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Co-operation with the International Criminal Court: towards a concrete and expanded commitment

Report¹

Committee on Legal Affairs and Human Rights

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Summary

The Committee on Legal Affairs and Human Rights reiterated its commitment to fighting impunity and to supporting the International Criminal Court (ICC) set up by the Rome Statute of 1998 to prosecute those accused of the most serious crimes of concern to the international community: genocide, crimes against humanity and war crimes.

Unfortunately, only 124 States have ratified the Rome Statute to date and six Council of Europe member States have not yet done so. Several member States have not ratified the “Kampala amendments” aimed at broadening the definition of war crimes and the crime of aggression. Others have not incorporated into their national legislation either the obligations relating to co-operation with the ICC or the crimes defined in the Rome Statute.

The committee is concerned about the fact that the ICC has been accused of applying “double standards”, that it does not have appropriate resources to carry out its work and that a number of African States are challenging its existence. It invites the member States which have not yet done so to ratify the Rome Statute and the relevant texts, to enact laws incorporating the provisions of these texts and to co-operate fully with the ICC. Renvoi en commission: [Doc. 13888](#), Renvoi 4159 du 27 novembre 2015.

1. Reference to committee: [Doc. 13888](#), Reference 4159 of 27 November 2015.



Contents	Page
A. Draft resolution	3
B. Explanatory memorandum by Mr Alain Destexhe, rapporteur	6
1. Introduction	6
2. The ICC and developments since Resolution 1644 (2009)	7
2.1. The ICC	7
2.2. The Kampala amendments	10
2.3. Investigations before the ICC	11
3. State of ratifications	11
4. Current challenges	12
5. Conclusion and proposals	15

A. Draft resolution²

1. The Parliamentary Assembly recalls its previous resolutions calling for the ratification of the Rome Statute of the International Criminal Court (ICC or “the Court”) and full co-operation with the latter as well as effective implementation of the Rome Statute, in particular [Resolutions 1300 \(2002\)](#) on risks for the integrity of the Statute of the International Criminal Court, [Resolution 1336 \(2003\)](#) on threats to the International Criminal Court and [Resolution 1644 \(2009\)](#) on co-operation with the International Criminal Court (ICC) and its universality.

2. The Assembly reiterates its firm commitment to fight against impunity and to support the ICC, the first ever permanent independent judicial institution with jurisdiction over individuals accused of “the most serious crimes of concern to the international community as a whole”: genocide, crimes against humanity and war crimes. It is the firm conviction of the Assembly that there cannot be genuine respect, promotion and protection of human rights under the European Convention on Human Rights (ETS No. 5) and the Universal Declaration of Human Rights in situations in which there is impunity for the most serious violations of international law encompassing gross human rights violations which are as serious as crimes against humanity or genocide and for the gravest breaches of international humanitarian law amounting to war crimes. Similarly, impunity for the crime of aggression – which characterised all the perpetrators of aggressive wars that took place after the Second World War – is certainly not conducive to the realisation of peaceful societies in which fundamental human rights are respected.

3. The Assembly believes that the universal ratification of the Rome Statute of the ICC is essential in order to avoid having situations referred to the Court by the United Nations Security Council, as these decisions might often succumb to double standards and politicisation. It notes that, since its adoption in 1998, the Rome Statute has been ratified by 124 States across the world. Regrettably, six member States of the Council of Europe (Armenia, Azerbaijan, Monaco, the Russian Federation, Turkey and Ukraine), one Council of Europe observer State (the United States), one State with observer status with the Assembly (Israel) and two States whose parliaments have partner for democracy status with the Assembly (Kyrgyzstan and Morocco) have not yet ratified it. The Assembly welcomes the changes to the Constitution of Ukraine, finally adopted by the Ukrainian Parliament, by which the ratification of the Rome Statute will be possible. At the same time, the Assembly is concerned that these changes will come into effect only in three years’ time, and not as soon as possible, as was recommended by the Assembly.

4. The Assembly welcomes the fact that, in 2010, the States Parties to the Rome Statute adopted two amendments to it (“Kampala amendments”) – one criminalising the use of certain weapons in non-international armed conflicts under the scope of the definition of “war crimes” and the other introducing the definition of crime of aggression as well as the system of exercise of jurisdiction over this crime by the ICC. The Assembly notes that, so far, almost half of the Council of Europe’s member States have ratified these amendments. Among the States that are already Party to the Rome Statute, so far 17 States of the Council of Europe (Albania, Bosnia and Herzegovina, Bulgaria, Denmark, France, Greece, Hungary, Ireland, Italy, Republic of Moldova, Montenegro, Netherlands, Norway, Portugal, Romania, Sweden and United Kingdom), three Council of Europe observer States (Canada, Japan and Mexico) and one State whose parliament has partner for democracy status with the Assembly (Jordan) have not yet ratified the Kampala amendment on the Crime of Aggression. Moreover, among the States that are already Party to the Rome Statute, so far, 17 member States of the Council of Europe (Albania, Bosnia and Herzegovina, Bulgaria, Denmark, France, Greece, Hungary, Iceland, Ireland, Italy, Montenegro, the Netherlands, Portugal, the Republic of Moldova, Romania, Sweden and the United Kingdom), three Council of Europe observer States (Canada, Japan and Mexico), and two States whose parliaments have partner for democracy status with the Assembly (Jordan and Palestine) have not yet ratified the Kampala amendment on war crimes.

5. The Assembly also recalls the importance of ratifying the Agreement on the Privileges and Immunities of the ICC, which facilitates the Court’s independent operation by providing the Court officials with the legal status necessary, as civil servants of an international judicial institution, to conduct investigations efficiently, and urges the States that have not yet done so to ratify or accede to this treaty. So far, among the States that are already Parties to the Rome Statute, two member States of the Council of Europe (the Republic of Moldova and San Marino), one observer State (Japan), and one State whose parliament has partner for democracy status with the Assembly (Jordan) have not acceded to this instrument.

2. Draft resolution adopted unanimously by the committee on 6 September 2016.

6. The Assembly recalls that the ICC is based on the principle of complementarity, assuming jurisdiction only as a last resort. Therefore, the States Parties to the Rome Statute should adopt its national legislation to fully implement the Statute, especially by incorporating the Rome Statute crimes and general principles of law into their domestic criminal law systems. The Assembly urges the States that have not done so to fully implement the Rome Statute. So far, among the States that are already Party to the Rome Statute, four member States of the Council of Europe (Albania, Hungary, Italy and San Marino), and two States whose parliaments have partner for democracy status with the Assembly (Jordan and Palestine) have not fully implemented those crimes and general principles of law into their domestic criminal law systems.

7. The Assembly also stresses the importance of States' co-operation with the ICC in investigating and prosecuting crimes within its jurisdiction, in particular as regards the arrest and surrender of suspects or accused persons, the seizure of assets of crime and the collection and preservation of evidence. In this regard, the Assembly calls on the member States of the Council of Europe that have not yet done so to establish in their national legislation the mechanism to efficiently co-operate with the ICC as well as to sign the so-called "voluntary co-operation agreements" with the ICC (Enforcement of Sentences pronounced in the ICC's judgments, Interim and Final Release, Protection and Relocation of Witnesses). Among the States that are already Party to the Rome Statute, so far five member States of the Council of Europe (Albania, Andorra, Hungary, the Republic of Moldova and San Marino), one observer States (Mexico) and two States whose parliaments have partner for democracy status with the Assembly (Jordan and Palestine) have not established in their national legislation the mechanism to efficiently co-operate with the ICC.

8. The Assembly welcomes the work of Parliamentarians for Global Action, a non-profit, non-partisan international network of committed legislators, which informs and mobilises parliamentarians in all regions of the world to advocate for human rights and the rule of law. Through its Campaign for the Universality and Effectiveness of the Rome Statute, it has contributed to 77 of the 124 ratifications and provided technical assistance for full implementation of the Rome Statute to several of its members. The Assembly also stresses the decisive role played by civil society, in particular the Coalition for the ICC which gathers together some 2 500 NGOs coming from more than 150 countries, which should be highly praised.

9. The Assembly notes with concern that the integrity and independence of the ICC has recently been called into question by some member States of the African Union. It considers that any attempt to undermine the authority of the Court as an independent permanent international judicial institution should be stopped.

10. The Assembly therefore urges the Council of Europe's member States, its observer States, Assembly observer States and States whose parliaments have partner for democracy status with the Assembly to reaffirm their commitment to the ICC by:

10.1. signing and ratifying without further delay the Rome Statute, the Kampala amendments and the Agreement on the Privileges and Immunities of the ICC, if they have not yet done so;

10.2. adopting effective legislation to implement the Rome Statute, in particular by introducing the crimes and general principles of law defined therein into their domestic criminal legislation and establishing procedures allowing full and effective co-operation with the Court;

10.3. fully co-operating with the ICC and providing judicial assistance to it, in line with the obligations stemming from the Rome Statute, for example by appointing a special focal point for co-operation with the ICC;

10.4. concluding co-operation agreements with the Court to facilitate the investigation and prosecution of crimes within its jurisdiction as well as the enforcement of the sentences pronounced in its judgments, protection and relocation of witnesses and interim and final release of persons;

10.5. providing mutual legal assistance in matters falling within the scope of the Rome Statute;

10.6. providing the ICC with effective budgetary resources in order to allow it to fulfil its tasks in an independent and efficient manner while respecting the autonomy of the Office of the Prosecutor in determining the situations that deserve investigation and prosecution under the Rome Statute and avoiding interference with her mandate through budgetary policies;

10.7. organising training for judges, prosecutors, lawyers and members of police and armed forces on issues related to the implementation of the Rome Statute;

10.8. organising seminars and conferences with members of parliament in collaboration with parliamentary networks such as Parliamentarians for Global Action in order to generate awareness and political will as well as to provide the national parliamentarians and their staff with the necessary tools to advance the process of ratification of the Rome Statute, the Kampala amendments and the Agreement on the Privileges and Immunities as well as the full implementation of these international treaties;

10.9. taking necessary awareness-raising measures to promote knowledge about the ICC among the general public;

10.10. providing political as well as financial support to non-governmental organisations combating impunity, promoting the universality and effectiveness of the Rome Statute system and the compliance of States with the Rome Statute obligations, as well as providing assistance to victims of the most serious crimes of international concern;

10.11. taking any other action to protect the integrity and the independence of the ICC, especially in respect of policies of other regional organisations, such as the African Union;

10.12. making meaningful financial contributions to the ICC's Trust Fund for Victims, thereby signalling that the ICC is not only delivering retributive and preventative justice, but also restorative justice.

11. The Assembly welcomes the referral of situations such as those in Darfur (Sudan) or Libya, by the United Nations Security Council to the ICC. It regrets that the situations in Syria and Iraq have not yet been referred to the Security Council. It calls on the United Nations Security Council to fulfil its responsibilities to implement the decisions and orders of the Court and to provide it with sufficient financial resources to fulfil its tasks.

B. Explanatory memorandum by Mr Alain Destexhe, rapporteur

1. Introduction

1. The motion for a resolution on “Co-operation with the International Criminal Court: towards a concrete and expanded commitment” was referred to the Committee on Legal Affairs and Human Rights for report on 27 November 2015. At its meeting on 26 January 2016, the committee appointed me as rapporteur. On 17 May 2016, in Rome, it held a hearing with the participation of Ms Silvia Alejandra Fernández de Gurmendi, President of the International Criminal Court (The Hague), and Mr David Donat Cattin, Secretary-General of Parliamentarians for Global Action (New York).

2. The motion for a resolution, referring to [Resolution 1644 \(2009\)](#) on co-operation with the International Criminal Court (ICC) and its universality, underlines the Parliamentary Assembly’s will to co-operate with the International Criminal Court (ICC or “the Court”). It also highlights its shortcomings, especially the lack of progress as regards a universal ratification of the Rome Statute and its effective implementation into national legislation. It also draws attention to the absence of police or public forces in the ICC system, which impedes its efficiency, to proposals aimed at re-establishing the immunity of heads of State and to the lack of co-operation of other organisations. According to the authors of the motion, the Assembly should:

- undertake an assessment of the ratification and implementation of [Resolution 1644 \(2009\)](#) by the member States of the Council of Europe;
- based on this assessment, make recommendations to the member States on the deficiencies of their co-operation with the International Criminal Court;
- recommend that member States consider the International Criminal Court as a complementary jurisdiction and set up the necessary framework at the national level in order to fight against impunity for the crimes over which the Court has jurisdiction.

3. It is worth recalling that the Council of Europe, and in particular the Assembly and the European Commission for Democracy through Law (Venice Commission), was one of the main advocates of the creation of the ICC. The Venice Commission produced a highly pertinent analysis of constitutional issues raised by the ratification of the [Rome Statute of the ICC](#)³ (“Rome Statute”). On many occasions, the Assembly had called for the establishment of the ICC (for example in [Recommendation 1189 \(1992\)](#) on the establishment of an international criminal court to judge war crimes and [Recommendation 1408 \(1999\)](#) on the International Criminal Court) and, subsequently, for the ratification of the Rome Statute and full co-operation with the Court ([Resolution 1300 \(2002\)](#) on risks for the integrity of the Statute of the International Criminal Court and [Resolution 1336 \(2003\)](#) on threats to the International Criminal Court).

4. In its latest resolution on this subject, [Resolution 1644 \(2009\)](#), the Assembly reiterated its belief that “the universal ratification of the Rome Statute and its effective implementation into domestic systems, as well as close co-operation by States Parties and other States in providing practical and judicial assistance to the ICC, are of key importance for the fight against impunity”. It called on Council of Europe member States and observer States and Assembly observer States which had not yet done so to sign and ratify without further delay the Rome Statute and the Agreement on the Privileges and Immunities of the ICC; to adopt effective national legislation to implement the Rome Statute and to protect its integrity. At the time of the adoption of this resolution, in 2009, eight Council of Europe member States (Armenia, Azerbaijan, the Czech Republic, the Republic of Moldova, Monaco, the Russian Federation, Turkey and Ukraine), one Council of Europe observer State (the United States) and one State with observer status with the Assembly (Israel) had not yet ratified it. The Assembly also recommended that Council of Europe member and observer States and Assembly observer States fully co-operate with the ICC, “empower their judicial and law-enforcement authorities in order to exercise the States’ primary jurisdiction over crimes within the purview of the ICC”, contribute financially to its Trust Fund for Victims and incorporate into their legal orders the relevant standards on victims’ rights.

3. Venice Commission, [Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court](#), CDL-INF(2001)1 and [Second Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court](#), CDL-AD(2008)031.

5. According to the authors of the above-mentioned motion for a resolution, most of the recommendations contained in Assembly [Resolution 1644 \(2009\)](#) have not been implemented and have to be re-examined. This report is thus aimed at recalling the unique character and role of the ICC, examining the changes made to the Rome Statute since 2009, and taking stock of its ratifications and of the main challenges to the functioning of the ICC.

6. Although our committee has not produced any new reports on this subject since the adoption of [Resolution 1644 \(2009\)](#), it has been cognisant of the problems raised in its previous texts. On 23 April 2013, our committee held an exchange of views with the then President of the Assembly of States Parties of the International Criminal Court, Ms Tiina Intelmann. During that meeting, Ms Intelmann said that the ICC was in need of political support and that the Assembly was in a good position to provide it. She called on States Parties to establish a co-ordinated and mainstreamed national system for co-operation with the ICC and asked the Assembly to examine whether Rome Statute crimes were included in national legislation.

7. As was stressed by the President of the ICC, Ms Fernández de Gurmendi, at the hearing before the committee in May 2016, the ICC is now facing unprecedented judicial activity and has to improve its efficiency. The ICC also has to deal with a number of external challenges such as the lack of universality of the Rome Statute, its national implementation, the need for increased co-operation by the States, and political support for upholding the integrity and legitimacy of the ICC. The lack of universality of the Rome Statute undermines not only the effectiveness of the Court, but also its legitimacy and could potentially lead to selective justice. It is now time to examine these challenges and to make appropriate recommendations.

2. The ICC and developments since [Resolution 1644 \(2009\)](#)

2.1. *The ICC*

8. Although the establishment and the purview of the ICC have been presented in detail in the previous reports of our committee,⁴ I will, however, recall the main provisions of the [Rome Statute of the ICC](#).

9. The ICC was established by the Rome Statute, an international treaty negotiated under the auspices of the United Nations. The Rome Statute was adopted on 17 July 1998 by 120 States and entered into force on 1 July 2002, after the deposition of the 60th ratification instrument on 11 April 2002.

10. The ICC, with its seat in The Hague (The Netherlands), is not part of the United Nations system; however, the United Nations provides important support to the Court and both organisations concluded a [Negotiated Relationship Agreement](#) on 4 October 2004. The ICC is the first ever permanent independent judicial institution (that is to say not created for a specific conflict and independent from States, the United Nations and any other entity) with jurisdiction over individuals accused of “the most serious crimes of concern to the international community as a whole”: genocide, crimes against humanity and war crimes (Article 5 of the Rome Statute). The Rome Statute defines those crimes (Articles 6-8), which are not subject to any statute of limitations (Article 29). The Court will also have jurisdiction over the crime of aggression (mentioned in Article 5.1.d) once the conditions adopted by the Review Conference in Kampala (Uganda) in 2010 are fulfilled (see below). Article 10 of the Rome Statute stipulates that its Part II (on jurisdiction, admissibility and applicable law) should not be considered as a definite codification of international law.

11. The Rome Statute (Article 6) defines “genocide” as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group”. The concept of “genocide” first appeared in 1944 in connection with the holocaust. Although missing from the [1945 London Agreement \(Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis\)](#) and the [Charter of the International Military Tribunal \(IMT\)](#), the term was used in the indictment of the [Nuremberg trials](#) to better define the crimes committed by the Nazi regime, and was ultimately recognised with the adoption in 1948 of the United Nations [Convention on the Prevention and Punishment of the Crime of Genocide](#), which separated it from other types of crime frequently committed in times of conflict. The definition included in Article 6 of the Rome Statute follows that of the said United Nations convention and those of the statutes of the [International Criminal Tribunal for the former Yugoslavia \(ICTY\)](#) and the [International Criminal Tribunal for Rwanda \(ICTR\)](#). As far as the subjective element is concerned,

4. See, in particular, the report of Ms Herta Däubler-Gmelin (Germany, SOC) on co-operation with the International Criminal Court (ICC) and its universality, [Doc. 11722](#).

genocide requires a double intent: besides the intent to carry out the material act, such act must be committed with the *specific intent* to destroy a protected group in whole or in part. The third key element for the definition of genocide is the notion of “group” (national, ethnic, racial or religious).

12. Article 7.1 of the Rome Statute defines “crimes against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” and lists: a) murder; b) extermination; c) enslavement; d) deportation or forcible transfer of population; e) imprisonment or other severe deprivation of physical liberty; f) torture; g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; h) persecution; i) enforced disappearance of persons; j) the crime of apartheid; or k) other inhumane acts. This notion had remained undefined for a long time; the [Charter](#) establishing the International Military Tribunal provided its definition, requiring that the inhumane acts “committed against any civilian population” (such as murder, extermination, enslavement, deportation or other acts listed in this legal instrument) should occur “before or during the war”. This was further developed in the statutes of the ICTY and ICTR; whereas the ICTY Statute restricted crimes against humanity to those “committed in armed conflict, whether international or internal in character”,⁵ the ICTR Statute had already removed this requirement.⁶ The Rome Statute replaced the nexus with the armed conflict with a new element: in order to qualify as crimes against humanity, the acts have to be committed as part of “a widespread or systematic attack against any civilian population”.⁷ The Rome Statute definition offers the most expansive list of specific criminal acts that may constitute crimes against humanity to date,⁸ and reflects the latest consensus of the international community.⁹

13. Article 8.2 of the Rome Statute defines “war crimes” as “grave breaches of the Geneva Conventions of 12 August 1949” and provides a list of acts qualifying as such crimes under letter a) and “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”, under letter b). The definition of the Rome Statute refers to customary law and embraces not only crimes committed in international armed conflicts, but also in non-international armed conflicts.¹⁰

14. The ICC has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute for the State concerned and, in any case, after 1 July 2002, the date of its entry into force. However, ratifying States can decide to lodge a declaration with the ICC Registrar accepting the jurisdiction of the Court for crimes committed after 1 July 2002. This declaration can be lodged even if a State has not yet decided to ratify the Rome Statute. Continuing crimes, such as enforced disappearances, fall within the jurisdiction of the Court only if the crime occurred after the entry into force of the Rome Statute in the State concerned which vests the Court with jurisdiction over the given territory or national. The Rome Statute is based on the principles of territoriality and active nationality (Article 12.2).

15. The ICC is based on the principle of complementarity, seeking to empower States to investigate and prosecute the above-mentioned crimes, assuming jurisdiction only as a last resort. States retain primary jurisdiction to try genocide, war crimes and crimes against humanity. The ICC can only act when domestic jurisdictions are “unwilling” or “unable” to genuinely carry out the investigation or prosecution (see Article 17 of the Rome Statute – “Issues of admissibility”). Shielding someone from prosecution or lacking the means to pursue the alleged criminals are objective factors the Court assesses when deciding whether the case is admissible, in a process that gives States the right to challenge the admissibility of the case under the ICC.

16. Its jurisdiction concerns only crimes committed on the territory of a State Party or by its nationals, unless a situation has been referred to the Prosecutor by the United Nations Security Council (see below) or if a State has made a declaration accepting the jurisdiction of the Court.¹¹ It applies equally to all persons without any distinction based on official capacity (head of State or government, a member of a government or parliament, an elected representative or a government official) and immunities or special rules attached to the official capacity of a person shall not exempt that person from ICC jurisdiction (see Article 27 of the Rome Statute). Superiors or military commanders may be held responsible for crimes committed by persons under their effective command and control or effective authority and control (Article 28 of the Rome Statute).

5. Article 5 of the ICTY Statute, adopted by United Nations Security Council on 5 May 1993 by Resolution 827.

6. Article 3 of the ICTR Statute, adopted by United Nations Security Council on 8 November 1994.

7. Article 7 of the Rome Statute.

8. International Crime Database, Crimes Against Humanity, www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity.

9. Margaret de Guzman, [Crimes Against Humanity](#), p. 2, in: *Research Handbook on International Criminal Law*, Bartram S. Brown (ed.), Edgar Elgar Publishing, 2011.

10. www.internationalcrimesdatabase.org/Crimes/WarCrimes.

11. ICC, [The ICC at a Glance](#).

17. The law applied by the ICC shall be in line with internationally recognised human rights (Article 21 of the Rome Statute) and the Rome Statute reiterates the main principles of criminal law such as non-retroactivity of law, individual criminal responsibility, *ne bis in idem* (no double jeopardy for the same cause of action) and *nullum crimen, nulla poena sine lege* (legality principle: no crime, no punishment without law) (Articles 20 and 22-24). The presumption of innocence and the rights of the accused, including the right to a public, impartial and fair hearing and the right of defence, are enshrined respectively in Articles 66 and 67 of the Rome Statute.

18. The Rome Statute provides the general principles and procedures for the operation of the Court. It also outlines the co-operation obligations of its States Parties (Part IX). This co-operation is crucial as regards arresting persons wanted by the ICC, providing evidence for use in proceedings, relocating witnesses and enforcing the sentences of convicted persons. It may also be received from non-Party States.

19. The ICC is composed of 18 judges, elected by the Assembly of States Parties, the Court's management oversight and legislative body, composed of representatives of the States which are Parties to the Rome Statute. There are four organs within the Court: the Presidency (the President and two Vice-Presidents), the Chambers (Pre-Trial, Trial and Appeals), the Office of the Prosecutor and the Registry.

20. Investigations or prosecutions by the ICC can be initiated in three different ways (Article 13.a, b and c of the Rome Statute):

- a. if a State Party to the Rome Statute refers a situation to the Prosecutor, provided that the jurisdiction of the Court exists in respect of the territories or the nationals of one or more States Parties (Article 12.1 of the Rome Statute) or of non-Party States that have accepted the jurisdiction of the Court (Article 12.3);
- b. if the United Nations Security Council requests the Prosecutor to launch an investigation regardless of the preconditions for the exercise of the Court's jurisdiction provided by Article 12 of the Rome Statute (hence, *de jure* allowing the Security Council to attribute to the Court a universal jurisdiction principle, but bearing in mind that the Prosecutor and the judges retain full independence to select cases within the framework of the situation referred to the Court);
- c. on the Prosecutor's own initiative (*proprio motu*), on the basis of information received from reliable sources and with the authorisation of the Pre-Trial Chamber. This is on condition that the Court disposes of jurisdiction in respect of the territories or the nationals of one or more States Parties (Article 12.1) or of non-Party States that have accepted the jurisdiction of the Court (Article 12.3).

21. The rights of victims to participate in proceedings before the ICC (including to testify as witnesses without losing their right to present their views and concerns, receive legal aid and legal representation) and to apply for reparation are fully enshrined in the Rome Statute (in particular its Articles 68 and 75) and the [Rules of Procedure and Evidence](#). A Victims and Witnesses Unit has been established within the Registry to provide protection to witnesses and victims who appear before the Court. Moreover, an Office of Public Counsel for the Victims has been set up to assist victims and/or support their legal representatives participating in the proceedings.

22. The States Parties to the Rome Statute have also established a Trust Fund for Victims (Article 79 of the Rome Statute) to "support and implement programmes that address harms resulting from genocide, crimes against humanity and war crimes".¹² The Trust Fund has two mandates: 1) to implement the reparation orders and principles established by the Court, especially when the convicted person does not have enough assets to fulfil such orders and principles; and 2) to provide interim assistance and support to the victims and their families before completion of an investigation, prosecution or adjudication regarding a situation falling under the jurisdiction of the Court. The Trust Fund for Victims is funded primarily by voluntary contributions of States Parties to the Rome Statute, but it may also receive other contributions from individuals, corporations, international organisations and other entities, including non-Party States. The ICC is funded by States Parties through a system of assessed mandatory contributions. The United Nations also provides funds to the Court, in particular in relation to referrals by the Security Council.

23. The [Agreement on the Privileges and Immunities of the ICC](#) (APIC), signed in New York on 9 September 2002, entered into force on 22 July 2004. Given that the ICC is an international organisation independent from the United Nations, it does not benefit from the privileges and immunities that United Nations members have granted to United Nations staff and property. Therefore, the APIC is an important feature of the ICC system, on the basis of which the Court's officials are given the necessary legal status to

12. www.trustfundforvictims.org/.

conduct investigations in an efficient way, to safeguard victims, witnesses and defence counsels, and to ensure the confidentiality and safety of the documents, materials and information handled by the ICC in the territory of its States Parties, as civil servants of an international court.

2.2. The Kampala amendments

24. From 31 May until 11 June 2010, the States Parties to the Rome Statute met in Kampala (Uganda) for the 1st Review of the Rome Statute, which was mandated to be convened seven years after its entry into force. The Review Conference adopted, by consensus, two resolutions amending the list of crimes under the jurisdiction of the Court.

25. **Resolution 5 of the Review Conference** amended Article 8.2 of the Rome Statute on war crimes. It expanded the scope of this article by criminalising the use, during times of non-international armed conflict, of:

- poison or poisoned weapons;
- asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- bullets which expand or flatten easily in the human body (also known as “dum-dum bullets”).

26. This amendment – also known as the “Belgium amendment” – fills an important loophole in the Rome Statute, which, so far, prohibited the use of these weapons only if they were used in an international conflict. Thus, it promotes the protection of civilians, which lies at the core of international humanitarian law, and reflects the existing customary rule which expands the criminalisation of the use of such weapons to non-international conflicts as well. The amendment enters into force for those States Parties which have accepted it one year after the deposit of their ratification instrument (according to Article 121.5 of the Rome Statute).

27. **Resolution 6 of the Review Conference** referred to Article 5.2 of the Rome Statute, which required that a definition of the crime of aggression be provided, along with the procedure according to which the jurisdiction of the Court over this crime would be exercised. On the basis of this amendment, a new Article 8bis was inserted into the Rome Statute. According to its paragraph 1, the “crime of aggression” (already recognised in Article 6 of the Charter of the International Military Tribunal) means “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. Thus, the amendment aims to hold to account the leaders of States that have committed an “act of aggression”; the latter is defined in paragraph 2 of Article 8bis, as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”. Article 8bis, paragraph 2, second sentence, lists acts which, regardless of a declaration of war, shall, in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as acts of aggression (for example, the invasion or attack by the armed forces of a State of the territory of another State).

28. The ICC may only exercise its jurisdiction over crimes of aggression after one year has elapsed since the ratification instruments were deposited by 30 States Parties. The Assembly of States Parties must then take an additional decision activating the Court’s jurisdiction, which can be done only after 1 January 2017, by consensus or by at least a two-thirds majority of States Parties. The first requirement was fulfilled on 26 June 2016 when the 30th ratification of the Kampala amendment was deposited by Palestine. Consequently, this enables the Assembly of State Parties to proceed to take an activation decision as of 1 January 2017.

29. This will be an important step taken by the States Parties since, once activated, the amendments will, for the first time in the history of humankind, establish a permanent system of international criminal accountability aimed at enforcing the most fundamental rule governing the peaceful coexistence of nations: the prohibition of the gravest forms of unlawful and aggressive use of force. The Court’s jurisdiction over the crime of aggression will provide some measure of criminal accountability at the international level for this «supreme crime» for the first time since the Nuremberg and Tokyo Trials.

30. Important elements of the amendments on the Crime of Aggression are:

- a. No jurisdiction over non-Party States: according to paragraph 5 of Article 15bis (added by Resolution 6 of the Review Conference), non-Party States are excluded both as potential aggressor and victim States unless the situation is referred by the United Nations Security Council;
- b. Role of the United Nations Security Council: there is no requirement for the Security Council to actively determine the existence of an act of aggression or to authorise ICC investigations for the Court to proceed.

31. The Security Council – after having been informed by the Prosecutor of his or her intention to formally open an investigation – can determine that an act of aggression has been committed. Such a determination is a sufficient – but not necessary – condition for the investigation to proceed. The Prosecutor must accord six months to the Security Council to make such a determination. Nevertheless, the ICC is not dependent on action by the Council because if such determination is not made, the Prosecutor may still proceed, provided that the judges of the Pre-Trial Division authorise him or her to do so.

2.3. Investigations before the ICC

32. Since the Rome Statute entered into force and the Court became operational, 23 cases regarding 10 situations have been brought before the ICC.¹³ To date, four States Parties to the Rome Statute have referred situations occurring on their territories to the ICC: Uganda, the Democratic Republic of Congo, the Central African Republic¹⁴ and Mali. The United Nations Security Council has referred two situations to the Court concerning non-Party States: one in Darfur (Sudan), through Security Council Resolution 1593 adopted on 31 March 2005, and another one on the situation in Libya, through Security Council Resolution 1970 of 26 February 2011 (both resolutions were unanimously adopted under Chapter VII of the United Nations Charter, as required by Article 13.b of the Rome Statute). Also, the Prosecutor was authorised by the Pre-Trial Chamber of the ICC to open an investigation *proprio motu* in three situations concerning: Kenya (as regards post-electoral violence between December 2007 and January 2008); Côte d'Ivoire (a non-Party State to the Rome Statute at that time, on the basis of its acceptance of the Court's jurisdiction under Article 12.3 of the Rome Statute) and Georgia (for crimes allegedly committed in Georgia, including South Ossetia, between 1 July and 10 October 2008).

33. Proceedings concerning most of these situations are pending, with the exception of the cases *The Prosecutor v. Thomas Lubanga Dyilo*, in which the accused was sentenced to 14 years of imprisonment, and *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui*, in which the first accused was sentenced to 12 years of imprisonment and the second one was acquitted. Both cases concerned situations in the Democratic Republic of Congo. Moreover, Trial Chamber III decided that *Jean-Pierre Bemba Gombo* was guilty of two counts of crimes against humanity and three counts of war crimes committed in the Central African Republic and sentenced him to 18 years of imprisonment (the conviction is not yet final). The trial against *Bemba et al.*, which opened on 29 September 2015, has reached the stage of judges' deliberations and the judgment is expected to be pronounced in due course. The suspects are accused of committing offences against the administration of justice in connection with witness testimonies in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. There are currently 8 accused in custody and 13 suspects at large.¹⁵

34. The Office of the Prosecutor is now conducting preliminary examinations in a number of situations concerning Afghanistan, Burundi, Colombia, Guinea, Iraq/United Kingdom, Nigeria, Palestine, Registered Vessels of Comoros, Greece and Cambodia and Ukraine.¹⁶

3. State of ratifications

35. To date,¹⁷ 124 States have ratified or acceded to the Rome Statute: 34 African States, 19 Asia-Pacific States, 18 eastern European States, 28 Latin American and Caribbean States and 25 western European and other States.¹⁸ Among the members of the Council of Europe, 41 States are Parties to the Rome Statute, while six – Armenia, Azerbaijan, Monaco, the Russian Federation, Turkey and Ukraine¹⁹ – are not.

36. As regards Council of Europe and Assembly observer States, only Canada, Japan and Mexico are States Parties to the Rome Statute (thus the Holy See, Israel and the United States of America are outside the ICC system). Jordan and Palestine, whose parliaments have partner for democracy status with the Assembly, have also acceded to the Rome Statute (while Kyrgyzstan and Morocco have only signed it).

13. For more information, see: https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

14. There are investigations into two situations in the Central African Republic.

15. <https://www.icc-cpi.int/#>.

16. For more information, see: <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx>.

17. As at 20 July 2016.

18. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

19. It should be noted that between Assembly Resolution (2009) 1644 and the year 2016, only two member States of the Council of Europe ratified the Rome Statute, namely the Czech Republic and the Republic of Moldova.

37. As regards the ratification of the Kampala amendments, 30 States have ratified the amendment to Article 8 concerning war crimes (the majority of which are Council of Europe member States: Andorra, Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Georgia, Germany, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, San Marino, Slovak Republic, Slovenia, Spain, Switzerland and “the former Yugoslav Republic of Macedonia”)²⁰ and 30 States the amendments on the crime of aggression (the majority of which are the following Council of Europe member States: Andorra, Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Georgia, Germany, Iceland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Poland, San Marino, Slovak Republic, Slovenia, Spain, Switzerland and “the former Yugoslav Republic of Macedonia”; Palestine has also accepted them).²¹

38. As regards the Agreement on the Privileges and Immunities of the ICC, 75 countries are States Parties to it, including 40 Council of Europe member States (including Ukraine, which is not a State Party to the Rome Statute).²² Armenia, Azerbaijan, Monaco, the Republic of Moldova, the Russian Federation, San Marino and Turkey have not acceded to this instrument. Canada, Mexico and Palestine have acceded to it.

4. Current challenges

39. Since the adoption of the Rome Statute in 1998, we are still far from achieving the universal jurisdiction of the ICC. The Court still faces accusations of “double standards”, as it has no power to investigate *proprio motu* situations in non-Party States; although such investigations can be triggered by decision of the United Nations Security Council – to be followed by an independent procedure under the monopoly of the Prosecutor, under the scrutiny of the Pre-Trial Chamber – the Security Council’s decisions are of a political character, which risks “politicising” the role of the ICC. An example of this is the veto against a proposal to refer the situation in Syria to the ICC in May 2014. As stressed by President Fernández de Gurmendi at the hearing in Rome in May 2016, the Rome Statute does not impose universal participation, but the powers of the Security Council amount to a form of universal jurisdiction, because they can be applied to any State in the world. However, the Security Council is a political actor, albeit constrained by applying its “specific powers” under Article 24 of the United Nations Charter, and some of its permanent members which have the right of veto are not Parties to the Rome Statute. Thus, the only way to achieve the universal jurisdiction of the ICC is to promote the universal ratification of the Rome Statute by all States. The lack of universality of the Rome Statute undermines not only the effectiveness of the Court, but also its perceived legitimacy. The inability to act in all situations that would deserve the attention of the ICC generates a perception of selective justice.

40. Most of the member States of the Council of Europe (41) have ratified or acceded to the Rome Statute; 40 member States have also acceded to the Agreement on the Privileges and Immunities of the ICC. However, six member States and some of observer States (including the United States of America) have not yet acceded to the Rome Statute, which, as mentioned before, could create the uneven application of the principles and norms of international criminal law and inefficiencies in the functioning of this jurisdiction. Moreover, almost half (19) of the Council of Europe’s member States have not ratified the Kampala amendments on the crime of aggression. As stressed at the hearing in Rome by Mr Donat Cattin, some member States of the Council of Europe have still not ratified the Rome Statute, despite some positive signals given by politicians. In Turkey, in 2004, Mr Recep Tayyip Erdoğan, then Prime Minister, pledged ratification, which has still not taken place, even though the required amendment to the Turkish Constitution has been adopted in the meantime. In Ukraine, the issue of acceding to the Rome Statute is examined in the context of a broader constitutional reform package; however, the process of accession may still be lengthy due to the inclusion in the constitutional reform package on the judiciary of a transitional provision that would automatically postpone by at least three years the commencement of the process of ratification. This constitutional reform was adopted by the Verkhovna Rada of Ukraine in the first half of 2016, and action to remove the transitional provision related to Article 124, which postpones the possibility of Rome Statute ratification, may be taken only one year after its adoption. However, the nature of this “transitional” provision – which is, by definition, deemed to expire with the passage of time – may be qualified as *sui generis* and could allow for an expedited process of revision.

41. As regards the ratification of the Rome Statute, States face political challenges related to issues such as transparency, accountability, fear of prosecution, a political agenda which does not prioritise this issue or the absence of certain global and regional powers among the States Parties to the Rome Statute.²³ Some

20. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-a&chapter=18&clang=_en.

21. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en.

22. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&clang=_en.

23. #globalJustice, *Universality and implementing the Rome Statute – What are the challenges?*, 24 September 2015.

legal challenges have been identified by the European Commission for Democracy through law (Venice Commission): several constitutional problems can arise in relation to the ratification of the Rome Statute: the lifting of immunity of heads of State or government and persons with “official status”, the extradition of nationals and the sentences which may be pronounced by the ICC (such as life imprisonment). Other issues relate to required co-operation with the ICC’s Office of the Prosecutor or the exercise of the prerogative of pardon. The Venice Commission has proposed some solutions, such as: 1) inserting a general clause into the Constitution to settle all constitutional issues relating to ICC accession (to avoid introducing exceptions to each article concerned; 2) introducing and/or applying a special procedure to ratify a treaty if any of its provisions are deemed to conflict with the Constitution; 3) systematically revising all constitutional provisions which are in conflict with the Rome Statute; and 4) interpreting certain provisions of the Constitution in such a way as to avoid conflict with the Rome Statute.²⁴

42. Some other challenges remain, in particular regarding the effective implementation of the Rome Statute and co-operation with the Court. In order to have a clear definition of the crimes and penalties in the national legislation as well as to make possible the effective functioning of the complementarity principle, States which have ratified or acceded to the Rome Statute should criminalise the acts defined in Articles 5-8*bis* of the Rome Statute in their national domestic (criminal) legal orders. Although, according to an interpretation of the Rome Statute, the incorporation of those crimes into the domestic system is not mandatory, it would harmonise criminal law standards and facilitate their effective investigation and prosecution at the domestic level. The creation of a system of international jurisdiction builds on the premise that the primary competence and authority to initiate investigations of international crimes rests with States. This recognition is reflected in the principle of complementarity, which is implemented by the Court through Articles 17 and 53. The ICC, in order to declare a case admissible, must establish, for each case, the actual ability of States to prosecute cases of crimes under their jurisdiction. One of the essential elements enabling a State to punish a particular crime is that it is established in the national criminal code, or other criminal laws. This definition, coupled with the incorporation of the General Principles of Law contained in Part III of the Rome Statute and in relevant customary law is necessary since the ratification of the Rome Statute does not imply automatically that these rules apply in domestic law, unless otherwise provided by the relevant domestic legal order. The national incorporation of crimes and general principles contained in the Rome Statute is, therefore, the first step that a State can take to ensure that the domestic legal framework enables it to exercise jurisdiction over the crimes and to contribute to the overall goal of putting an end to impunity. Moreover, given that the ICC has limited resources which enables it to exercise jurisdiction only in a limited number of situations, the ICC’s engagement in a particular situation does not prevent the State concerned from investigating and prosecuting the crimes which are subject to ongoing investigations or proceedings by the ICC. In such cases, the ICC and States, while working together, must ensure that all atrocities, all perpetrators and all victims in a given situation are taken into account. Due to the complexity of this jurisdictional framework, despite a clear political will to ratify and implement the provisions of the Rome Statute, countries may at times encounter technical problems in the drafting and adoption of implementing legislation, also taking into account the overlapping provisions of the Rome Statute and national legal systems.²⁵ However, a large majority of Council of Europe member States have been able to address and resolve these technical problems.

43. In addition, given that the Court does not possess its own police or other law-enforcement bodies or territory, it necessitates co-operation from States to function efficiently. This co-operation can be either obligatory (stemming from the Rome Statute, Articles 89-93) or voluntary. Obligatory co-operation concerns arrest and transfer of suspects, access to witnesses, production of documents, and the freezing and seizure of assets and instrumentalities of crimes. The case of Mr Omar Al Bashir, President of Sudan, accused of a number of counts of international crimes and sought by the police on the basis of ICC arrest warrants, shows the importance of international co-operation in executing arrests warrants.²⁶ Other forms of international co-operation are not strictly required under the Rome Statute, but are highly important to enable the ICC to fulfil its mandate. That is especially the case with the enforcement of sentences pronounced in its judgments (as the ICC only has a detention centre, in the Netherlands, for individuals held in detention during pre-trial, trial and/or appeals proceedings), effective relocation of witnesses and victims or interim or final release of

24. Venice Commission, [Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court](#), CDL-INF(2001)1, p. 12.

25. No peace without justice, ICC Ratification and implementation of the Rome Statute, www.npwj.org/ICC/ICC-Ratification-and-Implementation.html.

26. On 11 July 2016, Pre-Trial Chamber II decided that the Republic of Uganda and Djibouti had failed to comply with the request for arrest and surrender of Mr Al Bashir to the ICC and referred the matter to the Assembly of States Parties to the Rome Statute and the United Nations Security Council; see press release of 12 July 2016, ICC, [Al Bashir case: ICC Pre-Trial Chamber II finds non-compliance of Uganda and Djibouti; refers matter to ASP and UN Security Council](#). The case was also well-known due to South Africa’s failure to arrest him while he attended an African Union summit in June 2015.

suspects/accused (who may have no status to stay on Dutch territory after their release.)²⁷ As regards the enforcement of sentences, President Fernandez de Gurmendi stressed at the hearing in Rome that the ICC was entering a new phase, in which it needed more States to accept convicted persons for the execution of their prison terms. She also expressed concern that despite extensive negotiations conducted by the Court, only eight States Parties had concluded agreements on the enforcement of sentences (Austria, Belgium, Denmark, Finland, Mali, Serbia and the United Kingdom; Norway joined on 7 July 2016.)²⁸ The protection of witnesses, including their effective relocation, is another essential issue. According to the ICC's President, the Court needs more States to accept witnesses on their territory. Special witness protection programmes are not always the only means of guaranteeing the protection of witnesses as this can be also ensured by simply granting a residence permit in another State. Support to witnesses who are victims of crimes and their families is also provided through the Trust Fund for Victims (established by Article 79 of the Rome Statute), which is financed by private and public donors. The ICC also needs more States willing to accept acquitted persons and suspects or accused under interim releases. So far, only Belgium has signed an agreement on interim releases.

44. Without State co-operation, the ICC cannot fulfil its mandate and the Rome Statute system risks collapsing. Co-operation is necessary to ensure the integrity of the proceedings. Delays by States in responding to co-operation requests reduce the Court's efficiency and increase its costs. It is also a lost opportunity for justice for the victims, who may have to wait indefinitely for accountability and the search for the truth, as there are no trials *in absentia* at the ICC.

45. As indicated by Mr Donat Cattin, according to the database of Parliamentarians for Global Action, 35 member States of the Council of Europe that are also Parties to the Rome Statute have implemented the Rome Statute to fulfil both complementarity and co-operation obligations: Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia" and the United Kingdom. Thus, there are six member States of the Council of Europe which are States Parties to the Rome Statute that have not yet enacted the required legislation to fully implement relevant Rome Statute obligations: Albania, Hungary and San Marino do not have legislation to effectively fulfil both co-operation and complementarity provisions of the Rome Statute, Andorra and the Republic of Moldova do not have legislation on co-operation obligations, while Italy does not have legislation on complementarity.

46. Moreover, budgetary issues should not be overlooked, as the Court, which is still a relatively "young" institution, is in constant need of financial contributions in order to operate in an efficient and independent way and to provide adequate compensation to victims. As stressed by President Fernandez de Gurmendi at the hearing in Rome, every year the ICC has to struggle to secure an adequate budget for the following year. By way of example, the Prosecutor has already suspended or postponed some investigations and trials have slowed down because there were no resources for the operating of a third courtroom, following a decision of the Assembly of States Parties. Due to the lack of resources the ICC could not investigate certain situations which had been referred to it by the United Nations Security Council, such as the mass executions of Coptic Christians committed in Libya by Daesh or the situation in Darfur. As regards figures, the Assembly of States Parties set the ICC's budget for 2016 at €139 590 600; although it has increased by €8 925 000 (6.83%) over 2015, this was approximately €370 000 less than the budget recommended by the Committee on Budget and Finance of the Assembly of States Parties.²⁹

47. Serious problems also appear to be emerging with respect to African States Parties to the Rome Statute, given that in January 2016 the African Union, through a decision of its Assembly of Heads of State and Government, tasked its Ministerial Committee on the ICC to draw up a road map for a possible strategy of "collective withdrawal from the ICC".³⁰ Nevertheless, there was a positive development in this regard during the African Union Summit held in Kigali (Rwanda), in mid-July 2016. During the Executive Council of Foreign Ministers of the African Union, some States planned to introduce a new African Union resolution defining the modalities of mass withdrawal by the African Union member States that are Parties to the Rome Statute of the

27. In the absence of such an agreement, Congolese militia leader Mathieu Ngudjolo Chui spent three years in an asylum detention centre in the Netherlands following his release from the Court; #globalJustice, [Ten ways states can support the ICC](#), 7 December 2015.

28. ICC, press release of 7 July 2016, [ICC signs enforcement agreement with Norway](#).

29. #globalJustice, [ASP 14: ICC independence under threat at annual assembly](#), 27 November 2015.

30. *Le Monde*, Anne Hamidou, [Retrait de l'Afrique de la CPI: un nouveau permis de tuer?](#), 2 February 2016.

ICC. Given that during the discussions the proposal on withdrawal was strongly rejected by representatives of six African Union member States, the call for collective withdrawal did not figure in the text forwarded to the Assembly of Heads of State and Government of the African Union and was not discussed during the Summit.

48. While a campaign to delegitimise the ICC has been launched by certain States, the Heads of which are in a clear position of “conflict of interest” with the ICC (Sudan and Kenya), it is also a fact that so far almost all of the ICC’s cases concern African countries. As mentioned above, four of the countries have requested the ICC to investigate using a self-referral in accordance with Article 14 of the Rome Statute, one has accepted the ICC ad hoc jurisdiction using an Article 12.3 declaration and two situations have been referred by the Security Council, leaving only one investigation concerning an African country which was started *proprio motu* by the Prosecutor. This shows that Africa has not been “targeted” by the ICC but, on the contrary, in most of these situations, African countries have themselves requested the ICC’s co-operation in ending impunity. Thus, the concerns expressed by the African Union should be rebutted and more support should be given to the Court, as an institution on which the international community can count to help to end impunity for those responsible for the commission of international crimes. Within the framework of the arguments and proposals advanced by the African Union, the Council of Europe and its member States – regardless of their status with regard to the Rome Statute – should resist the threat to the Nuremberg legacy and to customary international law posed by the proposal to dilute Article 27 of the Rome Statute, which reaffirms the customary international law principle of irrelevance of official capacity or “no immunity” for the most serious crimes of international concern.

49. Through the adoption of the 2014 Malabo Protocol (the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights – “ACJHR”), which gave the ACJHR jurisdiction over genocide, crimes against humanity and war crimes, the African Union has sought to recognise immunity, preventing the prosecution and arrest of sitting heads of State and government and other senior officials. This contravenes the content of the Moscow Declaration of 1943 and the London Charter of 1945 that established the International Military Tribunal of Nuremberg, the legal principles of which were declared a part of customary international law by the unanimously adopted United Nations General Assembly Resolution 95 of 1946. The Parliamentary Assembly and its member States must clearly affirm that, regardless of any decision to withdraw from the Rome Statute, Article 27 reflects and reaffirms customary international law and that there can be no immunity for heads of State and government or other senior State officials before competent international jurisdictions.

5. Conclusion and proposals

50. Fourteen years after the entry into force of the Rome Statute and seven years after the adoption of Assembly [Resolution 1644 \(2009\)](#), the issue of the universality of the ICC remains topical. Indeed, although many member States of the Council of Europe have acceded to the Rome Statute, the system created on the basis of it needs the support of all States to be fully effective in order to fight impunity and to complement national jurisdictions. More ratifications and more international co-operation are necessary.

51. The Council of Europe must send another strong signal of support to the ICC and call for an end to impunity for the most serious crimes of international concern. It should call again on all member States which have not done so yet (Armenia, Azerbaijan, Monaco, the Russian Federation, Turkey and Ukraine) to ratify the Rome Statute, to ratify the Kampala amendments and the Agreement on the Privileges and Immunities of the ICC. It should extend this call to all States having observer or other partnership status with the Organisation. As regards those member States which are already Party to the Rome Statute, they should be urged to intensify their efforts to mainstream the Rome Statute in all relevant mechanisms of inter-governmental relations, through bilateral contacts and multilateral venues, such as the United Nations General Assembly, the Universal Periodic Review at the United Nations Human Rights Council, and in regional organisations, as well as in programmes of action designed by governments to promote human rights, the rule of law, justice, peace, democracy, sustainable development and multilateral co-operation. As stressed by the ICC President at the Rome hearing, the ICC was created by small and medium-sized countries in order to enhance the international rule of law. Any new ratification of the Rome Statute is a step forward.

52. Regarding co-operation, those States that have not yet implemented Part IX of the Rome Statute on international co-operation and judicial assistance should prepare draft legislation on co-operation with the ICC, ensuring that the legislation includes provisions on the tracing and freezing of assets of accused persons, which can ensure appropriate reparation for victims. States that have implemented the Rome Statute in their national laws should promote its domestic implementation also in other countries, for example by using the United Nations Human Rights Council Universal Periodic Review process.

53. Although the European States are in general co-operative with the ICC, there is still room for improvement in order to investigate and prosecute crimes in an efficient manner, especially by isolating and arresting fugitives or freezing assets of suspects and accused persons. More co-operation agreements are needed, especially as regards the enforcement of sentences, interim release of suspects or acquittals and witness protection or relocation. The latter measure has already been promoted by the Assembly on various occasions, including recently in its [Resolution 2038 \(2015\)](#) and [Recommendation 2063 \(2015\)](#)³¹ on witness protection as an indispensable tool in the fight against organised crime and terrorism in Europe. It is crucial to the proper functioning of criminal justice and requires good international co-operation and exchange of information.

54. As indicated above, in many States Parties to the Rome Statute, implementing legislation is still needed in order to define international crimes at national level, undertake effective national prosecutions and establish procedures which are necessary to effectively respond to requests for co-operation issued by the ICC. As proposed by President Fernández de Gurmendi, States could appoint a dedicated focal point for co-operation with the ICC. National implementation is necessary for ensuring effective complementarity. The ICC can only intervene when national jurisdictions do not conduct genuine proceedings. Moreover, mutual legal assistance between States in criminal matters is crucial for ensuring accountability for core international crimes. The Council of Europe could play an important role in supporting this kind of co-operation. States could also improve their co-operation in training judges, prosecutors, lawyers, police and military forces and in sharing expertise in the criminal law field.³²

55. Regarding the urgent need to protect the integrity of the Rome Statute (in particular its Article 27) and the general application of customary international law (namely to all States, regardless of their status with regard to the Rome Statute), our Assembly, the Committee of Ministers and member States of the Council of Europe must endeavour to undertake, individually and collectively, action aimed at ensuring that the African Union decisions against the ICC do not bring about any retrogressive development of international law, any withdrawal from the Rome Statute or any widening of the so-called “impunity gap”. Council of Europe member States that are States Parties to the Rome Statute must be particularly vigilant and co-ordinate action at the highest possible level. They should embark on a campaign of dialogue and co-operation with the African States whose leading representatives are not in a conflict of interest situation with the ICC in order to ensure that the relevant authorities reaffirm their commitment to the principles, norms and values contained in the Rome Statute. At the hearing in Rome, the ICC President recalled that the Court itself, as a judicial institution, is not in a position to respond to all attempts aimed at its delegitimation in the media or political fora and asked for the Assembly’s political support.

56. We, as parliamentarians, should therefore be more engaged in promoting the universal jurisdiction of the ICC and upholding the integrity and the legitimacy of the Court.

57. States Parties to the Rome Statute should ensure sufficient funding to the ICC, defend and respect its judicial independence, and prosecute international crimes under ICC jurisdiction. They must also press the Security Council to provide greater support to the Court, both in financial and political terms, and to follow up on cases of non-co-operation.

58. One should also recognise the invaluable role of inter-parliamentary networks and civil society in promoting the universal jurisdiction of the ICC and defending its independence, helping to find fugitives and giving support to victims. States Parties to the Rome Statute should do their best to protect NGOs promoting the fight against impunity and let them freely participate in sessions of the Assembly of States Parties. Local actions are also needed to promote awareness of the ICC among the general public and increase media coverage. I would like to pay tribute to the work of civil society (in particular the Coalition for the ICC, a network of 2 500 NGOs from over 150 countries) and inter-parliamentary networks advocating the effectiveness and the universality of the Rome Statute and present my special thanks to Parliamentarians for Global Action for its engagement in this area.”

59. The Nuremberg principles ([Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal](#) of 1950), drafted by the UN International Law Commission and recognising the individual responsibility, under international law, of any person who commits an act which constitutes an international crime (war crimes, crimes against humanity and crimes against peace, including aggression), had inspired the adoption of human rights conventions and the establishment of international criminal tribunals. Thus, the link between advocating the ratification of the Rome Statute and improving the

31. See also the report by Mr Arcadio Díaz Tejera (Spain, SOC), [Doc. 13647](#).

32. [#globalJustice](#), [Ten ways states can support the ICC](#), 7 December 2015.

efficiency of the ICC and the protection of the core values of the Council of Europe – democracy, rule of law and human rights – is obvious. That is why we, as members of national parliaments, should do our best to support the ICC by all possible means and promote the universal ratification of the Rome Statute.