other hand, this study seeks to reconstruct Dutch foreign policy efforts in the context of combating global impunity through its support for the ICC, ICTY and STL in particular. The findings concerning these questions are presented in Part II of this paper.

[1] Art. 90 of the Dutch Constitution provides that 'the government shall promote the development of the international rule of law ('de regering bevordert de ontwikkeling van de internationale rechtsorde').
[2] Wetenschappelijke Raad voor het Regeringsbeleid, 'Aan het Buitenland Gehecht: Over Verankering en Strategie van Nederlands Buitenlandbeleid' (Amsterdam University Press 2010), p. 69.
[3] Rijksbegroting 2015, Memorie van Toelichting, *Kamerstukken II* 2014/15 34 000 V, 2.

1.1. Scope of the Study

The scope of this study has been based on a Terms of Reference that is annexed to this paper (in Dutch).[4] This document describes the focal points of the forthcoming policy evaluation, which were already alluded to above. The first focus is a general sketch of the current problems that the ICC and the international legal order generally is facing in the global fight against impunity. Within this part of the paper, focus is on the following six points in particular:

(1) The desired universality of the jurisdiction of the ICC;
(2) The complementarity principle and the ICC's functioning as a court of last resort;
(3) The Dutch initiative for a multilateral instrument for the regulation of mutual legal assistance and extradition regarding international crimes;
(4) The position of victims before the ICC and the functioning of the Trust Fund for Victims;
(5) Current problems regarding hearing witnesses and witness protection in particular;
(6) Current Problems facing the ICTY and the STL
(7) The effectiveness of the ICC

Most of these points are self-explanatory except for the final one, which is very broad and for the discussion of which several more specific parameters will be developed in the course of this study. Second, this paper focuses on the Dutch foreign policy efforts in the global fight against impunity for international crimes, in particular regarding the Dutch support for the ICC and its effective functioning in the international legal order, as well as of the ICTY and the STL. Part II of this paper will further explain the focal points in that area. In principle, the period covered by this report ranges from 2009 until 2014.

1.2. Structure of the Study

The first part of this paper is divided into six sections. The first section addresses the universality of the ICC's jurisdiction, focusing, first on the ratification of the Rome Statute, second, on the ratification of ancillary agreements, and third, on domestic implementing legislation of the Rome Statute. The second section addresses several obstacles to the effective functioning of the

[4] See: Annex 1: Terms of Reference.

complementarity principle. To that end, it also addresses the related topic of an envisaged multilateral treaty on inter-State cooperation in the area of mutual legal assistance and extradition for international crimes, which is connected to the complementarity principle in that it seeks to enable the effective domestic prosecution of international crimes. The third section addresses the position of victims before the ICC. The fourth section, in turn, describes the current problems that the ICC is facing in the area of obtaining witness testimony and ensuring adequate protection of witnesses. The fifth section discusses, generally, the ICC's effectiveness, which, given the breadth of the topic, has been narrowed down to a discussion of six cross-cutting themes that impact on the effectiveness of the judicial process before the ICC in terms of its expeditiousness, its quality, and the costs of the Court. These themes are, first, States' cooperation with the Court, second, victim participation and its effects on the fairness and expeditiousness of the proceedings, third, the effectiveness of the Prosecutorial (investigative) strategies, fourth, the expeditiousness of the proceedings, fifth, the quality of the judicial staff of the Court, and sixth and finally, the need to ensure sufficient financial means for the Court to operate effectively. The seventh section addresses the achievements and obstacles that the ICTY and STL have encountered during the reporting period.

The second part of the paper addresses the Dutch foreign policy goals and efforts in the area of the global fight against impunity and the ICC in particular. To that end, six main themes have been identified that best capture the core of the six policy areas identified by the Terms of Reference described in the above. The first section describes general issues pertaining to Dutch foreign policy regarding international justice, including the way it comes about and the degree of coordination within the MFA. The second section addresses the Dutch efforts to stimulate global ratification of the Rome Statute. The third section focuses on the Dutch diplomatic efforts to foster global support for the ICC and its mission to combat global impunity. The fourth section addresses the Dutch efforts to stimulate effective cooperation with the Court. The fifth section describes the Dutch policy positions regarding the strengthening of the ICC's, ICTY's and STL's – legal – framework and functioning. The sixth and final section discusses the Dutch support for the complementarity principle and its efforts towards the creation of a multilateral instrument on mutual legal assistance and extradition for international crimes.

As such, this paper hopes to provide a comprehensive, yet succinct account of the current functioning of the ICC, as well as of the ICTY and STL, and in particular of Dutch foreign

policy for the strengthening of the international legal order, in particular in combating impunity for international crimes.

1.3. Methodology

This paper has been prepared on the basis of a combination of methods. First, a classical literature analysis has been conducted, in particular for the first part of the paper, the nature of which is rather descriptive and analytical. In addition, several (NGO) reports on the functioning of the ICC and several specific topics have also been analyzed, as well as official records of the ICC, STL and ICTY, and the case law of these Courts and Tribunals. Second, targeted searches of the archives of the Dutch MFA have resulted in the identification of relevant policy documents that describe specific foreign policy goals, the actual efforts and the results achieved. Third, a number of interviews have been conducted with MFA officials in order to get a clear picture of the full scope of the Dutch foreign policy efforts. The following individuals working for the MFA in The Hague have been interviewed for this study:

- Niels Blokker, former policy officer and vice-director of the International Right division of the Legal Affairs Department (LAD) of the MFA, currently professor of international law at Leiden University;
- Fiona Burger, policy officer at the MFA Human Rights and Policy and Legal Affairs division, tasked with all ICC-related matters;
- H.E. Ambassador Jan Lucas Van Hoorn, Ambassador to the ICC and the Organization for the Prohibition of Chemical Weapons;
- Elke Koning, senior policy officer at the MFA 33Human Rights and Policy and Legal Affairs division,, formerly tasked with all general Courts- and Tribunals related matters and the envisaged Multilateral Treaty on Extradition and Mutual Legal Assistance for International Crimes;
- Anne-Sophie Massa, Policy Officer at the LAD of the MFA, tasked with f ICC related matters at that specific department;
- Steven Sutton, policy officer at the of the MFA MFA Human Rights and Policy and Legal Affairs division,, tasked with all general Courts- and Tribunals related matters and

the envisaged Multilateral Treaty on Extradition and Mutual Legal Assistance for International Crimes;
- Alexandra Valkenburg, head of the Human Rights and Political and Legal Affairs Division of the MFA.

In addition, several MFA officials working with missions abroad have been interviewed. An effort has been made to speak to representatives of those missions that are likely to be confronted with ICC related matters on a regular basis:

- Carolyn Abong, policy officer at the Netherlands Embassy to Kenya;
- H.E. Susan Blankhart, Ambassador to Sudan;
- Marcel van den Bogaard, policy officer at the Netherlands Permanent Mission to the UN in New York;
- H.E. Alphons Hennekens, Ambassador to Uganda;
- Rick Slettenhaar, former policy officer at the Netherlands Embassy to the Democratic Republic of the Congo;
- Pieter Smidt van Gelder, policy officer at the Netherlands Embassy to Sudan;

As such, I have spoken with those primarily responsible for Dutch foreign policy regarding the ICC and the global fight against impunity within the MFA. In addition, in order to create a more objective image, interviews have also been conducted with two representatives of NGOs, active in the area of international justice:

- Elizabeth Evenson, senior counsel in the International Justice Programme, Human Rights Watch
- Lars van Troost, strategic director at Amnesty International Netherlands

Finally, representatives of five foreign embassies in The Hague have been interviewed in order to further strengthen this objective image. They were initially asked to 'rank' the quality of the Netherlands' foreign policy on a number of specific policy areas, compared to the other respondents and themselves. However, it proved difficult to ask these representatives to actually

come up with a ranking, as a result of which this approach was abondoned and open interviews on the identified policy areas were conducted. The representatives spoken with were:

- Philippe Brandt, Minister-Counsellor at the Swiss Embassy to the Netherlands;
- H.E. Ambassador Bruno Debuck, Permanent Representative of Belgium to the ICC;
- Shehzad Charania, legal advisor at the UK Embassy to the Netherlands;
- Geoffrey Eekhout, first secretary at the Belgian Permanent Mission to the ICC;
- Klaus Keller, legal advisor at the German Embassy to the Netherlands;
- Petter Lycke, second secretary at the Swedish Embassy to the Netherlands;

2. THE GLOBAL FIGHT AGAINST IMPUNITY: ACHIEVEMENTS AND OBSTACLES OF THE ICC, ICTY AND STL

This part of the paper sketches a number of key problems that the ICC, the ICTY and the STL have faced in the reporting period. As has been stated, primary focus is on the ICC. The Court has been operative for a little over ten years and continues to face momentous challenges. Pursuant to the goals of the Policy Evaluation this paper has identified seven areas of concern: Universality of the Rome Statute, Complementarity of the ICC's jurisdiction; the possible need for a multilateral treaty on mutual legal assistance and extradition for international crimes; the position and the needs of victims of international crimes before the ICC; the ICC's use of witness evidence; the overall effectiveness of the ICC; and the prospects and problems of the ICTY and the STL.

2.1. Universality of the ICC's Jurisdiction

The widespread ratification of the Rome Statute is of fundamental importance to the ICC's mission to combat global impunity. Universality is a key mission. Therefore, the Court and those who support it are actively engaged in campaigns to promote the ratification of the Rome Statute. The movement towards universality is the focus of this section. However, ratification of the Rome Statute alone is not sufficient to ensure the universal effectiveness of the ICC. Therefore, this Section discusses three related topics: first, ratification of the Statute itself; second, the importance of ratification of ancillary instruments, including the Agreement on Privileges and Immunities of the Court (APIC), specific cooperation agreements, and agreements on the enforcement of sentences; third, the importance of domestic legislation that implements States' obligations under the Statute and ancillary instruments, which many States have failed to do, posing a serious obstacle to the effective exercise of jurisdiction by the Court. As such, this section hopes to provide a full but succinct overview of the problems faced by the ICC in the context of the universality of its jurisdiction.

2.1.1. Ratification of the Rome Statute

Currently, 123 States have ratified the Rome Statute.[5] The Statute was originally adopted at the end of the Rome Conference in July 1998. Of the 150 States represented, 122 voted in favour of the Statute, including the Netherlands, 21 States abstained and 7 States opposed.[6] Many commentators have expressed regrets at the inability to arrive at a compromise solution at Rome that would have led to a consensus adoption of the Statute by all States present. Philippe Kirsch, the Chair of the conference, expressed his regret over this failure, stating that the final Statute 'is not a perfect instrument; no internationally negotiated instrument can be. It includes uneasy technical solutions, awkward formulations and difficult compromises that fully satisfied no one. But it is a balanced instrument, furnished with enough strength to ensure the effective functioning of the court and sufficient safeguards to foster broad support among States.'[7]

The Rome Statute would enter into force on the first day of the month, 60 days after 60 instruments of ratification had been deposited with the UN Secretary-General.[8] The initial speed of ratification of the Statute surprised many, as a result of which there was not yet a physical court, no budget and no staff when the Statute entered into force on 1 July 2002.[9] Notably, there was a distinct regional pattern in the geographical distribution of ratification of the Rome Statute in the early years. In particular, States in South-America, Europe and southern and central Africa were quick to ratify. There were active efforts to promote ratification in those early years. For example, Canada and several European States routinely advocated for ratification in bilateral exchanges with other States.[10] In addition, the Coalition for the International Criminal Court, an NGO, developed an effective strategy that combined engaging the support of local civil society and its own efforts, focusing on target countries in its campaign to promote universal ratification of the Statute, which continues to date.[11]

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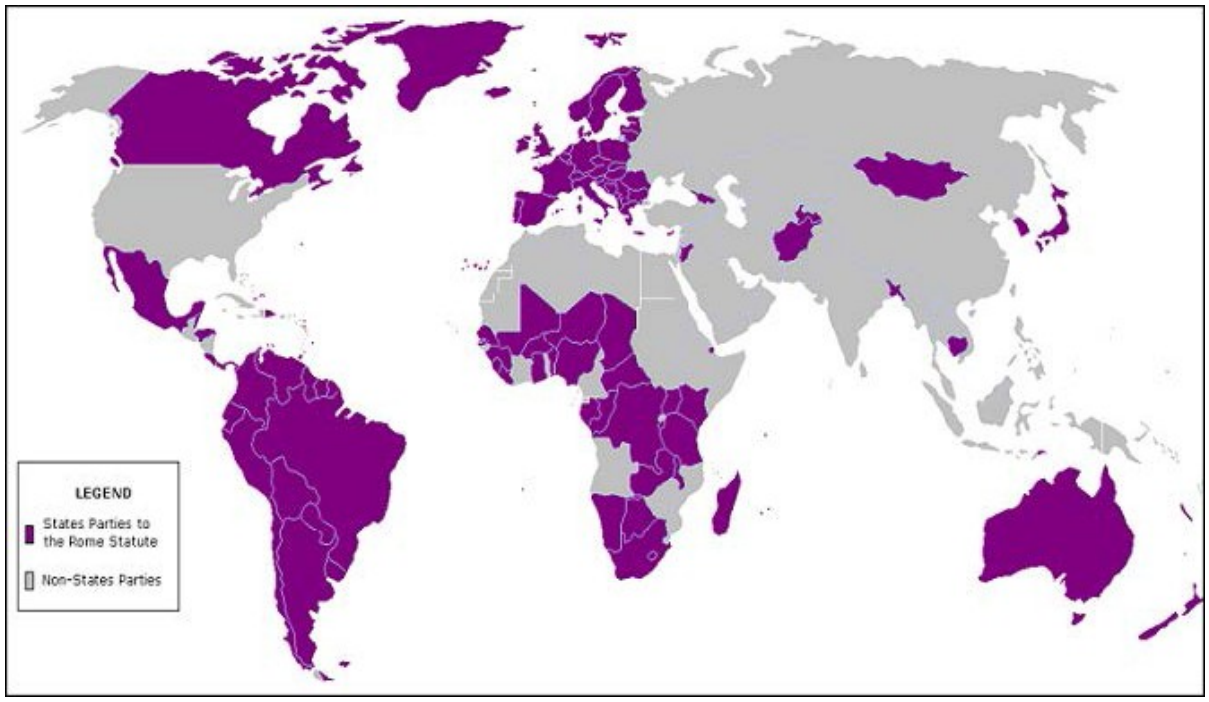
[5] United Nations Treaty Collection, Rome Statute of the International Criminal Court: < https://treaties.un.org/ Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en > (Accessed 24 July 2015).
[6] David Bosco, *Rough Justice: the International Criminal Court in a World of Power Politics* (Oxford University Press 2014), p. 50.
[7] Philippe Kirsch and John Holmes, 'The Rome Conference on the International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law* 2, p. 11.
[8] Art. 126 Rome Statute of the International Criminal Court (1 July 2002) 2187 UNTS 3 (ICC Statute).
[9] Bosco 2014 (n 6), p. 77.
[10] Bosco 2014 (n 6), p. 68-69.
[11] CICC Website, A Universal Court with Global Support < http://www.iccnow.org/?mod=universalcourt > (accessed 26 February 2015).

After an initial 'ratification race', between 2000 and 2002, with a peak of 39 ratifications in 2002, the number of ratifications stabilized at around two or three States joining the ICC each year. 2011 saw a bump of six ratifications, but only three States have ratified the Statute since (Guatemala, Cŏte d'Ivoire, and Palestine).[12]



This steadily low number of ratifications can partly be explained by the fact that a large majority of States have now ratified the Statute. At the same time, there are still 70 States that have not yet ratified and it seems that many, despite efforts of global civil society and States Parties to encourage further ratifications, have no discernable intent to do so. Another striking fact is the geographic distribution of States Parties to the Statute, which appears clearly from the figure presented above.[13] Virtually all States in South America and Europe have ratified the Statute. A majority of States in Africa have also ratified. However, only three States from the Middle East and North Africa region have ratified (Jordan, Tunisia, and recently, Palestine). In addition, there are few Asian States amongst the States Parties to the Statute. Furthermore, although a global majority of States has ratified the Statute, it is clear that large and powerful States have been and continue to be unwilling to join the ICC. Three of the five permanent members of the UN

[12] Palestine has deposited its instrument of ratification in January 2015: See ICC Press Release, 'The State of Palestine Accedes to the Rome Statute ' < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082_2.aspx > (accessed 27 February 2015). Since the ASP has recognized Palestinian statehood, Palestine is considered the 123rd State Party to the Rome Statute.

[13] CICC Website, 'A Universal Court with Global Support, Ratification and Implementation' < http://www.iccnow.org/ ?mod=ratimp > (accessed 26 February 2015).

Security Council, China, the United States and the Russian Federation persist in their refusal to ratify, and other powerful and populous States, such as India and Indonesia in particular, are equally reluctant. For example, despite efforts to stimulate Indonesia to join the ICC, including by the Netherlands, the Indonesian government has reemphasized its unwillingness to ratify the Rome Statute;[14] the Coalition for the ICC, however, continues its efforts to press Indonesia to join.[15]

The fact that many powerful and populous States continue to refuse to join the ICC is a serious obstacle to the Court's universality. It also enhances the perception of the Court as targeting only smaller and less powerful States, a criticism that is increasingly being levelled against the ICC.[16] In addition, the ICC heavily depends on State cooperation. The practical, logistical and moral support of powerful States is therefore of vital importance for the effective functioning of the Court. Finally, the fact that populous States are not party to the Statute places their populations beyond the 'protection' of the ICC, so to speak. This is illustrated by the following charts, which show the global participation in the ICC both in terms of Member States (Figure 3) and in terms of the portion of the world population that is within the 'jurisdiction' of the Court (Figure

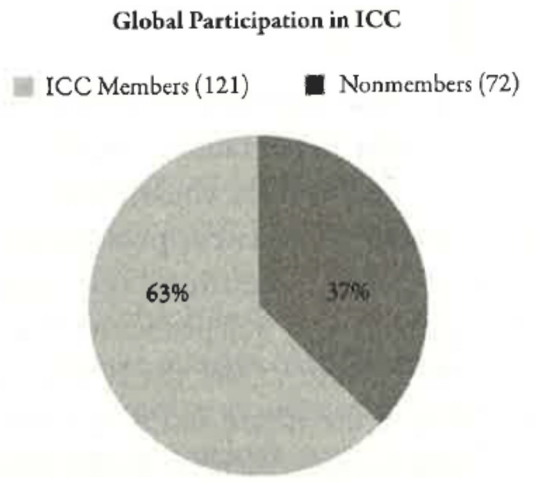


Figure 2: Global Participation in the ICC. Source: Bosco 2014, p. 5

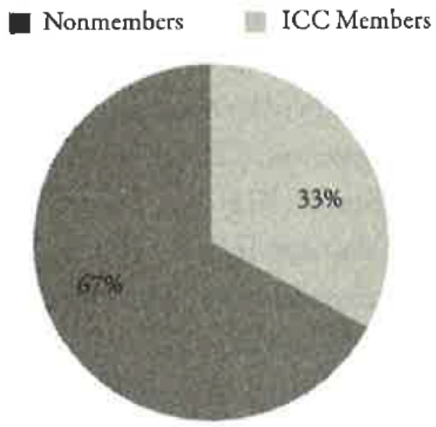


Figure 3: Global Participation in the ICC. Source: Bosco 2014, p. 6

[14] Jakarta Post, 'Government Officially Rejects Rome Statute' < http://www.thejakartapost.com/news/2013/05/21/govt-officially-rejects-rome-statute.html > (accessed 26 February 2015).
[15] CICC Website, 'Campaign for Global Justice, Target Countries: Indonesia' < http://www.iccnow.org/index.php?mod=cgj1214 > (accessed 26 February 2015).
[16] See eg: Ugumanim Bassey Obo and Dickson Ekpe, 'Africa and the International Criminal Court: A Case of Imperialism by another Name' (2014) 3 *International Journal of Development and Sustainability* 2025.

4).[17] As can be seen, 121 (now 123) out of 193 States are party to the Statute. However, the total population of ICC Member States combined comprises 2.3 billion people, while the total population of non-members is 4.7 billion people, more than double. This is largely due to the continued unwillingness of the most populous States to join the ICC, including the four most populous countries in the world (China, India, the USA and Russia). There is thus still much ground to be gained in terms of the universalist aspirations of the ICC.

2.1.2. Ancillary Agreements

The Rome Statute does not exhaustively regulate all forms of cooperation that the ICC requires in order to function effectively and universally. Additional ancillary agreements have therefore been concluded in order to complement the cooperation regime provided for by Part 9 of the Statute. The abovementioned APIC is an indispensable tool to ensure the effectiveness and independence of the Court and its officials.[18] In addition, specific cooperation of States is required for the enforcement of sentences, since persons convicted by the ICC cannot serve their sentence at the UN Detention Unit in Scheveningen, the Netherlands. The ICC Statute therefore envisages the conclusion of agreements on the enforcement of sentences with specific countries where convicted persons can serve their sentences.[19] Third, other forms of cooperation may also require the adoption of specific agreements in order to facilitate cooperation. The Court does not have a police force or army at its disposal, and has to conduct its investigations in difficult environments. It therefore largely depends on the cooperation of States for the effective conduct of its investigations. Therefore, the Court, and the OTP specifically, have, for example, concluded several cooperation agreements with States and international organizations in order to facilitate investigations. In addition, the Court is attempting to conclude agreements on interim release of defendants to States willing to receive them, and finally, agreements on the protection and relocation of witnesses. Such agreements are necessary to enable the Court to function effectively and to live up to its promise of universality. However, as will be briefly described below, there are several significant obstacles in this area.

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[17] Bosco 2014 (n 6), p. 5-6.

[18] Agreement on the Privileges and Immunities of the International Criminal Court (APIC) < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&lang=en > (accessed 24 February 2015).

[19] Art. 103 ICC Statute, where it is stated that convicted defendants can be sent to States 'who have indicated their willingness to accept sentenced persons'.

First, the APIC has been ratified by 74 States.[20] This agreement is vital for the effective functioning of the Court because it enables the Court and its officials to perform their duties in an independent and unconditional manner. For example, it ensures the freedom of movement of Court staff and defence counsel, as well as of victims and witnesses.[21] The importance of such freedom of movement and functional immunity from domestic interferences is illustrated by the fact that States have, on several occasions, attempted to interfere with officials, defence counsel, or victims and witnesses, both before the ICC and before the ad hoc Tribunals. For example, the Libyan authorities have arrested ICC investigators working on the defence of Saif al-Islam Gaddaffi.[22] The fact that a large portion of States Parties has not ratified this agreement may therefore be an obstacle to the effective functioning of the Court.

Now that the first ICC judgment has become final,[23] the importance of agreements on the enforcement of sentences has become even more pressing. This is of particular concern for the Netherlands, because, as Host State, it is the fall back option if no other State is willing to receive the sentenced person. The Court has now concluded eight such agreements, with Austria, Belgium, Colombia, Denmark, Finland, Mali, Serbia and the United Kingdom.[24] The Presidency uses a Model Enforcement Agreement to facilitate the conclusion of such bilateral enforcement agreements, the content of which is modelled on the practice of the ad hoc Tribunals.[25] It is important to note that the existence of an enforcement of sentences agreement does not imply an obligation on the part of the State to accept any sentenced person; specific consent to receive a particular person is still required.[26] The conclusion of more such agreements is important for the effective functioning of the Court and for ensuring fair burden-sharing among States Parties.

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[20] UN Treaty Collection, Agreement on the Privileges and Immunities of the International Criminal Court < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&lang=en > (accessed 20 July 2015).

[21] See, in particular, art. 15-21 APIC.

[22] BBC News, 'Libya holds four ICC staff after they met Saif Gaddafi' (9 June 2012) < http://www.bbc.com/news/world-africa-18380214 > (accessed 20 February 2015). The Rwanda and Yugoslavia Tribunals have experienced similar incidents. See generally, on the importance of strong defence immunities: Krit Zeegers, 'Defence Counsel Immunity at the ad hoc Tribunals' (2011) 11 *International Criminal Law Review* 869.

[23] ICC, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, *Prosecutor v. Lubanga Dyilo* (ICC-01/04-01/06), 1 December 2014.

[24] Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014), p. 511.

[25] Hirad Abtahi and Steven Koh, 'The Emerging Enforcement Practice of the International Criminal Court' (2012) 45 *Cornell International Law Journal* 1, p. 7; see also: Gerhard Strijards, 'Article 103: Role of States in Enforcement of Sentences of Imprisonment' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck 2009).

[26] Abtahi and Koh (n 25), p. 5.

Third, further agreements, enabling and regulating specific forms of cooperation may be necessary to further strengthen the effectiveness of the Court. First, Article 54(3)(d) of the Rome Statute authorizes the Prosecutor to 'enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person'. Such arrangements and agreements may take the shape of formal 'Judicial Cooperation Agreements', or informal instruments such as Memoranda of Understanding and Exchanges of Letters. The content of these instruments varies depending on the respective partner, be it a State, an international organization or a single person. Thus far, the Prosecutor has entered into voluntary cooperation agreements with three States Parties – the DRC, Uganda and Mali – after the opening of the investigation on their territories.[27] In all three cases the accords resulted from the absence of implementing legislation in those States. Therefore, the Prosecutor thus had to resort to special voluntary agreements to be able to start investigations on these States' territories. In addition, UN missions, NGOs and local informants operating on the territories where crimes occurred are a crucial source of information and evidence gathering for the Prosecutor. Given the constraints on its time and resources, the OTP needs to build partnerships with local actors who understand the geography of the region and have access to the local networks. The Prosecutor has signed several Memoranda of Understanding with specific bodies of the UN, such as the UN Mission in the DRC ('MONUSCO', previously called 'MONUC') and the United Nations Operation in Côte d'Ivoire (UNOCI) (the latter accord has now been replaced by a Court-wide agreement). The Prosecutor has also entered into a cooperation agreement with INTERPOL in 2004, for the exchange of police information and criminal analysis, as well as the search for fugitives and suspects. The agreement further gives the Prosecutor access to the Interpol telecommunications network and databases.

In addition, the early practice of the Court has uncovered the need for cooperation in the field of interim release. Since the Host State, the Netherlands, is unwilling to receive persons on interim release on its territory, other States Parties should be willing to receive them. Otherwise, the ICC's power to grant suspects interim release if there are no relevant and sufficient reasons for provisional detention will become nullified. Thus far, the ICC has concluded one such agreement with Belgium and it claims to be actively engaged in the procurement of more such

[27] On 6 October 2004, DRC; 6 September 2004, Uganda, 13 February 2013, Mali.

agreements.[28] This is a development that needs to be stimulated because it is necessary for the effective protection of the right to liberty of defendants on trial before the ICC. Finally, there is a strong need for State cooperation in the area of witness protection.[29] In particular, witnesses may have to be relocated in order to protect them from any possible harm that may befall them as a consequence of their testimony before the Court. The ICC Registrar may enter into agreements with States on the relocation of witnesses, but such agreements are 'currently limited and insufficient in number'.[30] Only 12 relocation agreements had been concluded by 2013.[31] In addition, the scope and effectiveness of the existing agreements is called into question because their generic nature 'mean that States may sign but still not accept witnesses, thus undermining the original intent of the agreement.'[32] These examples show that the effective fulfilment of the ICC's universalist aspirations thus significantly depends on the cooperation of States, as well as of International- and Non-Governmental Organizations, and that the required level of cooperation exceeds the one provided for by the provisions of the Statute alone. The conclusion of ancillary agreements on the privileges and immunities of the Court and its officials and on specific forms of cooperation is therefore necessary for the Court to function independently and effectively.

2.1.3. Implementing Legislation

For the universal project of the ICC to succeed, it is also vital that States make the necessary changes to their domestic law, both in order to enable the domestic prosecution of international crimes in light of the complementarity principle, and in order to enable providing legal assistance to the Court, when so requested.

According to the complementarity principle, the primary responsibility for the investigation and prosecution of international crimes lies with States themselves. The ICC is meant to step in only where States are unwilling or unable to investigate and prosecute.[33] For

[28] ICC, 'Belgium and ICC Sign Agreement on Interim Release of Detainees (10 April 2014) < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr993.aspx > (accessed 24 February 2015).
[29] See Sylvia Ngane, 'Witnesses before the International Criminal Court' (2009) 8 *The Law and Practice of International Courts and Tribunals* 431, p. 454.
[30] Ngane (n 29) 2009, p. 455.
[31] International Bar Association, 'Witnesses before the International Criminal Court' (July 2013) (hereafter: IBA Witnesses Report) < www.ibanet.org/Document/Default.aspx?DocumentUid=9C4F533D-1927-421B-8C12-D41768FFC11F >, p. 9.
[32] IBA Witnesses Report (n 31), p. 9.
[33] See art. 17(1)(a) ICC Statute.

States to be able to effectively fulfil this purpose, their substantive and procedural legal framework must accommodate the investigation and prosecution of such crimes. This means, first, that States must implement all crimes under the Rome Statute into their criminal Statutes.[34] If these crimes aren't formally enshrined in domestic Statutes, the legality principle will prevent the prosecution of persons who have committed them. Arguably, it is equally necessary to amend domestic procedures in order to accommodate the specific requirements of the investigation and prosecution of *international* crimes, which has many unique aspects and may raise procedural questions that are foreign to domestic investigations.[35] The success of the universal mission of the Court thus largely depends on the implementation of necessary changes to domestic substantive and procedural laws to allow for the effective investigation and prosecution of international crimes.

Second, once the ICC has jurisdiction over certain situations, it fully depends on the cooperation of States for the effective conduct of the investigation and prosecution, since the collection of evidence and the arrest of suspects will generally have to be carried out by domestic authorities on behalf of the Court, which does not have its own police force. Part 9 of the Statute provides the forms of cooperation that States Parties are obliged to provide to the Court, which includes the arrest and surrender of suspects and the gathering of all sorts of evidence. Article 88 of the Statute therefore requires States Parties to 'ensure that there are procedures available under their national law for all of the forms of cooperation which are specified' under this Part of the Statute. The effective functioning of this cooperation regime is dependent on the availability of cooperation laws at the national level. It is therefore vital that States ensure that such procedures are in place.

However, the majority of ICC States Parties have failed to adopt implementation legislation. The Coalition for the ICC actively engages with this problem, and published a report in 2012, from which it appeared that 56 States had adopted legislation that incorporates the crimes under the Rome Statute into their domestic law, while 41 States had adopted cooperation

[34] See eg: Jann Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86.

[35] See eg Gaetano Best, 'De Positie van de Verdediging in het Vooronderzoek van WIM-Zaken' in Denis Abels, Menno Dolman and Koen Vriend (eds), Dialectiek van Nationaal en Internationaal Strafrecht (Boom Juridische Uitgevers 2013), who convincingly argues that the fairness of domestic cases concerning international crimes requires the adaption of procedural arrangements.

laws that enable the provision of legal assistance to the Court.[36] An additional 34 States had some form of draft legislation concerning the implementation of the substantive crimes under the Rome Statute, and 31 States had draft cooperation legislation. However, many of these draft laws have been pending for many years, and it is unclear whether and when they will come into effect. As such, an absolute majority of States Parties to the Rome Statute have yet to fulfil their obligation to enact implementing legislation, both regarding the incorporation of the substantive crimes into their criminal codes and regarding their cooperation obligations. This may seriously impede the effective operation of the complementarity principle, because in the absence of legislation criminalizing the core crimes under the Rome Statute, it is far more difficult for States to effectively prosecute persons accused of such crimes. Similarly, in the absence of cooperation legislation in States on whose assistance the ICC depends, the Court may be unable to gain custody of suspects or acquire the evidence it needs to effectively prosecute and try certain cases.

2.2. Complementarity of the ICC

As has been stated above, the ICC is supposed to supplement national jurisdictions in the prosecution of international crimes as opposed to replace them. It is meant to be a Court of last resort. The complementarity principle, enshrined in the admissibility criteria of cases in the Statute, is a foundational principle for the ICC.[37] As stated, it implies that cases are only admissible before the ICC if States are unwilling or unable to prosecute themselves. For the complementarity principle to function effectively, it is important that States take the lead and are actually able to investigate, prosecute and try international crimes cases. At the same time, States must abide by the Court's assessment of its jurisdiction. If the Court finds that a case is admissible, the State who was found unwilling or unable must accept the Court's assessment and cooperate fully with the Court. This has proven to be a substantial obstacle to the global fight against impunity. Several root-causes of these obstacles can be identified and will be briefly discussed in this section.

[36] CICC Website, 'Summary Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)' < http://www.iccnow.org/documents/ Chart_Summary.pdf > (accessed 27 February 2015).
[37] See also Art. 1 of the ICC Statute, where it is stated that the ICC shall be 'complementary' to national jurisdictions.

First, it is important to understand how the complementarity principle functions in the jurisdiction of the Court. The principle operates as a hurdle to the admissibility of a case before the ICC. There is a 'two-step test' that the Court employs for determining whether a case is admissible before it, or whether it should divert to a domestic jurisdiction. First, the question is whether there is an ongoing investigation or prosecution of the case at the national level. If so, the second question is whether the State may still be unwilling or unable to *genuinely* carry out that investigation or prosecution.[38] Regarding the first tier, the ICC has clarified that the domestic investigation or prosecution must concern 'substantially the same conduct'.[39] The second tier is more complex, as it includes an assessment of the genuineness of the investigation or prosecution. The inability of a State to investigate or prosecute is more easy to assess than its unwillingness, the criterion for the Court is to consider whether, 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'.[40]

Two core problems can be identified in the functioning of the complementarity principle to date. The first relates to situations where States refuse to accept the Court's assessment of their inability or unwillingness to investigate and prosecute, and consequently refuse to cooperate with the Court and to surrender the defendants. This has occurred in the situation in Libya and Cŏte d'Ivoire. The ICC issued arrest warrants for Al-Senussi and Gadaffi in September 2011 and in both cases, the Libyan authorities challenged the admissibility of the case. In *Gadaffi*, the Pre-Trial Chamber rejected the Libyan challenges, first, because the domestic investigation did not concern 'the same case', and second, because the Libyan authorities were 'unable' to carry out the investigation and prosecution because they were unable to secure Gaddafi's transfer into State custody, to obtain the necessary testimony, and because the judicial and governmental authorities were generally unable to exercise full control over detention facilities, provide witness protection, and secure adequate legal representation for

[38] Cryer and others 2014 (n 24), p. 154; see also: ICC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1497), 29 September 2009, paras 1 and 75-79.
[39] Cryer and others 2014 (n 24), p. 156, see also: ICC, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", *Prosecutor v. Muthaura and others* (ICC-01/09-02/11-274), 30 august 2011, para. 76; ICC, Decision on the Admissibility of the Case against Abdullah Al-Senussi, *Prosecutor v. Gaddafu abd Al-Senussi* (ICC-01/11-01/11-466-Red), 31 May 2013, paras 73-83.
[40] Art. 17(3) ICC Statute.

Gadaffi.[41] This was partly confirmed by the Appeals Chamber.[42] Interestingly, the concurrent admissibility challenge concerning Al-Senussi did succeed, as the ICC found the case inadmissible because the Libyan authorities were investigating and prosecuting the same case. However, the Libyan authorities have failed to comply with the ICC's order to surrender Gadaffi. This may largely be attributed to the fact that the Libyan central authorities do not have effective control over him either. This example goes to show the difficult geo-political circumstances in which the ICC operates. The ICC cannot force Libya to cooperate. Commentators have lamented, in particular, the reluctance of the Security Council, which referred the situation in Libya to the Court, to provide more substantial support to the ICC in procuring cooperation from the Libyan authorities.

Similarly, the ICC has rejected Cŏte d'Ivoire's admissibility challenge in the case against Simone Gbagbo, wife of former president Laurent Gbagbo who is already in ICC custody. The ICC found that Cŏte d'Ivoire's domestic authorities were not taking tangible and concrete steps in their investigation of the same allegedly criminal conduct of Simone Gbagbo that the ICC is investigating.[43] However, Cŏte d'Ivoire has since instituted domestic criminal proceedings and persists in its refusal to transfer Simone Gbagbo to The Hague.[44] This case similarly exemplifies the dependent position of the Court vis-à-vis State authorities. Without their cooperation, the Court cannot function effectively.

The second primary obstacle to the effective operation of the complementarity principle rests in States' inability to investigate, prosecute and try international crimes cases. One crucial aspect of this has been discussed under the heading of the ICC's universality above. The fact that only 56 States have adopted legislation that incorporates the crimes under the Rome Statute into their domestic law renders a large majority of States ill-equipped to effectively conduct

[41] ICC, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Prosecutor v. Gaddafi and Al-Senussi (ICC-01/11-01/11), 31 May 2013.
[42] ICC, Judgement on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Prosecutor v. Gaddafi and Al-Senussi* (ICC-01/11-01/11), 21 May 2014.
[43] ICC, Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, *Prosecutor v. Simone Gbagbo* (ICC-02/11-01/12-47-Red), 11 December 2014.
[44] See eg: France 24, 'Trial opens for Cŏte d'Ivoire's 'Iron Lady' Simone Gbagbo' (26 December 2014) < http://www.france24.com/en/20141226-trial-opens-ivory-coast-iron-lady-simone-gbagbo/ > (accessed 3 March 2015).

international crimes cases.[45] In addition, as has also been pointed out, the procedural particularities of international crimes cases may require the adaptation of codes of criminal procedure as well. However, there is no general data available as to whether States have implemented changes to accommodate the procedural specificities of the investigation, prosecution and trial of international crimes cases, but given the data on formally required forms of implementing obligations, it is safe to assume that few states have done this.[46] Third and fundamentally, like the ICC, States will also be heavily dependent on the cooperation of other States in their investigation, prosecution and trial of international crimes cases. The State investigating the case in question may not be the territorial State where the crimes actually took place, such as is the case before the special Habré Tribunal erected in Senegal, as a result of which the gathering of evidence will be equally problematic compared to a case before the ICC. Suspects, witnesses and evidence may be dispersed across the globe, as a result of which States will need to cooperate with other States in order to effectively investigate international crimes cases. This is complicated further by the fact that there is no specific legal framework in place for inter-State cooperation in the investigation of such cases. This ties in neatly with the next section, which discusses the possible need for a Multilateral Treaty for Legal Assistance and Extradition in International Crimes.

2.3. The Position of Victims before International Courts and Tribunals

The needs and position of victims of international crimes have become a focal point in the global fight against impunity. The adoption of the Rome Statute marked a turning point for the degree of attention given to the rights and needs of victims, including in the criminal process itself. The central position that the Statute grants to victims in the practice and procedure of the ICC was unprecedented.[47] Because it is impossible to do full justice to the complexities of the issues, three aspects of the role and position of victims before the ICC will be addressed: first, the

[45] CICC Website, 'Summary Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)' < http://www.iccnow.org/documents/ Chart_Summary.pdf > (accessed 27 February 2015).
[46] See Best 2013 (n 35), who strongly advocates for changes to the Dutch Code of Criminal Procedure for this reason.
[47] Although several hybrid courts and tribunals, like the Extraordinary Chambers in the Courts of Cambodia, did follow the example set by the ICC; see generally: Anne-Marie de Brouwer and Mikaela Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance', in Göran Sluiter and others (eds), *International Criminal Procedure – Principles and Rules* (Oxford University Press 2013), 1299-1374.

participation of victims in ICC proceedings and its consequences; Second, the responsibility of the Court to protect victims (and witnesses); and third, the unique possibility created by the ICC Statute for victims to be granted reparations will be discussed, as well as the broader mandate of the ICC's Trust Fund for Victims to assist victims.

The immediate predecessors of the ICC, the ad hoc Tribunals for the former Yugoslavia and Rwanda, did not grant victims any participatory rights in their proceedings. They have been criticized because this lack of participation has been held to have caused a negative impression of these Tribunals' motives with the victims, thus frustrating the objectives of restoring peace and justice to the affected communities.[48] The ICC Statute seeks to take a different approach by granting victims the right to participate at almost every stage of the proceedings. Such procedural participation has multiple interrelated purposes, including, for example, contributing to the prosecution, obtaining restitution or reparation or other forms of satisfaction, ensuring fairness to the victims, avoiding secondary victimization and alienation, ensuring that the truth is exposed and that a just punishment is imposed, further ensuring that the offender is conscious of the serious injury and suffering they have inflicted, and even broader restorative and reconciliatory goals.[49]

The Rome Statute provides for victim participation as a right.[50] However, the Court has discretion in deciding whether a person is indeed 'a victim', whether their personal interests are affected and whether their participation is 'appropriate' and not inconsistent with the rights of the accused and a fair trial.[51] The Court has developed a two-step process by which victims must first be granted general participatory rights in a specific situation or case, followed by specific determinations concerning the actual participation in specific decisions.[52] The victim participation scheme before the ICC has been subject to a large measure of criticism, including from within the ICC itself, in particular for its alleged harmful effects on the rights of the defence. For example, it has been noted that the extensive participation of victims exposes the

[48] Michael Kelly, 'The Status of Victims under the Rome Statute of the International Criminal Court', in Thorsten Bonaker and Christoph Safferling (eds), *Victims of International Crimes: an Interdisciplinary Discourse* (TMC Asser Press 2012), p. 49.
[49] Cryer and others 2014 (n 24), p. 489.
[50] Art. 68(3) ICC Statute: 'Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'
[51] Cryer and others 2014 (n 24), p. 490.
[52] ibid.

accused to a 'second prosecutor', which negatively affects the equality of arms between the parties.[53] In addition, the extent of victim participation and the large numbers of victims being allowed to participate has been noted to negatively affect the expeditiousness of the proceedings, thus potentially violating the accused's right to be tried without undue delay. The ICC must thus maintain a fine balance between ensuring 'meaningful' as opposed to merely symbolic victim participation in the proceedings,on the one hand, and, on the other hand, ensuring that the rights of the accused to a fair and expeditious trial does not get jeopardized by this.

Pursuant to Article 68(1) of the Statute, the ICC has a responsibility to protect the "safety, physical and psychological well-being, dignity and privacy" of both victims and witnesses that come before the Court. The next section will address the protection of witnesses, and other witness-related issues in more in detail. For now, suffice it to note that the protection of victims and witnesses is a key concern for the Court, and that a special Victims and Witnesses Unit has been created within the Registry to ensure this.

The third aspect of the primary position of victims before the ICC is the possibility to obtain reparations. Article 75 of the Statute creates this possibility. Reparation may take the form of restitution, compensation and rehabilitation, but the Statute explicitly leaves it to the Court to 'establish principles relating to reparations to, or in respect of, victims'. Article 79, in turn, conceives the possibility of the establishment of a Trust Fund for Victims (TFV), for the benefit of victims and their families. The Court may allocate money and property collected through fines and forfeiture to this Trust Fund, and Article 75(2), in turn, provides that the reparations ordered by the Court may be paid from this Trust Fund. On 7 August 2012, the first decision on reparations was issued in *Lubanga*. There, the Trial Chamber established the principles and procedures to be followed, but did not rule on specific victim claims, because it identified the TFV as the principal agency to deal with reparations, subject to monitoring and oversight by a differently composed Chamber.[54] Because Lubanga was indigent, all reparations would have to be covered by the TFV in any case. An interesting issue was the question whether the Chamber could decide on the allocation of the TFV's budget that comes from voluntary contributions.

[53] Similarly: Christine van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2012) 44 *Case Western Reserve Journal of International Law* 475, p. 488.
[54] Cryer and others 2014 (n 24), p. 496.

According to the TFV, the Chamber cannot do this, while the Registry and the Chamber disagreed.[55]

Recently, the Appeals Chamber issued its Judgment on the Appeal from the Trial Chamber's Decision.[56] The Appeals Chamber amended the Trial Chamber Decision in order for it to be considered an 'order for reparations'. Most importantly, the Appeals Chamber held that, even if the accused is indigent, the reparations order must be directed to him or her.[57] Essentially, the Appeals Chamber determined that a Reparations Order must contain five factors: (1) it must be directed at the convicted person; (2) it must inform the convicted person of his or her liability; (3) it must specify and justify the character of the reparations ordered, which can be individual, collective, or both; (4) it must define the harm caused to victims as a result of the crimes and the modalities of reparations that is considered appropriate based on the circumstances of the case; and (5) it must either identify the victims eligible for reparations, or set out criteria to establish such eligibility. Finally, the Appeals Chamber ordered the TFV to present a draft implementation plan within six months. One significant drawback of the reparations scheme devised by the Appeals Chamber is that the Court can only grant reparations for the crimes of which the accused was actually convicted. This makes sense, because it is a decision on the liability of the accused. However, as was also recognized by the Appeals Chamber, this left victims of gender-based violence and sexual assault empty-handed. Therefore, the Appeals Chamber specified that the TFV could and should use its discretionary assistance mandate to assist victims of these crimes.

Indeed, the TFV has a broader mandate than merely executing the reparations orders of the Court. In addition to implementing court-ordered reparations, the TFV has a mandate 'to provide physical, psychological, and material support to victims and their families'.[58] Thereby, the TFV seeks to contribute 'to the realization of sustainable and long-lasting peace through the promotion of restorative justice and reconciliation.' To that end, the TFV has implemented a

[55] ibid; ICC, Decision Establishing the Principles and Procedures to Be Applied to Reparations, *Prosecutor v. Lubanga Dyilo* (ICC-01/04-01/06-2904), 7 August 2012, paras 269-273. Although the Chamber did emphasize its power to monitor and oversee the functioning of the TFV, it did refrain from making orders about the use of TFV's 'other resources' (see para 287).
[56] ICC, Judgment on the Appeals against the "Decision Establishing the Principles and Procedures to Be Applied to Reparations" of 7 August 2012, *Prosecutor v. Lubanga Dyilo* (ICC-01/04-01/06-3129), 3 March 2015.
[57] ibid, paras 102ff.
[58] De Brouwer and Heikkilä 2013 (n 47), p. 1361; See also: Trust Fund for Victims Website, http://www.trustfundforvictims.org/ > (Accessed 20 February 2015).

number of programs in Northern Uganda and the DRC.[59] It is not possible to discuss these programmes within the limited scope of the present paper. However, at the outset, it can be noted that the TFV's broader mandate has enabled outreach to victims of the crimes within the ICC's jurisdiction even before the cases in question had been finished.[60] The implementation of Court ordered reparations, however, is a lengthy process, which is made even lengthier by the fact that the trials themselves are significantly prolonged by extensive participation of the victims. As stated by ICC Judge Van den Wyngaert, 'the Court shuld ask itself whether the participation system that is set in place is "meaningful" enough to justify the amount of resources and time invested in it or whether it would be better to spend those resources and time directly on reparations', and perhaps on outreach more generally.[61] Be that as it may, it is clear that the ICC affords a significant position to the victims of the international crimes it has jurisdiction over.

2.4. Obtaining Witness Evidence – Problems of Cooperation and Protection

Modern international criminal prosecutions are built mostly on evidence presented in the form of witness testimony.[62] It must be noted that, in and of itself, this raises problems because the accuracy and reliability of – eye – witness testimony is increasingly falling into disrepute.[63] The problems surrounding the use of – sometimes questionable – witness evidence is a key issue affecting the legitimacy of international crimes cases, however, it is not the focus of the present inquiry.[64] Instead, this paper focuses on the problems that the ICC has faced in obtaining witness testimony, in particular in the context of ensuring the protection of witnesses who may be put at risk due to their testimony before the Court.

Like for other investigative measures, the ICC is largely dependent on States for obtaining witness testimony, both during the investigative phase and during the trial. Regarding the former, the Prosecutor (and the defence) can request State authorities to conduct the questioning on their behalf, or to conduct the questioning itself on the territory of the State.[65] If

[59] Trust Fund for Victims Website, 'Programmes' < http://www.trustfundforvictims.org/programmes > (Accessed 20 February 2015).
[60] Van den Wyngaert 2012 (n 53), p. 494.
[61] ibid, p. 495.
[62] Nancy Combs, *Fact-Finding without Facts: the Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010), p. 12.
[63] Ibid, p. 14; see also: IBA Witnesses Report (n 31), p. 6.
[64] For a full and convincing account, see Nancy Combs' Study cited in n 62 above.
[65] Art. 93(1) and 99(1) and (4) ICC Statute.

the Prosecution does not anticipate any problems, it can simply proceed to question the witness after it has notified and consulted with the State.[66] Problems arise where witnesses refuse to testify. The ICC itself has no power to compel the appearance of individuals in the investigative phace for questioning, nor to compel them to answer specific questions.[67] The ICC therefore fully relies on the assistance of States if it seeks to compel witness testimony in the investigative phase. In addition, it is important to note that, under certain circumstances, the ICC may admit testimony recorded in the investigative phase at trial, if the witness in question is unable to appear for direct examination.[68] There are several requirements for this, including the presence of both the prosecutor and the defence, which provides an important impetus for the Prosecution to ensure the presence of defence counsel, if it is doubtful whether the witness in question will be able to appear at trial. As will be seen, the Prosecution may wish to rely more extensively on prior-recorded testimony due to the difficulties of obtaining the presence of witnesses in Court during the trial phase.

During the trial phase, the ICC does not have the power to issue subpoenas to witnesses, unlike its ad hoc predecessors.[69] It may only 'require' the attendance of a witness, and may seek State cooperation in the execution of the request; however, the Court cannot oblige States to deliver a witness who refuses to testify.[70] This is obviously even more problematic when it comes to witnesses residing in non-States parties to the Rome Statute, which do not have any obligation to cooperate with the Court. Once the witness is present, however, the Court is empowered to compel him or her to answer questions, although questions have been raised regarding the effectiveness of the sanctions regime, thus rendering this power 'teethless'.[71] The absence of subpoena powers is problematic for a criminal court, in particular for one that relies largely on witness evidence given the general absence of documentary evidence regarding the

[66] Art. 99(4) ICC Statute; such a possibility is important because the involvement of the State authorities may deter the witness from questioning; see: Karel de Meester and others, 'Investigation, Coercive Measures, Arrest, and Surrender', in Göran Sluiter and others (eds), *International Criminal Procedure – Principles and Rules* (Oxford University Press 2013), p. 264.
[67] De Meester and others 2013 (n 66), p. 264.
[68] Art. 69(2) ICC Statute; Rule 68(a) ICC RPE.
[69] See Göran Sluiter, '"I Beg you, Please Come Testify"- the Problematic Absence of Subpoena Powers at the ICC' (2009) 12 *New Criminal Law Review* 590, pp. 592-599 for an examination of the Statute's legislative history regarding this issue.
[70] Nancy Combs, 'Fact-Finding Powers', in Göran Sluiter and others (eds), *International Criminal Procedure – Principles and Rules* (Oxford University Press 2013), p. 713.
[71] Rule 65 ICC RPE.; IBA Witnesses Report (n 31), p. 17.

crimes within its jurisdiction.[72] The IBA concludes that 'given the ICC's extensive reliance on live witness testimony, the Court's difficulties in compelling the appearance of witnesses could ultimately undermine the Court, deprive it of access to crucial witnesses and affect the fair conduct of proceedings.'[73]

One avenue that the ICC is increasingly exploring is the possibility to obtain testimony via video-link.[74] This has several advantages, such as limiting the costs and stress of traveling to the host-state, thus reducing the risks associated with testifying before the ICC for witnesses, since it makes witnesses' interaction with the Court 'less obvious. In addition, it removes the problematic legal questions regarding witnesses who might seek asylum, which would very much be welcomed by the Host State, the Netherlands.[75] However, defence counsel and ICC officials have both questioned the effectiveness of video-link testimony in relation to the truth-finding process, as it is more difficult to assess the reliability and credibility of a witness, on top of that, video-link testimony can incur many technical difficulties.[76] The ICC should therefore be cautious in relying too excessively on video-link testimony.

An important issue with regard to the ICC's ability to obtain witness testimony is the effectiveness of its witness protection scheme. Without adequate ways of protecting witnesses, many potential witnesses will be unwilling to testify or could even be induced to alter their testimony.[77] As stated above, Article 68(3) of the ICC Statute empowers the Court to take measures to protect victims and witnesses. In particular, the Court will need to provide security to individuals who are at risk as a result of their interactions with the ICC. This may take the form of protective measures, such as the non-disclosure of the identity of witnesses to the public, through, for example, *in camera* proceedings, or redacting public filings.[78] Many branches of the Court have a mandate to protect witnesses, as appears clearly from the Chart presented below. In short, the Prosecutor must assess the risks that witnesses may incur as a result of their testimony,

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[72] IBA Witnesses Report (n 31), p. 14.
[73] ibid.
[74] An option provided by Rule 67 ICC RPE; see also: Yvonne McDermott, 'Regular Witness Testimony' in Göran Sluiter and others (eds), *International Criminal Procedure – Principles and Rules* (Oxford University Press 2013), p. 869.
[75] IBA Witnesses Report (n 31), p. 18.
[76] Nancy Combs, 'Evidence' (2011) *Faculty Publications.* Paper 1178 < http://scholarship.law.wm.edu/facpubs/1178 > (accessed 4 March 2014), p. 329; IBA Witnesses Report (n 31), p. 18.
[77] Panel of Independent Experts, 'Expert Initiative on Promoting Effectiveness at the International Criminal Court' (December 2014), p. 245.
[78] Guido Acquaviva and Mikaela Heikkilä, 'Protective and Special Measures for Witnesses' in Göran Sluiter and others (eds), *International Criminal Procedure – Principles and Rules* (Oxford University Press 2013), p. 828.

the Chambers are empowered to order protective measures, and the Victims and Witnesses Unit of the Registry has a core mandate to provide protection, support and other appropriate assistance to witnesses and victims who appear before the Court. [79]

It is impossible to assess all issues that have arisen in the context of witness protection. However, one deserves highlighting. An effective protection scheme requires the possibility to relocate witnesses, if the circumstances so require. Within the ICC, the Registrar is mandated to negotiate relocation agreements with States.[80]

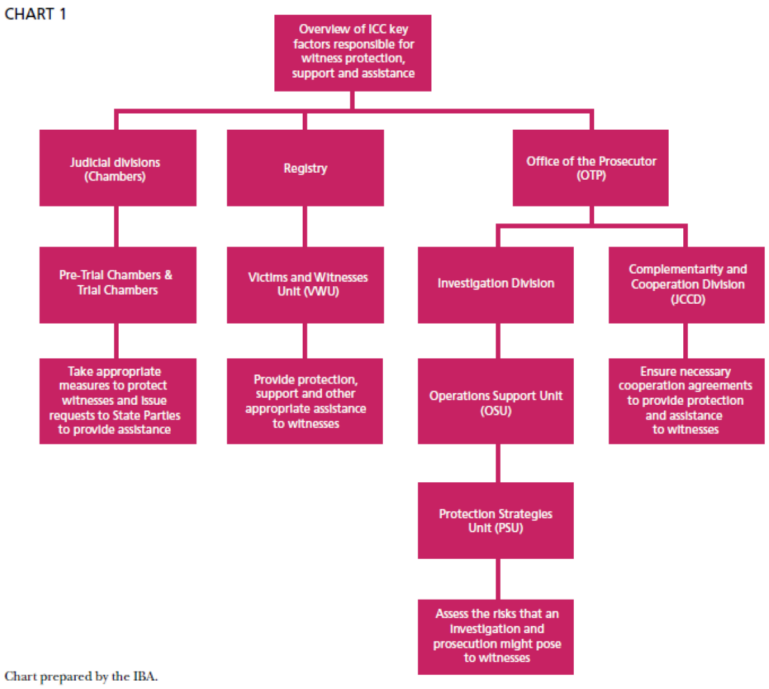

Figure 4: Overview of the ICC key factors responsible for witness protection. Source: IBA Witnesses Report (n 31), p. 29

The ICC has two operational protective measure systems that function beyond its premises in order to meet emergency protection needs of witnesses. The first is the so-called Initial Response System (IRS), which entails a 24/7 emergency response system that enables the extraction of witnesses from emergency situations. The second is the ICC Protection Programme, (ICCPP) which is aimed at the – permanent – relocation of witnesses and their close family. In 2013, the IBA reported that there were over 300 witnesses admitted into the ICCPP and the Kenya cases in particular have seen extensive relocation efforts.[81] Both these initiatives, the latter in particular, depend strongly on the cooperation of States. The permanent relocation of witnesses cannot be done without a State to which a witness can be relocated. To that end, the Registry is engaged in the procurement of Relocation Agreements. However, the

[79] IBA Witnesses Report (n 31), p. 28.
[80] Rule 16(4) ICC RPE.
[81] IBA Witnesses Report (n 31), p. 35.

IBA reported in 2013 that the ICC had only concluded twelve such agreements.[82] By now, this has increased to fourteen.[83] The absence of substantial numbers of agreement has been concluded to 'seriously restrict the ability of the Victims and Witnesses Unit to relocate witnesses' and to 'constitute an alarming shortfall in its ability to protect victims and witnesses at risk.'[84] Although the ICC, with the support of several States Parties, is actively engaged to address this problem, 'it will require the collective will of all States spearheaded by the ASP to seriously address the problems.'[85] More relocation agreements are needed, as well as more States willing to fund relocation to States with fewer financial means to support relocation.

2.5. The Effectiveness of the ICC

Obviously, a full in-depth assessment of the 'effectiveness' of the International Criminal Court is not possible within the scope of the present inquiry. However, it is possible to identify several key issues that have impacted on the effectiveness of the Court during the past years. A 2014 Expert Initiative on the Effectiveness of the ICC defined such 'effectiveness' as: 'the prompt, competent and economical delivery of justice'.[86] As such, effectiveness is defined in terms of the expeditiousness, quality and relative costs of the judicial process. It is not possible to strictly separate these elements of effectiveness as they are highly interrelated and mutually affect each other. For example, ensuring the quality of legal findings may require higher costs and more time. On top of that, this section's discussion is complicated by the fact that many issues affecting the Court's effectiveness have been discussed above. This section will therefore identify several crosscutting themes that impact on the effectiveness of the judicial process before the ICC in terms of its expeditiousness, its quality, and the costs of the Court. It is not possible to discuss these topics in-depth; instead, the core of the issue will be identified. The cross-cutting themes that have been identified are, first, States' cooperation with the Court, second, victim participation in the judicial process and its effects on the fairness and expeditiousness of the proceedings, third, the effectiveness of the Prosecutorial (investigative) strategies, fourth, the general expeditiousness of the proceedings, fifth, the quality of the judicial

[82] ibid.
[83] UN General Assembly, 'Report of the International Criminal Court on its Activities in 2013/2014' (18 September 2014) UN Doc A/69/321, para. 83.
[84] IBA Witnesses Report (n 31), p. 36.
[85] ibid p. 40.
[86] Expert Initiative 2014 (n 77), p. 3.

staff of the Court, and sixth and finally, the need to ensure sufficient financial means for the Court to operate effectively.

First, Obtaining cooperation continues to be a key challenge for the Court. The ICC's dependence on the cooperation of States and international organizations has been pointed out repeatedly in the above and need not be repeated here. The primary forms of cooperation that the Court relies on relate to the arrest and transfer of suspects, and the execution of investigative measures, which may include, for example, evidence-gathering and questioning and transferring witnesses. Generally, the ICC has been increasingly successful in getting suspects into custody. Currently, twelve arrest warrants are outstanding.[87] These can be divided into three categories: first, individuals who are in the custody of a State that is unwilling to transfer them (eg Simone Gbagbo and Saif al-Islam Gadaffi), second, nationals of non-State Parties who refuse to surrender (eg Omar al-Bashir), and fugitives evading justice (eg Joseph Kony). The failure to ensure the transfer into ICC custody of the former two categories of suspects is truly due to a lack of cooperation. The fact that several of the suspects in the second category travel internationally, including to ICC States-Parties, is particularly troubling. This is a key area where State cooperation with the Court needs to be improved, and the ICC needs the continued support of States Parties in that regard. In addition, the absence of effective cooperation in situations that have been referred by the Security Council is problematic, in particular due to the Security Council's failure to assist the Court in obtaining cooperation.[88] When it comes to other forms of cooperation, the ICC reported in 2012 that compliance with its requests for assistance was 72 %.[89] The reports in the following years only contain data regarding the number of requests sent out by the Court and are silent on compliance. Prior to that, the ICC reported an 85 % execution rate of its requests in 2009, and 70 % in 2011.[90] At the same time, it has been held that these number do not adequately represent the actual problems faced by the ICC in obtaining cooperation. For example, cooperation is particularly difficult in specific areas such as witness

[87] UNGA, ICC Report 2013/2014 (n 83), p. 2.
[88] Expert Initiative 2014 (n 77), p. 242, which therefore recommends, on p. 244, that, 'where the Council fails to [cooperate], the Prosecutor should not hesitate to suspend its investigations of that case and to give public notice of that fact to the Security Council'.
[89] UNGA, ICC Report 2013/2014 (n 83), para. 99.
[90] ICC ASP, 'Report of the Bureau on Cooperation' (15 November 2009) ICC-ASP/8/44, para. 40; ICC ASP, 'Report of the Court on Cooperation (18 November 2011) ICC-ASP/10/40, para. 10.

relocation and interim release for defendants.[91] Strengthening cooperation should be the first priority for the ICC and States Parties, as it is the key to ensuring the effectiveness of the Court.

This concern has become increasingly pressing due to increasing opposition to the ICC from African Union Member States. The ICC is being accused of being an instrument of colonisation due to the almost exclusive focus of its investigations on African States. The resistance against international criminal justice more generally first emerged in the context of the prosecution of Charles Taylor, the former Liberian head of State, by the Special Court for Sierra Leone.[92] The opposition strengthened following the indictment of Omar Al-Bashir, the incumbent President of Sudan, in 2009. Following its annual meeting in 2009, the AU reiterated its earlier decision that all AU Member States shall not cooperate with the ICC for the arrest and surrender of Al-Bashir, and it expressed 'concern over the conduct of the ICC Prosecutor'.[93] Several African States have expressed concern regarding what is considered the selective enforcement of international criminal law vis-à-vis African States, while powerful – Western – States are generally left alone. This is experienced as a double standard and as imperialistic.[94] 'The AU's hostile stance successfully branded the ICC across the continent as a racist institution, fixated with prosecuting African leaders.'[95] The election of ICC suspect Kenyatta to President of Kenya provided fresh fuel to this opposition. Kenya has been particularly vocal within the AU as well as within the ICC ASP in its opposition to the Court.[96] For example, it has proposed to amend the Statute in order to reinstate the immunity of heads of State as an impediment to prosecution and continues to push for resolutions and decisions within the AU that oppose the ICC. Finally, there is a continued concern that the AU will adopt a resolution calling on all AU Member States to withdraw from the Rome Statute. In that regard, the most active opponents of the ICC are Rwanda, Uganda, Sudan, Zimbabwe, the Gambia and Ethiopia.[97] The ICC and its supporters need to continue to engage in a constructive dialogue in order to regain its support in

[91] Similarly: Expert Initiative 2014 (n 77), p. 242.
[92] Ifeonu Eberechi, '"Rounding Up the Usual Suspects": Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance' (2011) 4 *African Journal of Legal Studies* 51, , p. 54
[93] Assembly of the African Union, 'Thirteenth Ordinary Session, 1-3 July 2009, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court' (July 2009) Assembly/AU/Dec.245(XIII) Rev.1.
[94] Eberechi 2011 (n 92), p. 84.
[95] Michela Wrong, 'Has Kenya Destroyed the ICC' (15 July 2014) in *Foreign Policy*, available online: < http://foreignpolicy.com/2014/07/15/has-kenya-destroyed-the-icc/ > (accessed 8 March 2015)
[96] See generally: Charles Jalloh, 'Kenya vs the ICC Prosecutor' (2012) 53 *Harvard International Law Journal* 269.
[97] MFA Archives.

this particular region, which will strengthen States' willingness to support and cooperate with the Court. In that regard, the ICC needs to address such criticism as valid, and needs to truly ensure its independence and impartiality from powerful States and not fear to investigate situations that might be sensitive in order to preclude accusations of regional bias.

Second, as has been described in the above, the prominent position of victims before the ICC has been hailed as an important achievement of international criminal justice. At the same time, its possible impact on the expeditiousness and fairness of the proceedings must be addressed.[98] The ICC and the ASP should continue to critically examine the modalities of victim participation and the effectiveness of the reparations scheme in order to remedy the possible harmful effects of such participation on the fairness and expeditiousness of the proceedings, and to ensure that victim participation is meaningful and effective.

Third, there has been much criticism of the effectiveness of the ICC's Prosecutorial Strategies. For example, the Prosecutor has been criticized for deciding to indict certain persons too quickly after the commencement of an investigation, without sufficient evidence.[99] In the Situation in Cŏte d'Ivoire, this resulted in the Pre-Trial Chamber initially declining to confirm the charges against Laurent Gbagbo, resulting in a delay of a year.[100] According to the aforementioned Expert Initiative, criticism of the prosecutorial strategegies has focused on, first, the timing and length of investigations; second, the quality of the evidence collected during the investigation and presented in court; third, the inappropriate delegation of investigative functions through, particularly the use of intermediaries; fourth, the failure to investigate exculaptory information equally, as required by Article 54 of the Statute; and sixth, the failure to properly analyse evidence and disclose potentially exculpatory material.[101] In 2013, the Prosecutor adopted a new strategic plan with which she sought to combat several of these deficiencies. First, the Plan moves from conducting 'focused investigations' to conducting 'in-depth, open-ended investigations while maintaining focus'. Second, the plan seeks to ensure that cases are as trial-ready as possible prior to the confirmation hearing. Third, the Prosecutor seeks to also focus on mid-level perpetrators in order to build cases against more senior accused. Fourth and finally, the structure of the office will be changed, for example, by hiring more senior prosecutors,

[98] See *supra* Section 2.4.
[99] Expert Initiative 2014 (n 77), p. 53.
[100] ibid, p. 54.
[101] ibid, p. 53, see p. 53ff for a thorough discussion of these issues.

enhancing the analytical function of the investigations division and ensuring stronger investigative relationships with States.[102]

Fourth, the average length of proceedings before the ICC thus far is substantial, although it may not be fair to judge the Court on its first few years of existence. To date, the ICC has completed three trials at first instance, which took around four-and-a-half, six, and six-and-a-half years for Ngudjolo, Lubanga, and Katanga respectively. The appeal in *Lubanga* has taken more than two-and-a-half years. Two further trials have commenced but are not proceeding expeditiously: Bemba has been in ICC custody for around seven years and closing arguments have taken place in November 2014. Furthermore, Ruto and Sang, who are not provisionally detained, waited around two-and-a-half years between their indictment and the commencement of their trial in September 2013. Some of the cases currently at the pre-trial stage have been plagued with delays. Gbagbo has been in ICC custody since late 2011, the confirmation of charges hearings have been completed on 28 February 2013 and the decision confirming the charges was issued in June 2014, while his trial is set to commence in July 2015.[103] The charges against incumbent Kenyan president Kenyatta were confirmed on 23 January 2012, less then a year after he was summoned. However, after almost three years of uncertainty, the Prosecutor dropped the charges against him in December 2014.[104] Finally, Ntaganda has been in ICC custody since March 2013 and the charges have been confirmed in June 2014. His trial commenced in September 2015, so the relatively swift progress in this case so far is promising.[105] Expeditiousness is an area where much ground is to be gained for the ICC. It is clear that the ASP is committed to this issue, for example, the Hague Working Groups, in

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[102] ibid p. 51; see also: ICC OTP, 'Strategic Plan 2012-2015 (11 October 2013) < http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf > (accessed February 2015).

[103] ICC, Decision on the Confirmation of Charges against Laurent Gbagbo, *Prosecutor v. Gbagbo* (ICC-02/11-01/11-656-Red), 12 June 2014; ICC Website, Situation in Côte d'Ivoire < http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/Pages/situation%20index.aspx > (accessed 4 March 2015).

[104] ICC Website, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta (5 December 2014) < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx > (accessed 4 March 2015).

[105] ICC Website https://www.icc-cpi.int/iccdocs/PIDS/publications/NtagandaEng.pdf (accessed November 17 2015) As the trial has been postponed, the editor changed the author's version. (scheduled at June 2015; < http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%)200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx > (accessed 4 March 2015).

particular the Study Group on Governance, is continuously assessing ways of expediting the proceedings, which is a commendable development that should be followed critically.

Fifth, it is essential to ensure the quality of Judges of the ICC, which is a very sensitive, but important issue. International criminal law and procedure are relatively novel bodies of law. As such, they pose many legal questions that cannot simply be answered by reverting to Statutes, or to a wealth of scholarship and legal tradition. This increases the importance of the quality of Judges, who often confront novel legal issues that combine questions of international criminal law, criminal procedure, international humanitarian law and human rights law. On top of that, international criminal judges have an almost unfettered discretion since there is hardly any form of external control. There is a very small pool of judges, only one instance of appeal and no form of external control. While international – human rights – courts and supervisory bodies, such as the European Court of Human Rights and the UN Human Rights Committee, often check domestic legal systems; the ICC is fully independent. The quality of ICC judges is therefore of the utmost importance.[106] The Statute enshrines strict selection criteria, ensuring a mix of judges with an academic background in international criminal- or international humanitarian law, and with trial experience. However, the selection procedure at the ICC has been criticised for its lack of transparency and the differences between the respective national processes by which candidates are selected. The voting process in the ASP has been said to resemble 'horse-trading more than an intelligent process for appointing the best judges'.[107] The ICC has instituted an Advisory Committee on Nominations that publishes reports on the merits of candidates, as a result of which the transparency of the system is improving, as is the quality of the candidates.[108] This is a good development that needs to be followed critically, as the quality of the ICC judiciary is of paramount importance to the Court's effectiveness and credibility.

Finally, the ASP needs to ensure that the Court and its institutions have sufficient means to effectively carry out their functions. International criminal justice is costly, and States Parties need to continue to recognize this and support the Court with sufficient financial means, both through their contributions to the budget of the Court as such, and through a willingness to incur

[106] On the quality of the international judiciary, see eg: Michael Bohlander, 'The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics' in Michael Bohlander (ed), *International Criminal Justice; a Critical Analysis of Institutions and Procedures* (Cameron May 2007).
[107] Expert Initiative 2014 (n 77), p. 225.
[108] See eg: ICC, 'Report of the Advisory Committee on Nominations of Judges on the Work of its First meeting' (31 May 2013) ICC-ASP/12/23.

additional costs for, for example, witness relocation, interim release, and the enforcement of sentences.

2.6 Ad Hoc Tribunals: The ICTY and the STL

The creation of the ICC in 1998 marked the establishment of the first permanent international criminal court. The negotiations on this instrument and the increased consensus on the need for such an institution were stimulated significantly by the creation and increasing success of two ad hoc predecessors that were established by the UN Security Council in 1993 and 1994, respectively.[109] The ICTY and the ICTR are *ad hoc* international criminal tribunals, created for the prosecution and punishment of alleged perpetrators of international crimes within the context of one specific conflict: the Yugoslav wars and the Rwandan genocide, respectively. They were the first international tribunals created since the Nuremberg and Tokyo Tribunals after World War II and their creation ushered in a period during which internationally supported prosecutions of core international crimes could count on strong support from the international community. Their ad hoc nature lies in the delimitation of their jurisdiction, both geographically and temporally. Between 1993 and 2007, international or internationalized ad hoc tribunals have been established to investigate and prosecute crimes committed in, for example, Sierra Leone, Cambodia, East Timor, and Lebanon.[110] Such ad hoc Tribunals are thus an important tool in the global fight against impunity. Therefore, this study briefly addresses two such Tribunals: the ICTY, which was the first, and the STL, which is the most recent one. This part of the study will briefly address the establishment and legal character of these Tribunals, as well as the major obstacles they faced and their major achievements in the period between 2009 and 2014.

2.6.1. The ICTY

The ICTY was established in 1993 by the UN Security Council in response to the atrocities committed in the context of the break-up of Yugoslavia. Its mandate was to prosecute individuals responsible for the most serious violations of international humanitarian law on the territory of the former Yugoslavia since 1991.[111] That means it had jurisdiction over the so called core inter-

[109] UN Security Council, Resolution 827,UN Doc S/RES/827, 25 May 1993; UN Security Council, Resolution 955, UN Doc S/RES/955, 8 November 1994.
[110] See generally: Cesare Romano, André Nollkaemper and Jann Kleffner (eds), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004).
[111] Art. 1 ICTY Statute.

national crimes: war crimes, crimes against humanity, and genocide. Unlike the temporal jurisdiction of the ICTR, which included 1994 alone, that of the ICTY was open-ended, which allowed for the investigation and prosecution of crimes committed after its establishment, including the genocide in Srebrenica, and even later the violence that accompanied the struggle for independence of Kosovo. Furthermore, unlike the ICC, which is intended as a court of last resort that is complementary to domestic criminal justice, the ICTY enjoys primacy over domestic courts, which means that the Tribunal can order the deferral of domestic proceedings of any state and take over the prosecution itself.[112] After a rocky start, the ICTY gained momentum in the late 1990s, with many cases in its docket and an increasing number of suspects actually getting arrested and handed over to the Tribunal.

The ICTY is generally considered quite successful. However, like any international institution, it faced and continues to face several key challenges. The way in which these have been addressed may be insightful for other international criminal courts in the future. However, at the same time, they may be due to a number of external factors that were unique to the situation in the former Yugoslavia. For example, the dependence of ICTs on state cooperation has already been pointed out in the above. In the case of the ICTY, as time progressed, states from the former Yugoslavia all experienced regime change that was key to enhancing their cooperation with the Tribunal. Former president Milošević was handed over to the Tribunal in 2001, a little over a year after his fall from power. Serbia's subsequent rocky transition to democracy, and firm international pressure from, in particular the USA and the EU were essential in ensuring increased levels of cooperation.[113] The same goes for Croatia, which became far more cooperative after its transition to democracy and with the prospect of EU membership in sight, for which full cooperation with the ICTY continued to be an absolute requirement.[114] This increased cooperation from states in the region was no doubt an essential element in the ICTY's ability to gain custody of suspects and conduct effective investigations.

[112] art 9(2) ICTY Statute, see also William Schabas, *The UN International Criminal Tribunals – the former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006), p. 58.
[113] See generally, Victor Peskin, *International Justice in Rwanda and the Balkans – Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press 2008), p. 61-91; Carla Del Ponte and Chuck Sudetic, *Mevrouw de Aanklager* (Bezige Bij 2008).
[114] See generally, Peskin 2009 (n 113), p. 119-148

A second key challenge for the ICTY, that has, without exception, also impacted the work of other ICTs, has been the complexity, size and consequently, the length of its trials.[115] Although there may be justifications for this, such as the seriousness of the crimes and the complexity of the cases, the average length of a trial before the ICTY is substantial. On average, a full trial, from the moment of arrest until the judgment on appeal lasts six years and two months before the ICTY.[116] Although this renders the ICTY significantly faster than the ICTR, where an average trial lasts over nine years, such lengthy periods still appear quite excessive, in particular given the fact that most accused persons are detained provisionally throughout their trial, when the presumption of innocence still applies.

This study focuses on the period between 2009 and 2014, which is arguably after the heydays of the ICTY. In resolutions from 2003 and 2004, the Security Council adopted a completion strategy, urging the ICTY (and ICTR) to complete its mandate as soon as possible, envisaging a closure of the ICTY in 2010.[117] Due to the late arrests of several – including very significant – accused persons and the length of certain trials, this has proven impossible, and it is now estimated that the final first instance trials will be completed in 2017, whereupon a (residual) Mechanism for International Criminal Tribunals will conduct the appeal procedures and address any and all remaining issues.

One of the prime focal points for the ICTY in the period 2009-2014 has thus been the completion of its work. In the start of the reporting period, the ICTY had completed proceedings against 126 out of 161 indicted persons.[118] That means it had either entered a final (appeal) judgment of guilt or innocence, through a full trial or through a guilty plea, or that the proceedings had been terminated for other reasons.[119] Only two of those 161 indicted persons were still at large in 2009, which exemplifies the increased cooperation from states from the former Yugoslavia, compared to the Tribunal's earlier years. At the same time, one of the individuals at large was Ratko Mladić, arguably one of the most important suspects before the ICTY, with regard to whom Tribunal investigators were convinced he was being protected up to the highest levels of

[115] See eg Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 *Mich J Int'l L* 79.
[116] Krit Zeegers, 'International Criminal Tribunals and Human Rights: Adherence and Contextualization' (PhD Thesis, University of Amsterdam 2015), p. 283 and 416, where a table is presented with data concerning the length of all trials conducted before the ICTY.
[117] UNSC Resolution 1503, 28 August 2003; UNSC Resolution 1534, 26 March 2004.
[118] ICTY, Annual Report 2009-2010, p. 4.
[119] For specific and current data, see: ICTY Website, 'Key Figures of the Cases' < http://www.icty.org/sections/TheCases/KeyFiguresoftheCases > (accessed 19 June 2015).

government in Serbia and Montenegro.[120] In both 2009 and 2010, the Tribunal's annual report noted increased cooperation from Serbia, but also called upon the government to increase its efforts to ensure the final arrests.[121] Both Hadžić and Mladić were apprehended in 2011, marking an important moment for the Tribunal in that all persons that were indicted by the Prosecutor had been 'accounted for'.[122] The judicial work of the Tribunal in the reporting period was marked by the completion of a number of significant cases. For example, the multi-accused trials against Popović and others and against Prlić and others were finally completed in 2010 and 2013 respectively. By the end of the reporting period, the ICTY had fully concluded proceedings against 141 out of 161 indictees, leaving proceedings against 20 individuals to be completed.[123] On top of that, the reporting period included the commencement of the two arguably most important trials since Milošević, namely those against Karadžić on 26 October 2009, and against Mladić on 17 May 2012.[124] The final trial of the ICTY, against Goran Hadžić, commenced on 16 October 2012, thus leaving no more cases at the pre-trial stage.

An important question that has occupied the Security Council, as parent organ of the ICTY, and the Tribunal itself, is how to formally arrange the winding down of the Tribunal, and how to address the work that would still be left to do. In the end, the Security Council decided to establish a Mechanism for International Criminal Tribunals (MICT),[125] which is the legal successor to the ICTY and the ICTR, tasked with continuing the work of these Tribunals and safeguarding their legacies.[126] The Arusha branch commenced operations in July 2012, while the The Hague branch started its work in July 2013.[127] the Mechanism will have the power to conduct review proceedings, supervise the enforcement of sentences and decide on pardon or commutation of sentences.[128] The MICT itself is not a subject of the present study, but the annual reports of the ICTY clearly – and logically – convey a strong relationship between the institutions, even

[120] See eg Del Ponte 2008 (n 113), p. 301 et seq.
[121] ICTY, Annual Report 2008-2009, p. 16.
[122] ICTY, Annual Report 2010-2011, p. 8, 13.
[123] ICTY, Annual Report 2013-2014, p. 4; see also: ICTY Website, 'The Judgment List' < http://www.icty.org/sections/TheCases/JudgementList > (accessed 21 June 2015), which shows that by now, proceedings against six further persons have been finalized.
[124] ICTY, Annual Report 2009-2010, p. 14; ICTY, Annual Report 2011-2012, p. 10.
[125] UN Security Council, Resolution 1966, UN Doc S/RES/1966, 22 December 2010.
[126] Gabrielle McIntyre, The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the former Yugoslavia and Rwanda' (2012) 3 Goettingen Journal of International Law 923, p. 926.
[127] ICTY, Annual Report 2012-2013, p. 7
[128] Guido Acquaviva, 'Was a Residual Mechanism for International Criminal Tribunals Really Necessary?' (2011) 9 *Journal of International Criminal Justice* 789; p. 795; See also: UN Mechanism for International Criminal Tribunals, 'About' < http://www.unmict.org/en/about > (accessed 21 June 2015).

more so since the ICTY President and Registrar concurrently serve at the MICT, and the MICT Prosecutor is concurrently ICTR Prosecutor.[129]

One of the most important challenges for the ICTY during the reporting period, which is closely related to the starting up of the MICT, were the problems it experienced in retaining qualified staff. Given the impending closure of the Tribunal, many of its staff members left the Tribunal or were intending to do so, presenting the ICTY with a brain-drain that had a negative impact on its ability to work effectively.[130] Another important priority has been both the transfer of proceedings to domestic courts in the former Yugoslavia under the Rule 11*bis* procedure, and the more general support of war crimes prosecutions in the region.[131] Rule 11*bis* was adopted as a part of the completion strategy, and allows the tribunal to refer the investigation and trial of relatively minor cases to domestic courts in the former Yugoslavia. The ICTY has successfully used this possibility with respect to thirteen individuals.[132] In that light, it is of vital importance that the domestic legal systems are well-equipped to process such cases, with regard to which cooperation with the ICTY can be vital, given its now more than twenty years of experience with trials of such a nature. Cooperation with domestic prosecutions is thus an important priority for the ICTY. For example, the ICTY Prosecutor has supported training, best practice development and information exchange, and it works actively to grant domestic prosecutors and investigators access to its database.[133] Finally, cultivating and guarding the Tribunal's legacy is an important priority, often connected to general outreach activity to publicize and promote the Tribunal's work in the region.[134]

2.6.2. The STL

The second ad hoc Tribunal that is addressed in this study is the Special Tribunal for Lebanon. The STL was created in 2007 in response to the 14 March 2005 bombing in Beirut that killed former prime minister Rafik Hariri and 21 others and injured a further 226 individuals. The deci-

[129] ICTY, Annual Report 2011-2012, p. 8.
[130] ICTY, Annual Report 2009-2010, p. 8; ICTY, Annual Report 2010-2011, p. 5; ICTY, Annual Report 2011-2012, p. 5.
[131] ICTY, Annual Report 2010-2011, p. 16.
[132] ICTY, Key Figures of the Cases: < http://www.icty.org/sections/TheCases/KeyFiguresoftheCases > (accessed 21 June 2015).
[133] ICTY, Annual Report 2011-2012, p. 18; ICTY, Annual Report 2012-2013, p. 15.
[134] ICTY, Annual Report 2010-2011, p. 17; ICTY, Annual Report 2011-2012, p. 19; ICTY, Annual Report 2012-2013, p. 17.

sion to involve the international community in the response to this attack was made soon after, when the UNSC established the UN International Independent Investigation Commission, which would carry out its investigative task until it was succeeded by the STL in 2009.[135] It became clear early that the Lebanese authorities were unable to conduct effective investigations and prosecutions due to the political sensitivity of the matter and the volatile security situation in Lebanon.[136] Purely international prosecutions would lack connectivity with the region, as a result of which the need for a hybrid tribunal was soon recognized. Involvement of the ICC was impossible for several reasons, including the fact that Lebanon had not, and did not intend to ratify the Rome Statute, and , most importantly, because the crime of terrorism is not within the Court's jurisdiction. The Security Council initially preferred to negotiate a treaty establishing such a tribunal with Lebanon, like had been done with regard to the ECCC and the SCSL. However, due the lack of political consensus in Lebanon, the STL was ultimately established through an SC Resolution adopted under Chapter VII, just like the ICTY and the ICTR.[137] This step raises several interesting legal questions that exceed the scope of the present study, but has also contributed to the numerous accusations that the STL is heavily politicized or is influenced as much by politics as law.[138]

The STL, although created by the UNSC like the ICTY and the ICTR, should be counted amongst the hybrid or internationalized tribunals like the SCSL, ECCC. Primarily because of its mixed composition of domestic and international judges and staff, and the fact that it applies an amalgam of domestic and international procedural and substantive law.[139]

Two aspects of the STL are truly unique compared to other ICTs. It is the first international court to address the crime of terrorism as such. Some other tribunals had jurisdiction over the crime of terrorism as a war crime or as a crime against humanity; but the STL is the first to have direct jurisdiction over the 'pure' crime of terrorism. However, the definition used is not an

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[135] UN Security Council, Resolution 1595, UN Doc S/RES/1595, 7 April 2005.
[136] Nicholas Michel, 'The Creation of the Tribunal in its Context' in Amal Alamuddin and others (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014), p. 17 ; see also: Bahige Tabbarah, 'The Legal Nature of the Special Tribunal for Lebanon' in Amal Alamuddin and others (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014), p. 33.
[137] UN Security Council, Resolution 1757, UN Doc S/RES/1757, 30 May 2007; on the exact nature of this resolution, which contained a draft agreement and the possibility for Lebanon to ratify this, see Michel 2014 (n 136), p. 25. adopted Resolution 1757 (2007)
[138] David Tolbert, 'A Very Special Tribunal: an Introduction' in Amal Alamuddin and others (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014), p. 3-4.
[139] Michel 2014 (n 136), p. 26-27.

international one, but the definition enshrined in Lebanese domestic law.[140] Secondly, the STL is the first international tribunal since Nuremberg that allows for trials in absentia. The Statute creates this possibility provided one of three requirements is met. An accused can only be tried in his absence if he (1) has waived his right to present; (2) has not been handed over to the Tribunal by the authorities concerned; or (3) has absconded or cannot be found.[141]

The STL opened its doors on 1 March 2009, almost four years after the attack on Mr. Hariri. The Annual Reports of the Tribunal convey the impression of a rocky start. Three main challenges can be identified that the Tribunal faced in its early years, and continues to face. Nonetheless, the years 2009-2014 saw several relevant developments, including the first decision of an international tribunal on the definition of terrorism, a rejection of the defence challenge of the legality of the tribunal, and confirmations of the indictments against five suspects. On top of that, the first trial, the *Ayyash et al.* case commenced on 16 January 2014,[142] and a fifth accused person was joined to this case on 25 February 2014.[143] This is currently the only ongoing case before the STL, besides several contempt cases, and it is being conducted in the absence of all the accused, pursuant to a decision of the Trial Chamber in 2012.[144] The impossibility to ensure the apprehension and transfer of the five accused persons continues to cast a shadow over the work of the STL. In addition, the scope of the STL's investigation was broadened in 2013 when three connected attacks, the attempted assassination of Marwan Hamade on 12 December 2004, the assassination of George Hawi on 21 June 2005, and then attempted assassination of Elias el-Murr on 12 July 2005, were added to the investigation.[145]

That brings is to the first significant obstacle to the STL's effective discharge of its mandate: its dependence on cooperation. Like all other ICTs, the STL is a 'giant without arms and legs' and it depends significantly on the moral and practical support of states, in particular Lebanon. The STL's situation is complicated further by the fact that Lebanon is the only state that has

[140] Art. 2 STL Statute, referring to the Lebanese Criminal Code, which defines terrorism in art. 314.
[141] Art. 22 STL Statute.
[142] STL, Annual Report 2013-2014, p. 9.
[143] STL, Decision on Trial Management and Giving Reasons for Joinder, *Prosecutor v. Ayyash et al.* (STL-11-01), 25 February 2014; see also: STL, Annual Report 2013-2014, p. 13.
[144] STL, Decision to Hold Trial *In Absentia*, *Prosecutor v. Ayyash et al*. (STL-11-01), 1 February 2012; confirmed by the appeal chamber later that year: STL, Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial In Absentia Decision, *Prosecutor v. Ayyash et al.* (STL-11-01), 1 November 2012.
[145] STL, Annual Report 2012-2013, p. 31.

a formal obligation to cooperate with the Tribunal, based on the relevant UNSC resolutions.[146] Other states are merely called upon to cooperate, which is a significant step back from the mandate of the UNIIIC, with regard to which Syria also had an explicit obligation to cooperate.[147] This is particularly problematic because the cooperation of states in the region, Syria in particular, is indispensable for the arrest of suspects and the collection of evidence. The STL has prepared a draft agreement that has been submitted to States.[148] However, it does not seem as though any state has actually concluded such an agreement with the Tribunal, since the STL's cooperation website mentions only agreements with Lebanon.[149]

In addition, extra challenges are presented by the at times volatile security situation in Lebanon, including the fact that the Lebanese government's enforcement officials cannot carry out their functions effectively in all parts of Lebanon. For example, OTP investigators have been physically threatened while carrying out their functions in Lebanon.[150] On top of that, the ongoing unrest in Syria further exacerbates the problems the Tribunal faces, since it cannot investigate in Syria, while the volatile situation there could theoretically provide an excellent safe haven for fugitives. Furthermore, the STL has had serious budgetary problems.[151] The annual report of 2011 attributed these costs to the novel and peculiar nature of the STL, since it investigates terrorism, which not only requires a large number of investigators, but also expensive and exceptional security measures. Startup costs and translation were also cited as explaining the relatively high costs. However, the Tribunal had significant problems in effectively discharging its duties, and the precarious financial situation in late 2011 has hampered the OTPs ability to conduct missions.[152] Later reports do not mention budgetary problems, so it can be assumed these problems have largely been resolved. Finally, the pace at which the STL is operating has been criticized. Its first, and thus far only, trial, commenced almost five years after the Tribunal opened its doors, almost nine years after the Hariri attack and the commencement of the investigation of the UNIIIC. The specific features of the STL as the first international tribunal investi-

[146] Göran Sluiter, 'Responding to Cooperation Problems at the STL' in Amal Alamuddin and others (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014), p. 137.
[147] Sluiter 2014 (n 146), p. 138.
[148] STL, Annual Report 2009-2010, p. 22.
[149] STL, Cooperation: < http://www.stl-tsl.org/en/documents/cooperation > (accessed 24 June 2015)
[150] STL, Annual Report 2010-2011, p. 26, reporting incidents from October 2010; see also: STL, Annual Report 2012-2013, p. 19; similarly, Annual Report 2014-2015, p. 20.
[151] see eg STL, Annual Report 2, 2010-2011, p. 36.
[152] STL, Annual Report 3, 2011-2012, pp. 32-33.

gating terrorism in a sensitive environment may go a long way in explaining this pace, however, it is problematic nonetheless, both for the fairness of the trial and for the legacy and impact of the Tribunal with respect to the victims and the Lebanese community.

2.7 Multilateral Mutual Legal Assistance and Extradition Treaty for International Crimes

The global fight against impunity for the commission of international crimes cannot and does not rest solely on the shoulders of the ICC and other international criminal courts and tribunals. States themselves have a crucial and central role, as also expressed by the complementarity principle, discussed in the above. However, it is important to emphasize that the Rome Statute by no means 'establishes' the obligation for States to investigate, prosecute and try international crimes cases. This obligation predates the Rome Statute and is firmly grounded in international law, both in international conventions and customary law.[153] Traditionally, the principle of *aut dedere aut iudicare* requires States to either prosecute persons suspected of having committed certain international crimes, or extradite them to a State who is willing to prosecute.[154] For example, the Geneva Conventions require States Parties to 'search for persons alleged to have committed, or to have ordered to be committed … grave breaches and shall bring such persons, regardless of their nationality, before its own courts [or hand them over to another High Contracting Party]'.[155] The UN Convention on Torture and Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) similarly requires States to criminalize acts of torture and to establish jurisdiction over such acts.[156] The UN Genocide Convention also requires States Parties to criminalize acts of genocide described in the Convention and to ensure the punishment of

[153] See generally: Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations' (1990) 78 *California Law Review* 449; Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41.
[154] Cryer and others 2014 (n 24), p. 74, who refer to Grotius as the original author of the principle.
[155] Art. 49-50 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (21 October 1950) 75 UNTS 970; Art. 50-51 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (21 October 1950) 75 UNTS 971; Art. 129-130 Geneva Convention Relative to the Treatment of Prisoners of War (21 October 1950) 75 UNTS 972; Art 146-147 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (21 October 1950) 75 UNTS 973.
[156] Art. 4-5 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (26 June 1987) 1465 UNTS 85.

individuals who have committed such acts.[157] These are just a few examples, but many more can be found in international law and practice.

As has been explained, the effective discharge of States' obligation to investigate and prosecute primarily hinges on the availability of domestic legislation that criminalises the conduct in question and that provides for jurisdiction. Several of the abovementioned international conventions include an obligation for States Parties to enact such legislation. However, the fact that there is no compressive convention on crimes against humanity, for example, makes that such crimes were only rarely included in domestic criminal Statutes, at least prior to the adoption of the Rome Statute.[158] As has been explained, the Rome Statute and the complementarity principle in particular have proven a catalyst for the domestic adoption of legislation criminalising the commission of war crimes, crimes against humanity and genocide. However, as has also been noted, a majority of States Parties to the Rome Statute have failed to enact implementing legislation. This is the first major obstacle to the effective investigation and prosecution of international crimes at the national level.[159] Another obstacle is the need for States to establish jurisdiction over such crimes.[160] The problems that have arisen for States in establishing jurisdiction over international crimes exceed the scope of this inquiry, but it is important to be aware of them in order to facilitate a comprehensive understanding of the issues at stake.

The practical obstacles to the national prosecution of international crimes constitute a third hurdle to the effective discharge of States' obligation to investigate and prosecute. Most fundamentally, the international nature of such cases poses unique difficulties that do not arise in ordinary domestic cases. Like the ICC and other international criminal courts and tribunals, States that investigate and prosecute such crimes will often require the cooperation of other States to, for example, secure the presence of accused persons and acquire access to physical and documentary evidence and witnesses. This issue is recognized by article 9 of the UNCAT, which

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[157] Art. 4-5 Convention on the Prevention and Punishment of the Crime of Genocide (12 January 1951) 78 UNTS 277.
[158] Cryer and others 2014 (n 24), p. 79.
[159] See generally, Olympia Bekou, 'Crimes at Crossroads: International Crimes at the National Level' (2012) 10 *Journal of International Criminal Justice* 677.
[160] See generally, Antonio Cassese, 'International Crimes in Domestic Jurisdictions' (revised by Paola Gaeta), in Antonio Cassese and others, *International Criminal Law* (3rd edn, Oxford University Press 2013), pp. 281-289 for an overview of international rules on domestic jurisdiction over international crimes; see also pp. 274-280 on different jurisdictional principles and their potential in the context of international crimes.

requires States Parties to 'afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences [enshrined in this Convention], including the supply of all evidence at their disposal necessary for the proceedings.'

The UNCAT thus recognizes that effective inter-State cooperation is pivotal to ensure the effective investigation and prosecution of the crime of torture. Although cooperation has the same essential role with regard to the investigation and prosecution of other international crimes, there are no equivalent provisions in other applicable treaties, and neither does the Rome Statute regulate cooperation *amongst States themselves* in this area. As a result, the international procedural legal framework for mutual legal assistance and extradition in the area of international crimes is incomplete and outdated. To combat this, several States, the Netherlands in particular, are pushing for negotiations on a new multilateral instrument for inter-State cooperation in the investigation and prosecution of international crimes.

Inter-State cooperation in criminal matters is a distinct field of international law that seeks to regulate and facilitate cross-border criminal investigations. Such cooperation normally involves two States: the requesting state, which wishes a certain (investigative) measure to be carried out in the territory of another state, and the requested state, which is asked to execute such (investigative) measures. These can include the arrest and extradition of suspects, the seizure of evidence, locating a specific witness, etc. Generally, a bi- or multilateral treaty on mutual legal assistance governs the relationship between the requested and requesting state. There is a plethora of different mutual legal assistance and extradition treaties across the globe, which govern a web of bilateral inter-State relations in this field. There are also several multilateral mutual legal assistance treaties that govern legal assistance related to specific forms of criminal activity, such as, for example, the UN Convention against Transnational Organized Crime and the UN Convention against Corruption.[161] The proposal of the Netherlands is to conclude a similar multilateral convention aimed specifically at extradition and mutual legal assistance in the area of international crimes. The Dutch efforts in this regard will be further assessed in section 3.5. of this paper. Here, the need for such a treaty and its envisaged parameters will be pinpointed.

[161] United Nations Convention against Transnational Organized Crime (29 September 2003) 2225 UNTS 209; United Nations Convention against Corruption (14 December 2005) 2349 UNTS 41.

As has been briefly explained, the need for this multilateral instrument arises from the outdated and incomplete legal framework applicable to legal assistance in the investigation and prosecution of international crimes. Although States are always free to provide assistance, experience has shown that a reply to a request for legal assistance is normally obtained much more expeditiously when a formal agreement exists because the States involved will have a legal duty to respond to such requests. In addition, many States require a domestic legal basis for the provision of such assistance, in particular when such requests involve the arrest and extradition of persons, or the execution of coercive measures, such as search and seizure operations or wiretapping. In addition, the creation of an instrument that regulates the provision of legal assistance is an effective tool to designate direct channels of communication, which will expedite judicial cooperation and enables the exchange of best practices, know-how and expertise. Several States have established specialized police and prosecution units to deal with international crimes, including Canada, Denmark, the Netherlands, Norway, Sweden and the United Kingdom.[162] The experiences of the Dutch specialized unit actually provided the impetus for the Dutch initiative because the difficulties they faced in acquiring foreign cooperation in their investigative efforts led the Dutch Ministry of Justice and the MFA to investigate the possibility of creating a new multilateral instrument that could address their concerns.[163]

The States that are spearheading the initiative for a multilateral treaty have clarified that the content of this instrument will be modelled on existing arrangements for extradition and mutual legal assistance, with some slight adaptations that pertain specifically to cooperation in the investigation and prosecution of international crimes. Without going into the technical specifics, the Agreement would, for example, include provisions on extradition, which would essentially offer a legal basis for extradition without derogating from the traditional rules pertaining to this issue such as the principles of specialty and non-bis in idem. It would also cover a broad range of issues that are normally regulated in such treaties, including the freezing of assets, protection of witnesses, transfer of criminal proceedings, seizure and confiscation, disposal of confiscated proceeds of crime or property, taking evidence or statements from persons, searches and seizures, service of judicial documents, identification or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes, facilitating the

[162] Cryer and others 2014 (n 24), p. 88.
[163] Interview with MFA Official.

voluntary appearance of persons in the requesting State Party, designating a central authority and channel of communication, videoconference, assistance to and protection of victims, training and technical assistance.[164] At this point, it is unclear whether, and if so, when, actual negotiations of this envisaged instrument will commence. The group of States spearheading this initiative have gathered support of a like-minded group of around forty States.

[164] The Netherlands MFA, 'Towards a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes' (on file with the author).

3. DUTCH EFFORTS IN THE GLOBAL FIGHT AGAINST IMPUNITY

Several departments within the MFA as well as within the Justice Ministry deal with international criminal justice-related matters. It is important to have a clear picture of the key players when it comes to devising and executing Dutch foreign policy in this area prior to commencing the analysis. Within the MFA, two departments play a central role. First of all, the Multilateral Organizations and Human Rights Department (MOHRD) is the coordinating department. In addition, the Legal Affairs Department (LAD) has an important role in evaluating the legal aspects of all issues that arise in the context of the Dutch position with respect to the ICC, such as, for example, proposed amendments to the Rome Statute or to the Rules of Procedure and Evidence. Third, the Netherlands Ambassador to the ICC and OPCW plays a key role, in close cooperation with the central departments of the MFA, the MOHRD in particular. Fourth, the Cabinet and Protocol Department (CPD) is in charge of all (practical) host-state related issues. In addition, during the past years, the MFA appointed a special International Organizations Ambassador who was tasked with host-state policy matters related specifically to promoting the Netherlands generally and The Hague specifically as a welcome environment for international organizations. Her specific contribution falls beyond the scope of this research, since an evaluation of host-state matters will be conducted separately. Still, as will be seen, host-state matters have had a spillover effect into all Dutch foreign policy regarding international justice institutions, as a result of which they cannot be excluded completely. Finally, the diplomatic missions across the globe, in particular those in countries where the ICC is investigating play an important role in gathering and fostering local support for the Court and other efforts to combat impunity at the domestic level. The Permanent Mission of the Netherlands to the UN in New York deserves special mention, as many ICC and international justice policy issues are discussed in New York, and the ASP is held there biannually.

Furthermore, it is important to note that the Netherlands strives, as much as possible, to operate jointly with its EU partners and within the context of the European External Action Service (EEAS). The Legal Council Working Group of the EU has a subcommittee on the ICC (COJUR-ICC) that gathers several times a year, in the context of which all ICC-related matters are discussed and, if possible, a coordinated EU standpoint is formulated. Finally, it is important

to be aware of the special position of the Netherlands as the Host-State of the ICC, the ICTY and the STL. This special position has a distinct impact on the position taken by the Netherlands on various issues, as will be seen in the following.

This part of the paper thus addresses the Dutch strategies, policies and their effects in the area of international justice broadly, and the ICC, ICTY and STL specifically. The first section of this part addresses general issues, in particular the way in which policies are developed and then coordinated and the extent to which host-state issues have impacted on – the perception of – Dutch foreign policy in this area. Subsequently, the Dutch policies and the way in which these have generally been implemented will be discussed along the lines of six central themes: first, the universal ratification of the Rome Statute; second, fostering global support for the ICC, ICTY and STL (with a particular focus on African Union anti-ICC sentiments); third, stimulating cooperation with the ICC, ICTY and the STL; fourth, strengthening the – legal – frameworks of the ICC, ICTY and STL; and fifth and finally strengthening the complementarity principle and the domestic prosecution of international crimes, generally, in particular through the Dutch efforts for a Multilateral Treaty on Extradition and Mutual Legal Assistance in the area of international crimes.

3.1. General Policy Matters

Article 90 of the Dutch Constitution tasks the government with the strengthening of the international legal order. The Minister of Foreign Affairs has repeatedly stated that the Dutch support to the ICC should be understood in that context. The Dutch policy of providing direct support, and fostering global support for the ICC is a direct consequence of the Dutch mission to strengthen the international legal order, which ties in neatly with the Dutch foreign policy on human rights.[165] In addition, the Dutch government routinely emphasizes the central role it envisages for the ICC in the global fight against impunity.[166] In fact, many MFA officials that have been interviewed for this study referred directly to article 90 of the Constitution when asked to identify the reason for the strong Dutch support for the ICC and ending impunity.[167] In

[165] MFA, Letter to Parliament regarding the 2013 Assembly of States Parties (6 November 2013), p. 2; MFA, Letter to Parliament regarding the 2014 Assembly of States Parties (21 November 2014), p. 1.
[166] See eg: MFA, Letter to Parliament regarding the Dutch Foreign Policy on Human Rights in 2012 (9 March 2012), p. 4.
[167] Interviews MFA Officials.

addition, there appeared to be a certain sense of pride amongst MFA officials of the Dutch reputation in this area which is considered important to uphold. Even more so given the fact that the Netherlands hosts many of these institutions.[168] This reputation was also acknowledged by several representatives of foreign embassies that have been interviewed.[169] One specifically mentioned the Dutch constitutional obligation to promote the international legal order and said that in her/his experience, this obligation permeated Dutch foreign policy regarding international justice.[170]

An important question is how this general obligation translates into specific policy positions and strategies. On a general level, Dutch foreign policy is aimed at supporting international justice, combating impunity, and strengthening existing international tribunals, in particular the ICC, but also the ICTY and STL. An internal policy document identified the Dutch priorities regarding the ICC for 2014, in relevant part, as follows: strengthening the Court's universality; fostering the global support for the ICC, in particular amongst African Union Member States; strengthening the complementarity principle, in particular through the envisaged multilateral treaty on mutual legal assistance and extradition for international crimes; strengthening the ICC's effectiveness; and supporting the Court through the Dutch contributions to the The Hague Working Groups.[171] These priorities also resemble those of the prior years, as will be subsequently shown. The policy towards the ICTY, a tribunal in the final years of its existence, has different priorities. In particular: safeguarding the Tribunal's legacy, supporting outreach to the region, and above all, maintaining a smooth host-state relationship.[172] Priorities related to the STL are supporting efficient and effective proceedings, safeguarding the independence and impartiality of the Tribunal, as well as ensuring and maintaining an effective host-state relationship with the Tribunal, just like regarding the ICC and ICTY. The subsequent sections will further develop the Dutch policy positions regarding specific topics.

First, it is interesting to see how the Dutch policy positions are developed, how they are put in practice – on a general level – and whether and how this is coordinated within the MFA. MFA Officials explained that the 'fourth estate' plays a key role in formulating and developing the Dutch policy positions. Although the Minister is finally responsible, the civil servants have

[168] Interview MFA Official.
[169] Interview Representative Foreign Embassy.
[170] Interview Representative Foreign Embassy.
[171] MFA Archives.
[172] Interview MFA Official.

the expertise on these issues and often have more experience. On important matters, in particular where choices have to be made, the Minister is consulted since s/he has the final say. Otherwise, day-to-day business is conducted within the confines of the general parameters of Dutch foreign policy. Every year, the Minister sends a letter to parliament regarding the ICC, the formulation of this letter was often mentioned as an important moment for stocktaking, for formulating new priorities, and as an important tool in clarifying and coordinating the MFA's policy in the area of international justice and the ICC.[173]

In that regard, it is important to note that there are regular coordination meetings on the ICC, as well as on 'courts and tribunals' generally, which include criminal tribunals such as the ICTY and the STL, but also other international institutions such as the Permanent Court of Arbitration and the ICJ. These meetings are generally chaired by the Director of the MOHRD, and are attended by members of all relevant departments of the MFA, as well as of the Justice Ministry. ICC and general international tribunal-specialists from the MOHRD and the LAD attend, as well as their superiors. Members of the CPD and the Justice Ministry also attend, as well as, generally, the Ambassador to the ICC and the International Organizations Ambassador.[174] During these meetings, current developments are discussed and if necessary, Dutch responses are formulated. Research into the agenda and minutes of these meetings has shown that a majority of the topics discussed are host-state related matters such as witnesses and acquitted persons who have requested asylum; this goes in particular for the 'general' Courts and Tribunals meetings.[175] The meetings on the ICC also address broader issues affecting the effectiveness of the Court, such as global support for the ICC, the Dutch agenda for the ASP, and developments in the Hague Working groups. In addition to the physical meetings at the MFA, research into the archives shows that whenever issues come up, when decisions have to be made or positions formulated, all relevant departments are included in the discussion, generally via e-mail.[176] An MFA Official at the PM in New York stated that there is frequent and in-depth contact between the relevant departments of the Ministry in The Hague and with the Missions abroad.[177] Similarly, MFA cables reveal that there is a lot of contact between the Missions and the capital on ICC and internationaljustice related topics. Frequent updates are sent to The Hague

[173] Interview MFA Official.
[174] MFA Archives.
[175] MFA Archives.
[176] MFA Archives.
[177] Interview MFA Official.

and country specialists at the MFA and at the Missions are generally included in ICC related discussions whenever this is required.[178]

Generally, representatives of foreign Embassies in The Hague did note that the division of labour between different departments of the MFA and the Justice Ministry is not always clear to them.[179] It was also stated several times that when dealing with the MFA, there was often a different person, both because of the involvement of many different departments, but also because of the frequent degree of rotation of individuals.[180] Two diplomats specifically mentioned that the relationship between the ICC Ambassador and the MOHRD was not entirely clear to them.[181] In that regard, it might be interesting to note that until 2007/2008, the MFA harbored an ICC Taskforce, with a 'director' (whereas now it falls under the general directorate of the MOHRD). The relevance of this specific directorate and taskforce, however, was connected to the initial years of the ICC. An MFA official noted that after taskforce ended, the coordination between different departments did not deteriorate.[182] Indeed, a majority of representatives of foreign Embassies emphasized that this lack of clarity had never led to any concrete problems for them, although one mentioned they were sometimes unsure as to which MFA department to contact regarding specific issues.[183] In addition, two specific incidents that may point at a lack of coordination within the MFA were mentioned during these interviews. Two representatives mentioned that during the 2014 ASP, the Permanent Mission in New York appeared to have had a different position than the ICC ambassador regarding the question whether states from the Eastern Europe group should be included in meetings of the Western Europe and Others group.[184] Another representative mentioned an incident where the ICC Ambassador and the International Organizations ambassador had a public disagreement in a meeting, which s/he said came across as slightly unprofessional.[185]

Generally, however, the representatives of foreign embassies were positive about the coordination and coherence of the Dutch positions on international justice related matters.[186]

[178] MFA Archives; Interviews MFA Officials.
[179] Interviews Representatives Foreign Embassies.
[180] Interviews Representatives Foreign Embassies.
[181] Interviews Representatives Foreign Embassies.
[182] Interview MFA Official.
[183] Interviews Representatives Foreign Embassies.
[184] Interview Representative Foreign Embassy.
[185] Interview Representative Foreign Embassy.
[186] Interviews Representatives Foreign Embassies.

They lauded the professionalism and expertise of several specific officials. All in all, it thus appears that the MFA does an effective job in including all relevant departments in the formulation and execution of their policies, and in ensuring coordination and coherence among the relevant actors.

One final issue that needs to be discussed is the impact of host-state matters on the general Dutch policy positions regarding the ICC. Naturally, the fact that The Hague hosts many international justice institutions has an impact on the MFA's positions regarding these institutions. It is both a root-cause and a result of the Dutch commitment to promoting the international legal order that the Netherlands chooses to host these institutions. However, it seems that host-state issues are sometimes overemphasized at the expense of Dutch support to the ICC. This appears, firstly, from the fact that host-state issues generally appear higher on the Agenda of MFA meetings on the ICC and other courts and tribunals than any other issues.[187] To a certain extent, this is understandable since they have a more direct effect on the Netherlands. At the same time, it is important that the MFA is cautious against a singular focus on host-state issues, as this may negatively impact the Dutch image as a genuine promotor of the international rule of law. Generally, all representatives of foreign Embassies that have been interviewed stated that Dutch policy positions on the ICC are heavily informed by their position as host-state.[188] This was unanimously emphasized and identified as the key problem of Dutch foreign policy regarding the ICC. Generally, room for improvement was identified in the area of being a 'welcoming' host-state. However, all representatives also mentioned the improvements during the past years and the very positive impact of Ambassador Stehouwer in that regard. Specific issues pertaining to international justice that were mentioned were, first and foremost, the Dutch position regarding witnesses and acquitted persons requesting asylum.[189] One representative even called the Dutch psotion in this area unreasonable.[190] The Human Rights Watch official interviewed was also extremely critical of the Netherlands' handling of this specific issue, as in her opinion, it had resulted in the flagrant violation of the involved individuals' human rights.[191] Most Embassy representatives expressed an understanding of the difficult position of the Netherlands as host-state, but still emphasized that this was a definite area for improvement.

[187] MFA Archives
[188] Interviews Representatives Foreign Embassies.
[189] Interviews Representatives Foreign Embassies.
[190] Interview Representative Foreign Embassy,
[191] Interview NGO representative.

Some stated that the Dutch do not seem to fully appreciate the benefits of hosting international institutions. In addition to the asylum seekers issue, many representatives mentioned difficult debates about the costs for the ICC permanent premises and were negative about the Dutch position on this issue.[192] To a certain extent, the MFA seems aware of this issue, and in 2014, an internal meeting on Courts and Tribunal policy and the role of NL as host-state noted that the division of labour between the different ministries and departments should be improved internally and communicated better externally. In addition, it was concluded that the Dutch should better explain and communicate their position and efforts as host-state to these institutions. However, it must be emphasized that overall, the representatives of foreign embassies did emphasize their generally very positive impression of Dutch foreign policy in the area of international justice and towards the ICC specifically. The Dutch are known for their strong and principled support to the Court and genuine commitment to upholding the international rule of law.[193]

3.2. Universality of the Rome Statute

Promoting universal ratification of the Rome Statute is a key focus of Dutch foreign policy. According to the MFA, the government continuously pushes for universal ratification, bilaterally as well as in the EU context.[194] Such promotion of ratification can take many shapes and forms.

For example, the MFA often invites delegations of foreign governments to The Hague to meet with international criminal justice institutions and their representatives and provides support to these visits. The Ministry not only provides logistical support to such visits, but also participates in them. Such participation may entail, for example, inviting foreign guests to the MFA's premises and engaging them in a dialogue about the merits of ratification and answering any concerns expressed. The MOHRD plays a central role in such visits, as does the Netherlands Ambassador to the ICC and OPCW. For example, the Malaysian Justice Minister visited The Hague in December 2012 and the Indonesian vice-Minister for Justice and Human Rights visited

[192] Interviews Representatives Foreign Embassies.
[193] Interviews Representatives Foreign Embassies.
[194] MFA, Letter to Parliament regarding the 2009 Assembly of States Parties (5 November 2009), p. 1; MFA, Letter to Parliament regarding the 2010 Kampala Review Conference on the Rome Statute (18 May 2010), p. 1; Letter to Parliament regarding Assembly of States Parties 2010 (29 November 2010), p.1; MFA, Letter to Parliament regarding the 2012 Assembly of States Parties (9 November 2012), p. 2; MFA, Letter to Parliament on the International Criminal Court (8 April 2013), p. 2.

in March 2013. These guests were received by the Dutch Foreign Minister, the State Secretary for Security and Justice, as well as by representatives of the ICC, the ICJ and other international legal institutions in The Hague. The primary purpose of these visits was to encourage ratification. Subsequent to such visits, the Dutch MFA strives to continue a dialogue about ratification.[195] Similarly, in 2014, a delegation of ministers and parliamentarians from Jamaica has been received on directorate level to stimulate ratification.[196] In addition, during the reporting period, delegations of representatives of the Kurdish people and from Somalia have also been received.[197] Currently, the MFA is contemplating similar visits from delegations from the USA and Egypt.[198] Similarly, when a delegation of the ICC visited Guatemala to encourage ratification, the Netherlands Ambassador to Guatemala participated in the visit and offered technical and logistical support to the Guatemalan officials.[199]

Some of such visits have been organised and coordinated by an NGO, Parliamentarians for Global Action (PGA), which receives financial support from the MFA. The MFA thus contributes to this NGO's universal ratification campaign. Similarly, the MFA sponsors the Coalition for the International Criminal Court (CICC), a coalition of NGOs that engages in various campaigns to support and strengthen the ICC.[200] One of their primary focal points is promoting universal ratification, through its campaign 'A Universal Court with Global Support'.[201]

Representatives of the MFA further habitually bring up the importance of ratification in bilateral contacts. For example, during official State visits, policy officers of the MOHRD will make an estimation of whether it will be useful to bring the issue up, and if so, it will ensure its inclusion on the agenda as it is a policy priority for the Ministry.[202] In addition, members of Dutch diplomatic Missions across the globe may bring the issue up in their bilateral contacts, if it is considered opportune. In addition, an MFA official has stated that cooperation treaties concluded by the Netherlands or by the EU generally include clauses on the ICC.[203] More

[195] MFA, ICC Letter 2013 (n 194), p. 2; MFA, ICC ASP Letter 2013 (n 194), p. 6.
[196] MFA, ICC ASP Letter 2013 (n 194), p. 1.
[197] Interview MFA Official.
[198] ibid.
[199] MFA Archives.
[200] Interview MFA Official; see also: MFA, ICC Letter 2013 (n 194), p. 6.
[201] CICC Website, 'A Universal Court with Global Support' < http://www.iccnow.org/?mod=universalcourt > (accessed 5 March 2015).
[202] Interview MFA Official.
[203] Interview MFA Official.

specifically, for example, the Dutch Ambassador in Turkey urged the Turkish Foreign Minister to consider ratification and to cooperate more closely with the ICC.[204] Moreover, effective implementation of the Rome Statute in domestic law is a subsidiary priority. For example, the Dutch Ambassador in Kinshasa has urged DRC officials to increase their efforts to implement the Rome Statute in domestic law.[205] The Netherlands has also offered to finance a project to support the efforts towards implementation.[206] Finally, during the Universal Periodic Review of the UN Human Rights Council, of which the Netherlands is a member, the Dutch representatives habitually question States that have not yet ratified the Rome Statute about this, and press for ratification.[207]

At the same time, the interviews with representatives of foreign embassies indicate that the Dutch are not regarded as having a 'specific' or particular focus on universality. Most representatives stated that all countries that were interviewed are on an equal level in that regard, although the UK was sometimes identified as making a stronger effort.[208] In addition, one MFA official stated that it should be acknowledged that, for the moment, the ICC seems to have reached its limit in terms of number of Member States, and focus should perhaps be diverted elsewhere for the time being.[209]

3.3. Fostering Global Support for International Courts and Tribunals

In order to function effectively, it is essential that States cooperate with the ICC and other international tribunals, and assist them in carrying out investigative measures and arresting and surrendering suspects. In addition, for the ICC, ICTY and STL to achieve their mission to end impunity and to contribute to reconciliation and peace, it is important that they are regarded as independent and fair institutions.

However, as has been discussed above, the ICC is subject to serious attacks on its legitimacy, in particular from the African Union and its Member States, some of which accuse the ICC of regional bias, and paint the institution as a neo-colonial or imperialist tool of Western

[204] MFA, Letter to Parliament regarding Al Bashir's Visit to Turkey (11 November 2009), p. 2.
[205] MFA Archives.
[206] MFA Archives.
[207] Interview MFA Official; see also: MFA, ICC ASP Letter 2013 (n 194), p. 6; MFA, ICC ASP Letter 2014 (n 194), p. 1.
[208] Interview Representative Foreign Embassy.
[209] Interview MFA Official.

States. The Dutch MFA is keenly aware of this problem and is actively engaged in efforts to correct this image. For example, in 2014, the MFA prepared a document that has been spread to all the Dutch Missions in African States with a strategy regarding how to respond to criticism of the ICC in this light. It provides several examples of possible answers to accusations of the ICC as being a neo-colonial institution, and explains that the ICC is also conducting preliminary investigations in a number of States outside the African continent.[210] Dutch Embassies in AU Member States were also specifically instructed to bring up these arguments at opportune moments in the run-up to the 2013 AU Summit, although they were also instructed not to engage in active outreach on this issue.[211]

It is difficult to ascertain to what extent and on how many occasions representatives of the Dutch MFA have employed these strategies in their bilateral contacts with representatives of governments of African States, but the Government has stated this happens regularly.[212] Interviews with MFA Officials convey a similar impression and it is supported by research into MFA cables and its general archive.[213] For example, the Ambassador in Accra, Ghana, employed this strategy in a meeting with the Ghanaian Foreign Minister in 2013 when the latter accused the ICC of targeting African States.[214] Similarly, during an official State visit of the Minister for Foreign Trade and Development Cooperation to Uganda in 2013, she urged President Museveni to support and cooperate with the ICC.[215] Specifically, she empahsised that negative declarations and resolutions emanating from the AU were not helpful in supporting the effectiveness of the ICC.[216] Similarly, the Dutch Ambassador in Kampala had a meeting with the Ugandan Foreign Minister and discussed support for the ICC.[217]Another example is the Dutch Embassy in Kinshasa's effort to ensure faster handling of visa requests from DRC citizens if they are related to visits to the ICC.[218] Such visits are an important aspect of the ICC's outreach activities and ensure the visibility of the Court's activities amongst, particularly, victim communities.

[210] MFA Archives.
[211] MFA Archives.
[212] MFA, ICC ASP Letter 2013 (n 194), p. 3.
[213] Interviews MFA Officials; MFA Archives.
[214] MFA Archives.
[215] MFA, Letter to Parliament Answering Questions on the ICC's Position in Africa (13 June 2013), p. 3.
[216] MFA Archives.
[217] MFA Archives.
[218] MFA Archives.

Generally, the Dutch often publicly express support for the ICC and for other international tribunals. For example, in their contributions to debates in the UNGA.[219] This applies more broadly than to the ICC alone, for example, one MFA official mentioned that in 2014, Serbia's contribution to the UNGA expressed a sentiment very hostile to the ICTY, whereupon the Dutch representative openly disagreed and expressed support for ICTY.[220] Furthermore, the Dutch sponsor the yearly UNGA resolution on the ICC, and thus coordinate the negotations on this. This can be very difficult, since all UNGA members must agree as it has to be adopted by consensus. Essentially, the fact that the Dutch sponsor this resolution aids its image as a staunch supporter of the ICC and also support the Dutch authority on ICC related matters.[221] Within the UN context, an important policy priority for the Netherlands is the financing of ICC investigations referred to the Court by UNSC. However, this is a sensitive issue facing strong opposition from the USA in particular, as a result of which no real results have been accomplished in this area.[222] The STL has had similar problems with maintaining funding, as explained in the above. The Netherlands has exerted diplomatic pressure on the Lebanese government to fulfil its obligation to pay its part of the STL Budget, even when the government was openly hostile to the Tribunal. One MFA official stated that the Dutch thus contributed to ensuring that the Lebanese contributions never halted.[223]

At the same time, interviews with MFA officials reveal that it is sometimes difficult to publicly support the ICC in certain countries where it is under heavy scrutiny.[224] As a Western power, the Netherlands could do more harm than good to the ICC. Another issue that was often mentioned was the danger that the ICC is regarded as a Dutch institution, which should be avoided according to MFA officials, because it will harm both the Netherlands and the ICC. One Dutch embassy has therefore chosen to support NGOs that support the ICC, instead of publicly campaigning for the ICC itself.[225]

The Netherlands also organizes specific events to foster support for the ICC. For example, it organized a visitors' programme in 2012 for influentials from various African States. In October 2013, the Netherlands, in cooperation with the Swiss embassy in the Netherlands and

[219] MFA Archives.
[220] Interview MFA Official.
[221] Interview MFA Official; confirmed by Interviews Representatives Foreign Embassies.
[222] Interview MFA Official.
[223] Interview MFA Official.
[224] Interviews MFA Officials.
[225] Interview MFA Official.

the ICC itself, organized an event for representatives from the diplomatic community in both The Hague and Brussels, focused on how the ICC could gain and strengthen its support on the African continent, where representatives from around ten African States were present.[226] In addition, over the past years, the Netherlands has organized several seminars on cooperation with the ICC in cooperation with the Norwegian Embassy in several African States, which have been attended by many representatives from numerous African States.[227] These seminars will be discussed further under the heading of fostering cooperation, but Dutch representatives also often address the importance of broader, moral support for the ICC in such meetings.[228] Overall, the Dutch government emphasizes that retaining and increasing support for the ICC on the African continent is a key policy priority for the Netherlands.[229]

Furthermore, the Dutch MFA has engaged in a joint initiative with the City of The Hague in the 'Peace & Justice Project'. This Project aims to foster global support in the fight against impunity, both on the domestic and the international level, through public diplomacy and other activities.[230] The focus is thus broader than on support of the ICC alone, but this is a key element of the initiative. The initiative undertakes five types of activities. First, it organizes visits to the Netherlands, for example, for journalists and politicians, such as the 2014 visit from journalists from Francophone African States, in which the Dutch MFA also participated.[231] Second, it organises outgoing visits from high-level representatives from Hague-based international criminal justice institutions. In 2014, a visit from female ICJ Judges and ICC Prosecutor Bensouda to the USA was supported, as well as a visit of the President, Judges and other representatives of Hague-based Courts to South Africa.[232] Third, it organizes highly publicized public debates, such as the HagueTalks, which is an important outreach tool that utilises social media to reach a large and global audience. Fourth, the Project has developed a 'Toolkit Peace and Justice', which includes core messages, factsheets and other supporting materials that is spread to diplomatic Missions so that they can use the information to support their message

[226] MFA, ICC ASP Letter 2013 (n 194), p. 3; see also: MFA Archives.
[227] See eg: MFA, ICC ASP Letter 2013 (n 194), p. 3.
[228] Interviews MFA Officials; see also: MFA, ICC ASP Letter 2013 (n 194), p. 3
[229] MFA, ICC ASP Letter 2014 (n 194), p. 5; see also: MFA, Letter to Parliament on the ICC and Africa (n 215), p. 3
[230] Peace and Justice Project, 'Hague Project Peace & Justice in a Nutshell' (on file with the author); Peace and Justice Project, 'Strategy and Project Plan' (January 2012), p. 3 (on file with the author).
[231] Peace and Justice Project, 'Interim Evaluation' (October 2014), p. 2 (on file with the author); similarly: Interview MFA Official.
[232] Peace and Justice, Interim Evaluation 2014 (n 231), p. 2-3.

about the ICC.[233] As such, the Initiative has a key role in cooperating with Dutch Embassies and Consulates, and currently focuses on several priority States, primarily India, the USA, Russia, China, South-Africa and Egypt.[234] Fifth, since 2012, the Initiative functions as a platform for other stakeholders in The Hague in order to align their messages and focal points.[235]

Similarly, the MFA has sponsored a Lebanese trial monitoring project with regard to the STL, and has facilitated many outreach activities of both the STL and the ICTY.[236] Embassies across the globe also said they have supported many events and campaigns that support the ICC.[237] An MFA ofcicial identified outreach to the affected communities as one of the key components of succes of an international tribunal, and therefore as one of the key priorities of Dutch policy regarding international justice.[238] For example, a delegation of journalist visited The Hague in October and November 2010.[239]

3.4. Cooperation with International Courts and Tribunals

The ICC relies on State cooperation for the execution of its arrest warrants and investigative measures. In addition, the Court needs practical assistance from States in specific areas, such as the enforcement of sentences, receiving individuals on interim release, and the protection of witnesses.[240] As such, State cooperation is essential to the effective functioning of the ICC. Therefore, fostering cooperation is a key priority of Dutch foreign policy. This has manifested itself in various ways. On a general level, the Dutch government continually emphasizes the importance of execution of the Court's orders, requests, and arrest warrants.[241] For example, during the ministerial week of the 2010 General Assembly of the UN, the Dutch Prime Minister expressed his dissatisfaction about the apparent freedom with which ICC suspects were travelling to ICC Member States.[242]

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[233] ibid p. 3-4.
[234] Peace and Justice, Plan 2012 (n 230), p. 7.
[235] Peace and Justice, Interim Evaluation 2014 (n 231), p. 4.
[236] MFA Archives.
[237] Interview MFA Official.
[238] Interview MFA Official.
[239] STL, Annual Report 2010-2011, p. 21.
[240] See *supra* Section 2.1., 2.2. and 2.4.
[241] MFA, ICC ASP Letter 2009 (n 194), p. 2; MFA, Kampala Review Conference Letter 2010 (n 194), p. 2; MFA, ICC ASP Letter 2010 (n 194), p. 3; MFA, ICC ASP Letter 2012 (n 194), p. 3.
[242] MFA, ICC ASP Letter 2010 (n 194), p. 2.

The arrest of suspects is a key priority. The Netherlands habitually exerts pressure on States that fail to execute the ICC's arrest warrant against Sudanese President Al-Bashir, both bilaterally and through joint EU action.[243] For example, the Dutch government has repeatedly called upon the Chadian government to abide by its obligations under the Rome Statute, both independently and through joint EU action.[244] This was confirmed by MFA officials that were interviewed for this study.[245] In addition, the Dutch government has expressed its concern about Al-Bashir's then upcoming visit to Turkey towards the Turkish Ambassador.[246] Similarly, the Government requested a meeting with the Kenyan Ambassador after a visit of Al-Bashir to Kenya in 2010.[247] In general terms, the Dutch policy when States Parties fail to abide by their obligation to arrest and surrender certain suspects is to raise it with the EEAS and request concerted EU action.[248] The EEAS has a mixed track record in that regard. For example, it had already conducted a demarche towards Malaysia by the time the Netherlands requested action and was proactive regarding an upcoming trip of Al Bashir to China; but it reacted slowly when he visited Djibouti.[249] In addition, the Netherlands continues to call upon the Sudanese government directly to fully cooperate with the ICC.[250] For example, the Dutch Ambassador in Khartoum has been summoned by the Sudanese government on multiple occasions because of statements made by representatives of the Dutch government in relation to Sudan's failure to cooperate. Whenever this happens, the ambassador consistently reiterates the Dutch position regarding Sudan's obligation to cooperate with the ICC.[251] Similarly, the Ambassador in Kinshasa has repeatedly urged the Congolese government to actively pursue the arrest of Bosco Ntaganda.[252] Interviews with representatives of foreign embassies confirm that the Netherlands is a strong and important voice in the area of cooperation with the Court.[253] In that regard, it must also be noted that the Netherlands is wellknown to have played a key role in maintaining a strong EU position on conditioning cooperation with former Yugoslav states, in particular Serbia and

[243] MFA, ICC Letter 2013 (n 194), p. 3; MFA, ICC ASP Letter 2013 (n 194), p. 6.
[244] MFA, ICC ASP Letter 2013 (n 194), p. 4; MFA Archives.
[245] Interviews MFA Officials.
[246] MFA, Letter on Al-Bashir's Visit to Turkey 2009 (n 203), p. 2.
[247] MFA, ICC ASP Letter 2010 (n 194), p. 2.
[248] MFA Archives; Interview MFA Official.
[249] MFA Archives.
[250] MFA, ICC ASP Letter 2014 (n 194), p. 6; MFA, ICC ASP Letter 2013 (n 194), p. 3-4.
[251] MFA Archives
[252] MFA Archives.
[253] Interviews Representatives of Foreign Embassies.

Croatia, on their cooperation with the ICTY. As such, the Netherlands likely contributed to ensuring the arrest of the final ICTY suspects in 2011.[254] Former ICTY Prosecutor Del Ponte has confirmed the instrumental nature of EU pressure on both Croatia and Serbia in ensuring the arrest of numerous suspects.[255]

Another important issue in this context is the Dutch position regarding official contacts with ICC suspects. The Dutch position is reasonably strict, and entails a commitment to avoiding all non-essential contacts.[256] The Netherlands Government routinely pushes for a consistent approach regarding this in the EU context. Although some EU States advocate avoiding any type of contact, the Dutch government oppose this, as it would disable any form of communication and cooperation. Those EU States with Missions in Sudan take position a similar to the Dutch.[257] In that light, the Netherlands has opposed labelling ceremonial events as non-essential.[258] At the same time, the Dutch representatives in the ASP have repeatedly called for resolutions in that context to call upon Member States to avoid all non-essential contacts with ICC suspects. Representatives of foreign embassies, particularly of EU Member States, confirm the strict Dutch position on this issue.[259]

Another key focus of Dutch foreign policy has been to stimulate other States in providing close cooperation with the Court on other issues, in particular in the area of witness protection. To that end, the Dutch MFA, in particular through the Netherlands Ambassador to the ICC and OPCW, has organized several seminars on cooperation, in close conjunction with the Norwegian embassy and the ICC itself.[260] These seminars have taken place in 2013 and 2014 in Dakar, Arusha, Cotonou, and Accra.[261] Broader themes of cooperation are generally discussed at these seminars, such as the need for agreements on the enforcement of sentences, but the need for witness relocation agreements is a central focus. The seminars were generally attended by around thirty persons, mostly influentials from a variety of African States. For example, in the 2013 Seminar in Dakar, representatives from Ghana, Cameroon, the Central African Republic, the

[254] See eg: Andrea Leoni, The Arrest of Ratko Mladic and its Consequences for the Process of Admission of Serbia to the EU' (6 July 2011) The Hague Justice Portal: < www.thaguejusticeportal.net/index.php?id=12838 > (accessed 16 July 2015); confirmed by Interviews Representatives of Foreign Embassies.
[255] Del Ponte 2008, p. 457; See also: ICTY, Annual Report 2008-2009, p. 17.
[256] MFA Archives.
[257] Interviews MFA Officials.
[258] MFA Archives.
[259] Interviews Representatives of Foreign Embassies.
[260] MFA, ICC ASP Letter 2014 (n 194), p. 2; Interview MFA Official.
[261] Interview MFA Official.

Democratic Republic of the Congo, Mali and Cõte d'Ivoire participated.[262] The intention of such seminars is to explain the work of the ICC and its specific needs in the area of cooperation. Experts from the ICC therefore also attend these seminars, as do other Dutch MFA officials. Thus far, five relocation agreements have been concluded as a direct result of these seminars.[263] This is commendable development and a direct result of Dutch foreign policy. Representatives of foreign embassies all lauded the Dutch efforts in this area. Those who were willing to rank the relevant states consistently ranked the Dutch second, after Belgium, when it comes to their efforts to promote cooperation with the ICC.[264]

On a broader level, the MFA has issued a general instruction to the Missions to cooperate fully with the ICC whenever so requested, and to appoint a contact person at the Embassy to coordinate with the Ministry.[265] As such, Dutch Missions may provide ad hoc support to the ICC if the situation so requires. For example, the Dutch Embassy in London carried out a demarche to urge the British Foreign Secretary to facilitate the transfer of an ICC suspect to the UK for the duration of his interim release.[266] The representative of the UK embassy in The Hague confirmed that the Dutch efforts were instrumental in convincing the UK to accept this individual in the UK for the duration of his interim release.[267] Similarly, when Bosco Ntaganda reported to the US embassy in Kigali, the Dutch Embassy there played a central role in facilitating his transfer to the Netherlands.[268] MFA Officials also recalled that representatives of the Dutch Embassy in Kinshasa routinely called for increased efforts to ensure the arrest of Ntaganda.[269] Among other things, the Embassy functioned as an intermediary between the ICC, Rwanda and the USA, and facilitated Ntaganda's transfer to the airport in Kigali, since these States are not party to the Rome Statute.[270] The Dutch Mission in Libya also helped ensure the prompt release of ICC investigators who were jailed for a short period when they attempted to visit Saif al-Islam Gadaffi.[271] Similarly, the Dutch Embassy in Nairobi provides logistical support to the ICC. On a general level, Embassy officials consistently urge for full cooperation with the ICC in their

[262] MFA Archives.
[263] Interview MFA Official.
[264] Interviews Representatives Foreign Embassies.
[265] MFA Archives.
[266] MFA Archives.
[267] Interview Representative of Foreign Embassy.
[268] MFA, ICC ASP Letter 2013 (n 194), p. 7.
[269] Interviews MFA Officials.
[270] MFA Archives.
[271] MFA, Letter to Parliament 2012 (n 194), p. 4.

official contacts with the Kenyan government.[272] In terms of practical support, the Embassy provides background information to the ICC regarding the local context in which it is operating.[273] For example, regular meetings ICC Kenya representative and Dutch embassy, and the Dutch embassy facilitated the TFV reparations team's visit to Kenya.[274] In addition, the Embassy has made its diplomatic courier service available to the ICC in order to facilitate contact between local investigators in Kenya and the ICC in The Hague.[275] Finally, the Embassy has facilitated meetings between ICC officials and representatives of the international community in Nairobi.[276] Interviews with MFA officials confirm that the Dutch position in this regard is that it is often more effective to support the ICC privately, rather than publicly.[277]

Similarly, the Dutch Embassy in Kinshasa has been an active supporter of the ICC. It has helped finance conferences and public diplomacy activities to strengthen local support for the Court, and it has brought together international and local experts to stimulate the enactment of implementing legislation of the Rome Statute.[278] The embassy in Khartoum has also sponsored ICC related events in Chad, which is an ICC Member State.[279] As such, embassies can provide technical and logistical support to the ICC, and can foster goodwill amongst civil society and representatives of the government of States that they work in.

3.5. Strenghtening the – Legal – Frameworks of International Courts and Tribunals

The Netherlands actively seeks to strengthen the legal framework and effectiveness of the ICC. This has manifested itself in various ways. For example, the Netherlands plays an active role in the ASP and various Hague Working Groups that focus on different aspects of the ICC's work.

First of all, the Dutch play an active role in the administration of the Court. For example, the Netherlands has been re-elected as a member of the Bureau of the ASP in 2014, a position it

[272] MFA, Letter to Parliament Answering Questions on Kenya and the ICC (28 February 2013), p. 2.
[273] MFA Archives.
[274] MFA Archives.
[275] MFA Archives.
[276] MFA Archives.
[277] Interview MFA Officials.
[278] MFA Archives.
[279] Interview MFA Official.

previously held from 2002 until 2008.[280] The Bureau is a body composed of eighteen States that are more directly involved in the management of the Court. In addition, the Bureau has established a number of Working Groups – in New York and in The Hague – in which all States Parties can participate. The Netherlands is a member of the Budget Working Group, where it consistently takes the position that substantial budget increase should be viewed critically, but that the ICC must be able to function effectively so that occasional budget increases might be necessary.[281] Representatives of foreign embassies confirm this position consistently taken by the Netherlands, as opposing proposals that would limit the budget growth of the ICC too much. At the same time, the Dutch are not regarded as a very vocal participant in debates on the Court's budget, which, according to MFA officials, is linked to its sensitive position as host state to the ICC.[282]

The Netherlands has been particularly active in the Study Group on Governance (SGG), which is a study group that focuses on strengthening the institutional framework of the Court through 'a structured dialogue between States Parties and the Court', *inter alia*, to enhance 'the efficiency and effectiveness of the Court while fully preserving its judicial independence'.[283] Initially, the Netherlands Ambassador to the ICC and OPCW chaired the Study Group for two years.[284] Subsequently, an MFA official functioned as (co-)focal point for two years within the SGG regarding the topic of increasing the efficiency of the criminal process.[285] Representatives of foreign embassies unanimously lauded the Dutch contributions to the SGG. The Dutch contributions were described as well-informed, targeted and principled. Flexible where it's needed, but always principled on where the limit to manouvre lies, that is, all proposals must be in line with the Statute.[286] At the same time, the representatives of foreign embassies consistently found that the Dutch were not the most present delegation during Hague Working groups. Some expressed surprise at this, since it might be easier for the Dutch to attend given the ICC's

[280] ICC, ASP Information, Members of the Bureau < http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ASP1-15_BureauMembers-ENG.pdf > (accessed 3 March 2015).
[281] MFA Archives.
[282] Interview MFA Officials; Interviews Representatives of Foreign Embassies.
[283] ICC ASP, Resolution ICC-ASP/9/Res.2 (10 December 2010),
[284] ICC ASP, 'Report of the Bureau on the Study Group on Governance (ICC-ASP/10/30), 22 November 2011, para. 2; ICC, ASP, 'Report of the Bureau on the Study Group on Governance (ICC-ASP/11/31), 23 October 2012, para. 5.
[285] ICC ASP, 'Report of the Bureau on the Study Group on Governance' (ICC-ASP/12/37), 15 October 2013, para. 4; ICC ASP, 'Report of the Bureau on the Study Group on Governance' (ICC-ASP/13/28), 28 November 2014, para. 4.
[286] Interviews Representatives of Foreign Embassies.

presence in The Hague. The UK and Germany were consistently mentioned as the most present and vocal attendees of Hague Working Group meetings.[287] The Dutch were regarded as more selective as to which working groups they attend, although most representatives did emphasize that when in attendance, the Dutch contributions were very constructive.

The Study Group on Governance has been an important part of the Hague Working Group of the ASP. It has created several proposals for amendments of the ICC Rules of Procedure and Evidence (RPE) in particular that seek to enhance the effectiveness and efficiency of the Court. Its work thus far has focused on three issues: first, possibilities to enable Chambers to sit with two judges if one judge is temporarily unavailable; second, increasing the possible use of prior-recorded witness testimony in order to limit the time needed to hear witnesses during Court sessions;[288] and third, enabling the Court to authorise partial translations of prosecution witness statements.[289] The LAD of the MFA plays a central role in evaluating such proposals and developing a Dutch position regarding their acceptability. It evaluates each proposal on the basis of several criteria, including whether or not the proposed amendment is in line with the Statute and whether or not it is in line with the rights of the accused.[290] For these reasons, the Netherlands was unable to support the amendment that would enable the continuation of trials despite the temporary absence of one Judge. It is the Dutch position that this would not be in line with the Statute, and that it is not desirable to bypass the requirements for amendments of the Statute by arranging such matters through the RPE.[291] Where the SGG's proposals are in line with the Statute, the Netherlands will support them in the context of broader ASP sessions, and successfully lobbied to ensure the adoption of the changes proposed by the SGG in 2012.[292] In its capacity as an active ASP member, the Netherlands thus guards the integrity of the Statute and focus, in particular, on protecting the rights of the accused.[293] Several representatives mentioned this proposed amendment as an example of the strong Dutch position on guarding the integrity of the Court. It was stated that the Dutch were instrumental in defeating this proposal because it

[287] Interviews Representatives Foreign Embassies
[288] ICC ASP, 'Report of the Bureau on the Study Group on Governance' (ICC-ASP/12/37), 15 October 2013, paras 16-20; See also: ICC ASP, 'Study Group on Governance – Working Group on Lessons Learnt: Second Report of the Court to the Assembly of States Parties (31 October 2013) ICC-ASP/12/37/Add.1.
[289] ICC ASP, 'Report of the Bureau on Study Group on Governance' (28 November 2014) ICC-ASP/13/28, Annex I, paras 4ff.
[290] Interview MFA Official.
[291] MFA Archives; Interview MFA Official.
[292] MFA, ICC ASP Letter 2012 (n 194), p. 6; MFA Archives.
[293] Interview MFA Official.

was not in line with the Statute, even though other states adopted a more flexible, or less principled position.[294]

Several representatives of foreign embassies also mentioned the Dutch role in reaching a compromise with Kenya and AU Member States on the issue of allowing ICC hearings in the absence of the accused.[295] Kenya had proposed a very sensitive amendment to that effect, and the Dutch played a key role in achieving a compromise that would allow a suspect to follow the proceedings via video-link, instead of having to travel to The Hague, provided the Judges did not oppose this. One MFA official explained that in reaching this consensus, there was continuous contact between the Kenya policy officer at the MFA, the Kenyan embassy, the Dutch Mission in New York and the MFA.[296] This arguably helped dissuade further fears of a Kenyan withdrawal from the ICC, which was a concrete risk at the time. Several representatives of foreign embassies lauded the Dutch role in this process, which resulted in a compromise that both pleased Kenya, but also protected the integrity of the ICC and its Statute.[297]

Finally, it is vital that the Court is staffed with the most competent, experienced and high-quality judges. Judges are elected by the Assembly of States Parties (ASP) and, as has been noted in the above, the political nature of such elections sometimes leads to a process that focuses too little on the quality of the candidates, and is impacted on by political considerations. The Dutch MFA has made the quality of Judges its only priority in determining its position regarding these elections. The LAD of the MFA therefore conducts a rigorous vetting process, in which they assess the candidates CV, background and focus, in particular, on their experience and knowledge.[298] The vetting process has at times included conducting interviews with prospective candidates at various Embassies in The Hague. It is of particular importance for the Netherlands that candidates have substantial experience with the (international) criminal process.[299] Several representatives of foreign embassies confirmed that the Dutch are regarded as very active, principled, and constructive regarding the selection of judges for the ICC. Their impression was that the Dutch were only concerned with the quality of judges, which was

[294] Interviews Representatives of Foreign Embassies.
[295] Interviews Representatives of Foreign Embassies.
[296] Interview MFA Official.
[297] Interviews Representatives of Foreign Embassies.
[298] MFA Archives; Interviews MFA Officials.
[299] MFA Archives.

regarded in a very positive light.[300] However, as Host-State, the Netherlands never publicly takes a position regarding specific candidates, because it is important to maintain a good relationship with elected Judges, even if the Netherlands did not support them.[301] Finally, it is important to emphasize that the Netherlands does not participate in any form of vote-trading because the only priority is the quality of the candidates.[302] As such, the Dutch policy seeks to ensure the election of only highest quality judicial candidates.

Finally, the inclusion of Aggression in the jurisdiction of the Court, and the Princeton and Kampala processes to achieve this were a very high priority in Dutch foreign policy. In the run-up to the Kampala Review Conference in 2010, the Dutch MFA pushed for the inclusion of this crime in the Court's jurisdiction and was willing to compromise on several points in order to ensure the broadest level of participation amongst States Parties.[303] The Dutch participated actively in the special ASP working Group on aggression and consistently emphasized that the Rome Statute would be incomplete without the Court having effective jurisdiction over this crime.[304] Indeed, interviews with MFA officials, in particular with those involved in this process, reveal that the importance of including aggression was genuinely regarded as an essential step in promoting the international legal order: the sense was that the ICC was not yet 'done' without aggression.[305]

Debates regarding the addition of aggression in Kampala focused on the level of participation of the UN Security Council and the question of whether or not the alleged 'aggressor state' would have to consent to an ICC investigation. The permanent members of the Security Council were initially in favour of a requirement of a UNSC finding of 'aggression' before the ICC could be involved. Essentially all other participants in the debates opposed this idea, although the political departments of the Dutch MFA were initially more inclined to support this position, in particular because of the importance of a good relationship with the USA.[306] As such, the Netherlands was willing to compromise on this issue in order to foster the

[300] Interviews Representatives of Foreign Embassies.
[301] Interviews MFA Officials.
[302] Interview MFA Official.
[303] MFA, ICC ASP Letter 2009 (n 194), p. 3; MFA, ICC Review Conference Letter 2010 (n 194), p. 3; MFA Archives.
[304] MFA, ICC Review Conference Letter 2010 (n 194), p. 3.
[305] Interview MFA Official.
[306] Interview MFA Official.

widest level of consensus and ensure the adoption of the amendment.[307] The Dutch representatives played a central role in the negotiations in Kampala, and were ultimately satisfied with the consensus outcome that ensures the inclusion of aggression in a way that was acceptable to a large majority of both Parties and non-States Parties to the Statute, including the P5.[308] In Kampala, the Dutch delegation forged a coalition of friends of the ICC, with Germany in particular, as well as with Canada and several other EU and Latin-American states. There were regular meetings with this coalition in order to devise a strategy to achieve consensus and these meetings were chaired by the then Dutch Ambassador to the ICC and a member of the LAD of the MFA.[309] In addition, the Dutch delegates were in continuous contact with then ASP President Wenaweser of Liechtenstein in order to consult on how the Dutch proposals and negotiations could be as constructive as possible.[310] Meanwhile, the Dutch delegation was in continuous contact with the MFA Headquarters in The Hague as well. Representatives of foreign embassies confirmed the constructive role of the Dutch delegation in Kampala. As a result, it is possible to conclude that the MFA played a crucial role in the adoption of the Kampala amendments on aggression.

Another development worth noting were the Dutch efforts to include terrorism in the jurisdiction of the ICC. This was a clear priority in the years 2009 and 2010.[311] The Netherlands argued that granting the ICC jurisdiction over terrorist crimes would strengthen the Court and would be an effective tool in the global fight against terrorism and impunity. Then Foreign Minister Verhagen was a staunch supporter of this concept. [312] In 2009, the Dutch pushed for the inclusion of a proposed amendment on the agenda of the Review Conference, but was not successful. It did manage to reach a compromise in that the topic was included on the agenda of a working group that would further assess the amendments to be discussed at Kampala.[313] In addition, the Netherlands approached several countries bilaterally.[314] However, due to limited

[307] MFA Archives.
[308] MFA, Letter to Parliament Reporting on the 2010 Kampala Review Conference on the ICC (12 July 2010), p. 3.
[309] Interview MFA Official.
[310] Interview MFA Official.
[311] MFA, ICC ASP Letter 2009 (n 194), p. 3.
[312] Interview MFA Official.
[313] MFA Archives.
[314] MFA Archives.

support for the Dutch proposal, the government eventually decided to drop it for the time being, and focus on the crime of aggression and other ways to strengthen the Court.[315]

Finally, it must be noted that the ICTY and STL appear lesser priorities in Dutch foreign policy than the ICC. This can be explained by the fact that the ICTY is a UN Security Council subsidiary organ, as a result of which the Dutch government has little to no influence in the Tribunal's management and is not actively involved in the administration of the Court, unlike with regard to the ICC. Similarly, the STL has been created by the UNSC but the Netherlands, as host-state, is a member of its Management Committee, which gathers in New York. Delegates from the Dutch Permanent Mission in New York always attend these Management Committee meetings, and MFA officials have stated that, in addition to host-state matters, the Dutch priorities are ensuring the effectiveness, independence and efficiency of the STL.[316] However, MFA officials have also expressed that the independence of the STL makes it hard to exert influence on the day-to-day business of the STL.[317]

3.6. Complementarity & The Initiative for a Multilateral Treaty on Mutual Legal Assistance and Extradition for International Crimes

Strengthening the complementary role of the ICC is a key priority for the Dutch government. The Netherlands fully supports the role of the ICC as a court of last resort and routinely emphasises States' primary responsibility for the effective prosecution of international crimes.[318] In that regard, the Netherlands actively stimulates domestic prosecutions of such crimes and enabling such prosecutions has become a key priority of Dutch foreign policy in the area of strengthening the international legal order and combating global impunity.

To that end, the Netherlands has been actively advocating the conclusion of a multilateral treaty on mutual legal assistance and extradition for international crimes. These efforts were initiated based on particular problems and issues that were encountered by the international crimes unit of the Dutch Public Prosecutor's office in the context of several cases that were initiated at the national level.[319] Since then, the Dutch MFA has spearheaded an initiative to

[315] MFA, ICC ASP Letter 2010 (n 194), p. 4; Interview MFA Official.
[316] MFA Archives.
[317] Interview MFA Official.
[318] See eg: MFA, Letter Review Conference ICC 2010 (n 194).
[319] Interview MFA Official.

commence negotiations on such an instrument. The Dutch position is that States have a pre-existing obligation, based on international conventions and customary international law, to ensure the effective investigation and prosecution of international crimes. In order to enable States to give effect to this obligation, they need the tools to successfully complete such processes.[320] One such indispensable tool is the cooperation of other States. Just like the ICC depends on State cooperation, so will States when they conduct international crimes cases: evidence, witnesses and suspects will be dispersed over different countries, as a result of which the legal assistance of other States is necessary for effective investigations and prosecutions. However, existing treaties on international crimes do not include arrangements for inter-State cooperation. The Dutch initiative seeks to remedy this lacuna.

Since 2011, the Dutch MFA has prioritized this envisaged treaty and has conducted an intensive campaign to gather international support. The diplomatic efforts have been focused on two fora: the Commission on Crime Prevention and Criminal Justice (CCPCJ) of the UN Office for Drugs and Crimes (UN ODC), and the ASP of the ICC. In 2011, the Netherlands already sponsored a side-event at the ASP to 'test the waters' and to foster support for this initiative.[321] In 2013, the Netherlands attempted to negotiate a resolution in the CCPCJ but these efforts failed because the general backlash against the ICC in certain forums has created a general unease when it comes to multilateral efforts regarding international crimes.[322] Many States have expressed that the timing of this initiative is not optimal. The Dutch efforts therefore focus on convincing States that such a multilateral treaty is actually exactly what States that oppose an active role of the ICC need because it enables the *domestic* prosecution of international crimes. Thus far, the Netherlands has spearheaded this initiative with Belgium, Slovenia, and later Argentina and Senegal, although the latter has recently withdrawn from the core group due its presidency of the ASP.

In concrete terms, the diplomatic efforts thus far have been conducted through two approaches. The first has been to conduct global demarches. In 2013, the Netherlands, Belgium and Slovenia conducted demarches in all ICC Member States, connecting the initiative to the complementarity principle. [323] In addition, a worldwide demarche has been conducted again in

[320] Interview MFA Official.
[321] MFA Archives; Interview MFA Official.
[322] Interview MFA Official.
[323] MFA Archives.

2014 with all core group members, at the time Belgium, Slovenia, Argentina and Senegal.[324] In addition, during incidental bilateral contacts, the initiative has also been brought up. For example, when the Dutch State Secretary for Security and Justice visited Burundi and Rwanda, he discussed the topic, which resulted in a statement of support from Burundi.[325] Similarly, the Dutch Minister for Security and Justice discussed the topic with his German counterpart during an official visit in 2014.[326] The second approach has been to include the topic on the Agenda of both the CCPCJ and the ASP.[327] In 2013 and 2014, the Netherlands tried to pass a resolution on the topic in the CCPCJ, but was unsuccessful. The lobby at the ASP has been more successful. The Netherlands first tried to gather support for this imitative in 2012, connecting it to the complementarity principle and advocating for the initiative in its contribution to the plenary session.[328] In 2013 and 2014, the initiative was actively lobbied at the ASP, and the Dutch Minister mentioned it in his contribution to the general debate.[329] In 2014, the Dutch MFA also organized a side-event at the ASP in New York, which was attended by many States.[330] These efforts have produced mix results. On the one hand, around forty States have expressed their support for the initiative. However, the MFA has adopted the position that the support of at least an additional twenty States is necessary before formal negotiations will be commenced.[331] It will be interesting to see how this develops in the future, for now, the Dutch MFA will continue its efforts in order to push for this treaty.

One final development that is relevant to mention in the context of the complementarity principle and the global fight against impunity is the prosecution of Hissène Habré, the former Chadian dictator, in Senegal. The Netherlands has played an active role in the preparation of this trial and actively supports the special chambers that have been created for this trial. The Netherlands is a member of the Special Chambers Steering Committee as one of the largest donors of these proceedings, having contribution 1 million euros.[332] In addition, it has offered the support of the Dutch Forensic Institute.[333] The success of this trial is a priority for the

[324] MFA Archives.
[325] MFA Archives.
[326] MFA Archives.
[327] Interview MFA Official.
[328] MFA, ICC ASP Letter 2012 (n 194), p. 7; MFA Archives.
[329] MFA, ICC ASP Letter 2013 (n 194), p. 2.
[330] MFA, ICC ASP Letter 2014 (n 194), p. 2.
[331] Interview MFA Official.
[332] MFA Archives.
[333] MFA Archives.

Netherlands because it is believed to be a helpful development in convincing AU member States in particular of their active interest in the prosecution of international crimes. In addition, the Dutch Embassy in Dakar actively supports the participation of victims as civil parties in the proceedings by providing various ways of support. Similarly, the Dutch Embassy in Kinshasa has offered support to the establishment of domestic special courts for war crimes and the general battle against impunity.[334] The Dutch are a member of an informal support committee for this special court, together with Sweden and the US. Similarly, the Dutch Embassy in Khartoum and the MFA also support initiatives in the CAR to improve domestic prosecution of international crimes.[335]

[334] MFA Archives.
[335] Interview MFA Official.

4. CONCLUSION

This exploratory study has addressed the current problems and prospects for the ICC in the context of the global fight against impunity. Several key areas of concern have been identified. First, although a large majority of States is now party to the Rome Statute, powerful and populous States are still generally reluctant to join the ICC. In addition, for the ICC to function effectively and universally, it is necessary that states also conclude ancillary cooperation agreements and, fundamentally, implement the Rome Statute and such ancillary agreements into their domestic law. This will also strengthen the domestic capacity to investigate and prosecute persons suspected of international crimes, thus enabling the effective operation of the complementarity principle. In that regard, the proposed multilateral convention on mutual legal assistance and extradition for international crimes could be a fundamental tool. However, the general backlash against the ICC and international criminal justice constitutes a major hurdle to both this multilateral convention and to the effective operation of the Court itself. Cooperation is vital and the key to the success of the ICC. The importance of logistical support from States also appears from the need for witness relocation agreements to protect witnesses whose testimony before the Court puts them at risk. Finally, the effectiveness of the ICC itself needs to remain an issue of primary concern. The Court needs to be staffed with the highest quality personnel, and the Office of the Prosecutor needs to ensure effective, impartial, and fair investigations. This will strengthen the Court's legitimacy and thereby its international support.

The Netherlands foreign policy can generally be commended for its active focus on supporting the ICC and the global fight against impunity. The Dutch MFA actively works to strengthen the Court and focuses on specific areas, such as universal ratification, strengthening the Court's cooperation regime by stimulating states to provide support to the Court, and for its commitment to the complementarity principle and the simultaneous enabling of domestic prosecutions of international crimes. The envisaged multilateral convention on mutual legal assistance and extradition for international crimes, as well as the support for domestic prosecutions of international crimes in Senegal, the DRC and the CAR are commendable. Finally, Dutch embassies across the globe have provided logistic and moral support to the Court. This is a commendable development that deserves to be expanded upon.

At the same time, several caveats deserve to be mentioned. First, the Dutch MFA prides itself on its campaign for universality of the ICC Statute. On the one hand, it is clear that concrete actions have been taken in this regard, including through bilateral contacts and the engagement of civil society. On the other hand, an NGO representative called this priority a 'safe choice' that does not correspond to the real needs of the ICC, which is facing larger problems in different areas. In addition, an MFA official has stated that at the moment, the ICC is likely to have about reached its maximum number of states parties for the time being, and it would be more constructive to focus on different priorities to strengthen the Court. The second important caveat relates to the impact of the Dutch position as host-state to the ICC on the way it is perceived by other ASP members. All representatives of foreign embassies regarded this a key problem in Dutch foreign policy with respect to the ICC. The Dutch positions are at times considered unreasonable, which negatively impacts on their authority as a staunch supporter of the ICC. The MFA needs to critically evaluate its position on some of these areas (eg asylum requests and budgetary issues) and/or communicate their positions and the reasons for them more effectively to its partners.

Overall, however, the Netherlands is rightly regarded as a strong supporter of international justice. Its network of embassies seem to work tirelessly in support of the ICC, often behind the scenes in a way that is regarded more effective than through public diplomacy. Its activities in the area of cooperation have been lauded by representatives of foreign embassies. Similarly, Dutch diplomacy has made key contributions in specific areas, for example in ensuring the adoption of the Aggression amendment at Kampala, and at forging a compromise on the possibility to hold trials in the absence of accused persons that both assuaded Kenya and maintained the integrity of the ICC Statute. Finally, the Dutch contributions to strenghtening the legal framework of the ICC, in particular through its active membership of the ASP's SGG has been unanimously commended by its ASP partners and has likely contributed to a more effective and efficient ICC.

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ANNEX 1: TERMS OF REFERENCE

Terms of Reference Beleidsdoorlichting vooronderzoek straffeloosheid

1 Aanleiding

De Regeling Periodiek Evaluatieonderzoek (RPE) schrijft voor dat ieder beleidsterrein periodiek wordt doorgelicht. Bevordering van de ontwikkeling van de internationale rechtsorde is in de grondwet verankerd (artikel 90) en vormt onderdeel van beleidsartikel 1 van de Memorie van Toelichting (MvT) bij de Rijksbegroting voor het Ministerie van Buitenlandse Zaken (BZ) dat luidt: *Versterkte internationale rechtsorde en eerbiediging van mensenrechten.* Beleidsartikel 1 bevat twee operationele doelstellingen (OD's): 1.1 *Een goed functionerende internationale rechtsorde;* 1.2 *Bescherming en bevordering van mensenrechten.*[1]

De evaluatieprogrammering van het ministerie van Buitenlandse Zaken 2007-2012 draagt de uitvoering van de beleidsdoorlichting op aan de Inspectie Ontwikkelingssamenwerking en Beleidsevaluatie (IOB) en voorziet afronding in 2015. OD 1.1 is nooit doorgelicht en is onderwerp van deze beleidsdoorlichting, met dien verstande dat een belangrijk onderwerp binnen dit beleidsterrein, de *responsibility to protect* (R2P), niet in de beleidsdoorlichting wordt meegenomen. De reden is dat een aparte evaluatie van R2P gepland staat voor 2017.

2 Achtergrond

Internationale rechtsorde heeft betrekking op het geheel van regels dat zijn geldigheid ontleent aan de algemeen geaccepteerde internationale rechtsbronnen, zoals verdragen, gewoonterecht, algemene rechtsbeginselen, jurisprudentie en doctrine.[2] Het wordt ook wel 'internationale ordening' genoemd en betreft de internationale samenwerking tussen soevereine nationale staten en tussen staten en internationale organisaties op het gebied van vrede en veiligheid, handel, milieu en mensenrechten.

De versterking van de internationale rechtsorde betreft naast het vastleggen van normen en het zorgen voor naleving hiervan, ook het optreden tegen schenders van deze normen en daarmee het tegengaan van straffeloosheid. Straffeloosheid duidt op het niet berechten en bestraffen van degenen die zich aan ernstige misdrijven, zoals beschreven in artikel 5 van het Statuut van Rome(genocide; misdaden tegen de menselijkheid; oorlogsmisdaden; en vanaf 2017 de misdaad van agressie) schuldig maken. Dit betekent geen instelling van vervolging, vrijspraak of een symbolisch (lage) straf. Het voortduren van mensenrechtenschendingen is mede te wijten aan straffeloosheid.

Nederlands beleid

[1] Tot 2012 bevatte beleidsartikel 1 drie operationele doelstellingen (OD's): 1.1 *Een goed functionerende internationale rechtsorde;* 1.2 *Bescherming en bevordering van mensenrechten;* en 1.3 *Goed functionerende internationale juridische instellingen in Den Haag (juridische hoofdstad).* In de MvT 2012 is dit gewijzigd en is 1.3 ondergebracht bij beleidsartikel 8 (8.2 *Een aantrekkelijk vestigingsklimaat voor internationale organisaties in Nederland*).

[2] Definitie Wener en Wessel. Internationaal en Europees Recht. Een verkenning van grondslagen en kenmerken (2005).

Bevordering van de internationale rechtsorde is een breed, fluïde en rekbaar begrip.[3] De Wetenschappelijke Raad voor het Regeringsbeleid (WRR) stelt in haar rapport 'Aan het buitenland gehecht' in 2010 dat Artikel 90 zich laat vertalen in een actief lidmaatschap in internationale organisaties, het stimuleren van de ontwikkeling en naleving van internationaal recht, het opkomen voor de mensenrechten, het verbreiden van de *rule of law* en het bevorderen van veiligheid.[4] De bevordering van de internationale rechtsorde wordt door de regering als essentieel geacht voor een rechtvaardige, vreedzame en welvarende wereld.[5] Bevordering van de internationale rechtsorde is een verantwoordelijkheid van de regering en wordt op vele manieren uitgevoerd, zowel binnen het Ministerie van Buitenlandse Zaken als daarbuiten. De Minister van Buitenlandse Zaken heeft hierin een coördinerende taak.[6]

Beleid Buitenlandse Zaken

Beoogde beleidseffecten onder operationele doelstelling 1.1[7]:

1) Multilaterale instellingen (zoals de VN, het Internationaal Strafhof en bijzondere internationale tribunalen) functioneren effectief en efficiënt met de middelen die ze ter beschikking staan.
2) Bestendigen en verder ontwikkelen van de internationale rechtsorde door uitbreiding van het lidmaatschap van internationale hoven en tribunalen, waaronder het Internationaal Gerechtshof en het Internationaal Strafhof. De rechtsmacht van het Internationaal Gerechtshof wordt door een groeiend aantal staten erkend.
3) Een multilateraal systeem dat straffeloosheid wereldwijd bestrijdt, door nationale instellingen te versterken en op te treden waar nationale straffeloosheidsbestrijding faalt.
4) Interstatelijke rechtshulp waardoor de samenwerking tussen de statenpartijen van het ICC verbetert.
5) Goede complementariteit en onderlinge samenhang tussen de internationale organisaties, inclusief de multilaterale ontwikkelingsinstellingen, door het bevorderen van samenwerken en voorkomen van *mission creep*.
6) Een VN-Veiligheidsraad die een betere afspiegeling vormt van de huidige wereldverhoudingen.
7) Operationalisering van *Responsibility to Protect* (R2P)-concept.

Samengevat richt de bevordering van de internationale rechtsorde door het Ministerie van Buitenlandse Zaken zich op het inbedden van landen in het multilaterale systeem en het ondersteunen van landen om hun nationale rechtsstaat te ontwikkelen.[8] De verbinding van nationale rechtsordes met het internationale strafrechtsysteem krijgt daarbij speciale aandacht.[9] Een intern document geeft een nadere precisering en uitwerking van de Nederlandse inzet in onderstaande zes 'hoofdpunten van de Nederlandse beleidsagenda' met betrekking tot de ontwikkeling van de internationale rechtsorde.

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[3] Zie onder meer MvT's en http://politiek.thepostonline.nl/2014/01/23/strategisch-denken-deel-heeft-nederland-nog-strategen/.
[4] Wetenschappelijke Raad voor het Regeringsbeleid (2010), *Aan het buitenland gehecht. Over verankering en strategie van Nederlands buitenlandbeleid*.
[5] Ministerie van Buitenlandse Zaken (2013) *Wat de wereld verdient: Een nieuwe agenda voor hulp, handel en investeringen.*
[6] http://www.rijksbegroting.nl/2012/voorbereiding/begroting,kst160360_10.html
[7] MvT 2011, aangezien deze redelijk representatief is voor de gehele periode. Vermeld dient te worden dat de OD's niet exacte dezelfde zijn geweest in de periode 2009-14.
[8] Ministerie van Buitenlandse Zaken (2013) *Wat de wereld verdient* en Verslag themasessie 5 'Nederlandse agenda bevordering internationale rechtsorde', januari 2012, Rijksportaal.
[9] Ministerie van Buitenlandse Zaken (2013) *Beleidsbrief Respect en recht voor ieder mens*.

- Verdere uitbouw vreedzame geschillenbeslechting.
- Voorkomen van straffeloosheid.
- Beter functioneren van het bestaande systeem.
- Efficiënt mensenrechtenbeleid.
- Optimaliseren en versterken van profiel van Den Haag als *'Legal Capital of the World'*.
- Bevorderen multilaterale aanpak.

Van deze hoofdpunten komen er vier aan de orde in de beleidsdoorlichting: de eerste drie en de laatste. De twee overige zijn onlangs geëvalueerd (mensenrechtenbeleid) of staan gepland voor toekomstige beleidsdoorlichtingen (gastland). In paragraaf 4 en 5 volgt een nadere afbakening.

Actoren binnen BZ

Binnen het Ministerie van Buitenlandse Zaken zijn diverse directies betrokken bij de ontwikkeling en bevordering van de internationale rechtsorde. Hieronder een niet-uitputtende inventarisatie:

DJZ: bijdragen aan rechtsontwikkeling; verdragsonderhandelingen; beoordeling consistentie verdragen; verdragenbank; deelname aan expert bijeenkomsten; procesvertegenwoordiging en procesvoering.

DSH: assisteren bij het opbouwen van nationale rechtssystemen.

DVB: richt zich op internationale veiligheid en internationale stabiliteit.

DKP: publieksdiplomatie rondom Nederland als gastland voor internationale organisaties.

DMM: budgethouder binnen BZ; hervorming van de VN; bestrijding van straffeloosheid door steun aan ICC en andere tribunalen; steun aan ngo's en expertgroepen.

Instrumenten

Onderhandelen, bilaterale diplomatie, het beschikbaar stellen van expertise en financiële steun zijn de meest frequent ingezette beleidsinstrumenten. Overige instrumenten: de organisatie van bijeenkomsten, procesvertegenwoordiging en technische assistentie.[10]

Budget

Tabel 1 Budget voor operationele doelstellingen 1.1 en 1.3/8.2/4.5 (bedragen x EUR 1 miljoen)

	MvT 2009	MvT 2010	MvT 2011	MvT 2012	MvT 2013	MvT 2014
OD 1.1 Een goed functionerende internationale rechtsorde	47,6	46,7	47,3	51,7	52,5	
OD 1.1 Goed functionerende internationale instellingen met een breed draagvlak						52,7
OD 1.3 Internationale juridische instellingen	14,2	13,1	21,4			
OD 8.2 Een aantrekkelijk vestigingsklimaat voor internationale organisaties in Nederland				17,8	13,8	
OD 4.5 Een aantrekkelijk vestigingsklimaat voor internationale organisaties in Nederland						8,8

Bron: Memories van Toelichting bij de BZ-begrotingen voor 2009 t/m 2014.

Het grootste gedeelte van het budget voor OD 1.1 wordt besteed aan de reguliere Nederlandse bijdrage aan de VN (ongeveer EUR 40 miljoen per jaar). De overig financiële middelen gaan naar verschillende internationaalrechtelijke instellingen en ngo's die werken ter bevordering van

[10] In beleidsdocumenten (zie bijvoorbeeld MvT 2008) staat dat het niet zinvol of haalbaar wordt geacht indicatoren te kwantificeren. Redenen die hiervoor worden gegeven is dat outcome en output moeilijk objectief meetbaar zijn, bruikbare gegevens niet beschikbaar en niet (tijdig) kunnen worden verzameld.

het functioneren van internationale organisaties, onder meer op het gebied van straffeloosheidsbestrijding.

3 Beleidstheorie/resultaatketen

Hieronder is zeer vereenvoudigd gereconstrueerd hoe Nederland beoogt bij te dragen aan de versterking van de internationale rechtsorde en daarmee aan vrede, rechtvaardigheid en meer welvaart in de wereld. Zoals aangegeven in de vorige paragraaf, richt de beleidsdoorlichting zich op vier van de zes hoofdpunten van de beleidsagenda. Deze punten worden in dit schema aangemerkt als intermediaire doelen. Deze vereenvoudiging betekent dat een aantal zaken buiten beschouwing blijven, zoals sancties of andere maatregelen die NL kan nemen en neemt bij het niet-naleven van afspraken.

Impact	**VREDE** ⟷ (voorkomen van conflicten; disputen opgelost via onderhandelingen of rechtsgang)	**RECHTVAARDIGHEID** ⟷ ***(mensenrechten gerespecteerd, preventie van internationale misdrijven; toegang tot recht en arbitrage; overtreders van internationaal overeengekomen normen gestraft; slachtoffers krijgen compensatie)***	**WELVAART** (economische ontwikkeling landen; meer internationaal economisch verkeer; economische en sociale rechten individuen gerespecteerd; bij niet respecteren toegang tot recht en arbitrage)
Assumpties: bestaand internationaal juridisch systeem is voldoende dekkend/volledig; beperkte invloed externe factoren (bijv. natuurrampen, internationale crises)			
Outcome	**EEN GOED FUNCTIONERENDE INTERNATIONALE RECHTSORDE** (landen werken op basis van goede afspraken met elkaar en via internationale organisaties samen en kunnen elkaar aanspreken als regels worden overschreden)		
Voorwaarde: naleving van afspraken, gewoonterecht, verdragen en niet bindende instrumenten en verdragen			

Nederlandse prioriteiten (beoogde resultaten op outcome en output niveau)	**Verdere uitbouw internationale vreedzame geschillenbeslechting**. *ICJ en Hof van Arbitrage genieten grotere bekendheid. *universele aanvaarding rechtsmacht ICJ. *functioneren van andere vormen van geschillenbeslechting.	**Voorkomen van straffeloosheid.** *Universele rechtsgelding ICC. *Complementariteit ICC. *ad hoc tribunalen functioneren. *totstandkoming verdrag interstatelijke rechtshulp bij internationale misdrijven. *behoud van draagvlak ICC binnen Afrika/AU.	**Beter functioneren van internationale hoven en tribunalen.** *institutionele ontwikkeling gerechtshoven en tribunalen (grotere effectiviteit en efficiëntie).	**Multilaterale aanpak** *Complementariteit tussen internationale organisaties. *VNVR-lidmaatschap weerspiegelt huidige wereldverhoudingen.
Activiteiten/ Input	*Inzet Nederland:* Deelname aan mondiale discussiefora. Onderhandelen. EU-diplomatie en bilaterale diplomatie.	*Inzet Nederland:* Deelname aan mondiale en EU discussiefora. Deelname aan ASP; financiële steun ICC en andere tribunalen; financiële steun ngo's; side events; technische en financiële steun aan derde landen t.b.v. de rechtsgang en compensatie slachtoffers; interstatelijke rechtshulp;	*Inzet Nederland:* Deelname aan discussiefora; financiële steun voor functioneren gerechtshoven en tribunalen. Nederland voorzitter van study group on governance.	*Inzet Nederland:* Deelname overlegfora VN-organisaties. Voorwaarden stellen met betrekking tot vrijwillige bijdragen aan organisaties.

Gewoonterecht, verdragen en niet-bindende instrumenten zijn instrumenteel voor het voorkomen en indammen van conflicten, het tegengaan van straffeloosheid en het behoud van welvaart of het bereiken van grotere welvaart. Deze drie uiteindelijke doelen zijn tevens onderling met elkaar verweven. De mate waarin de internationale rechtsorde daadwerkelijk bijdraagt aan het bereiken van een meer rechtvaardige wereld, met inbegrip van het tegengaan van straffeloosheid, is afhankelijk van de mate waarin staten overeengekomen afspraken respecteren. Een belangrijke belemmering hierbij is dat een aantal in geopolitiek opzicht belangrijke staten geen partij is bij het belangrijkste statuut op dit gebied, het Statuut van Rome van het ICC. De Verenigde Staten (VS), China en Rusland hebben het verdrag niet geratificeerd.[346]

Een ander obstakel voor de bijdrage van het internationale recht aan het tegengaan van straffeloosheid is de non-coöperatie van staten bij de tenuitvoerlegging van aanhoudingsbevelen en andere rechtshulpverzoeken van het ICC. Hierbij kunnen zij het argument gebruiken dat het ICC andere vormen van verzoening in de weg staat. De juistheid van dit standpunt wordt betwist met het argument dat vredesopbouw zonder recht onmogelijk is. De geringe bereidheid van staten om getuigen, veroordeelden en vrijgesproken verdachten op te nemen wanneer deze niet kunnen terugkeren naar het land van herkomst vormt ook een obstakel voor het functioneren van het ICC en daarmee voor het tegengaan van straffeloosheid.

4 Vooronderzoek met betrekking tot het tegengaan van straffeloosheid

Het vooronderzoek heeft tot doel het in kaart brengen van:

- *Problemen* inzake het tegengaan van straffeloosheid, waarbij de nadruk ligt op het ICC. Hierbij in ieder geval aandacht voor:
    - Universaliteit van de rechtsmacht van het ICC (herzieningsconferentie statuut van Rome; toename ratificaties Statuut van Rome).
    - Complementariteit van het ICC.
    - Initiatief voor totstandkoming verdrag interstatelijke rechtshulp teneinde de strafrechtelijke samenwerking tussen staten op het gebied van internationale misdrijven te verbeteren.
    - Aandacht voor slachtoffers; functioneren van het slachtofferfonds van het ICC.
    - Problematiek met betrekking tot het horen van getuigen.
    - Effectiviteit van het ICC.

- De Nederlandse *inspanningen* met betrekking tot het tegengaan van straffeloosheid en een reconstructie van de *hiermee beoogde resultaten* met betrekking tot:
    - Initiatief voor straffeloosheid; positie andere landen; krachtenveld.
    - Nederlandse inzet binnen Assembly of State Parties (ASP); krachtenveld.
    - Bilaterale diplomatie voor ratificatie Statuut van Rome.
    - NL inzet m.b.t. verdrag interstatelijke rechtshulp.
    - Nl inzet m.b.t. Haagse werkgroepen, m.n. Study Group on Governance (SGG).
    - Financiële steun aan slachtofferfonds.

Informatieverzameling vindt plaats op basis van documentstudie (literatuur, beleidsstukken) aangevuld met interviews (MinBuZa, andere ASP landen, voorzitter SGG, etc.).

[346] China heeft geen handtekening gezet; de VS wel, maar vervolgens aangegeven niet de intentie te hebben het statuut te ratificeren. Rusland heeft het Statuut van het ICC wel getekend. In 2014 waren 122 landen partij bij het Statuut van Rome.

5 Product en planning

De resultaten worden samengevat in een rapport in NL of ENG; indicatie van omvang: 30 - 50 pp. Afronding medio maart.

6. Organisatie

Het onderzoek wordt uitgevoerd door de heer K. Zeegers, internationaal jurist.