

Article

Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court

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Abstract

The Statute of the International Criminal Court (the ICC) entered into force on 1 July 2002. After ten years exercising jurisdiction, academics have just begun to discuss its legitimacy and examine its efficiency and effectiveness. Prosecutorial discretion exercised by the ICC prosecutor is also measured in terms of legitimacy. Nonetheless, the legitimacy of this international organisation is far from self-evident. This article tries to sort out the existing arguments of the legitimacy of the ICC and analyses its current status by using the assessment of legitimacy. Finally the article deals with the question how to enhance the legitimacy of the ICC.

Introduction

The year 2012 marks the tenth anniversary of the beginning of the exercise of the International Criminal Court (ICC), an international organisation established by treaty in July 1998. It is a permanent institution and has the power to exercise jurisdiction over persons for the most serious crimes of international concern.¹ After ratification by 60 countries, the treaty to establish the ICC, the Rome Statute, entered into force in 2002. Academics have just begun to discuss its legitimacy and examine its efficiency and effectiveness. Prosecutorial discretion exercised by the ICC prosecutor is also measured in terms of legitimacy. Nonetheless, the legitimacy of this international organisation is far from self-evident. Since there is no direct electoral foundation for decision-making at the international level by international organisations, it can be said that this international organisation has no democratic legitimacy. In a similar vein, the ICC is criticized as lacking democratic linkage between itself and those non-party nationals over whom it exercises authority.² However, the counter-argument holds that the right to a fair trial is far more important than the right to democratic governance, and the assurance of a fair trial is essential for a liberal understanding of democratic legitimacy.³ Those two opposing views on the democratic legitimacy of the ICC reveal that a discussion of the legitimacy of international organisations, specifically the ICC, is not without complications.

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¹ Article 1, Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/9, at: <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> (accessed on 9 April 2012).

² M. Morris, 'The Democratic Dilemma of the International Criminal Court', *Buffalo Criminal Law Review* 2002-5, pp. 591–596.

³ A. Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence', *Journal of International Criminal Justice* 2006-4, pp. 765–785.

The meaning and measurement of indexes of legitimacy at the international level may be discussed independently from the usual meaning of legitimacy in the national sphere. For this reason, this article first discusses the definition and indicia of legitimacy prior to the evaluation of the legitimacy of the ICC. In order to clarify the meaning of legitimacy for the ICC, its stakeholders need to be identified since they are to whom the ICC is accountable in the first place. Of course, as an international organisation, the ICC is accountable to its member states for its activities. Yet at the same time, there must be other stakeholders of the ICC as it holds individuals criminally accountable for crimes under international law. Second, the article analyses the current situation of the ICC by using the assessment of legitimacy, the meaning of which will be clarified in the preceding section. Using the word legitimacy to critically analyse the works of international criminal institutions will eventually enhance their credibility. To think about enhancing the legitimacy of the ICC as an international organisation may contribute to increasing the number of contracting states and extend its universality. It is recognised that the ICC has a certain degree of legitimacy in the international community, especially in light of the fact that by February 2012, it already had 120 member states.⁴ However, at the same time, the ICC has been questioned for various reasons. Therefore, thirdly, the article deals with the further question of how to enhance the legitimacy of the ICC.

I. What is Legitimacy? The Definition and Indicia of Legitimacy

Only recently has legitimacy received a reasonable amount of attention by international society. However, legitimacy has been a concern of domestic societies since at least the political revolutions in the 17th century.⁵ The reasons for the long indifference to legitimacy in the contexts of international society and international law may be attributed to a number of factors. In the first place, the structure of international society might not provide individuals with the sense of a direct chain of authority or legal constraints, as opposed to that of nation states. Whereas the international community lacks an explicit sovereign, people normally have strong ties to a state, including its legal rights and constraints. International law also supports that people have ties to their domestic societies from birth by encouraging people to acquire a nationality.⁶ On the other hand, people do not feel strong ties to the international or global community, which lacks both an explicit government and a house of parliament, i.e. a legislature. Under such circumstances, people are not compelled to discuss the legitimacy of either international society or international law. Secondly, traditional international law consists mainly of consensual obligations, principally bilateral treaties, and such “consensualist basis of obligation has tended to moot the issue of legitimacy”.⁷ To the extent that the structure of international law depends on consensual agreements among sovereign states by their own free will, this second reason relates to the first reason. Finally, international institutions have been thought not to be very influential, and they are regarded as exercising little authority.⁸

The end of the Cold War changed publicists’ indifferent attitude towards the legitimacy of international law and international institutions, and it intensified the role of the United Nations and its Security Council. After the end of the Cold War, the Security Council

⁴ On 1 July 2012, the Republic of Guatemala will become the 121st State Party to the Court. See the press release of the International Criminal Court, ‘Guatemala becomes the 121st State to join the ICC’s Rome Statute system’, ICC-CPI-20120403-PR783, 3 April 2012.

⁵ D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, *AJIL* 1999-93, p. 596.

⁶ See Article 24 (2) and (3) of the International Covenant of Civil and Political Rights (1966) and Article 7 of the Convention on the Rights of the Child (1989).

⁷ Bodansky 1999, *supra* note 5, p. 597.

⁸ *Ibid.*

Member States were less concerned about the vetoes of its permanent members. The Security Council was able to reach agreement on the uses of force under Chapter VII of the Charter of the United Nations under which such decisions bind all states in accordance with Article 25 of the Charter. The need to discuss the legitimacy of the use of force in light of the Charter and the legitimacy of the Security Council emerged.⁹ Therefore, international lawyers and states recently began to discuss the legitimacy of international law and international institutions.

The next problem in relation to international law and international institutions concerns the meaning and contents of legitimacy. The word 'legitimacy' may be defined in various ways. In the context of international institutions and their legitimacy, the term 'legitimacy' is generally defined as the justification of authority of the law.¹⁰ To ponder legitimacy is to pursue the question why subjects of the law should accept authority. Such questions of legitimacy belong to the area of normative legitimacy as discussed below.

There seems to be general agreement that the concept of legitimacy has two dimensions, namely the procedural aspect (procedural legitimacy *aka* normative legitimacy) and the sociological aspect (sociological legitimacy *aka* substantive legitimacy).¹¹ While substantive legitimacy can be seen as a somewhat subjective test, normative legitimacy is a comparatively objective test. Normative legitimacy questions the authority of law. It asks by what means, approaches or theories authority can be justified.¹² Since the fact that a particular norm is a legal norm grants that norm sufficient normative legitimacy, in general lawyers have not put normative legitimacy on the table.¹³ However, international law lacks a legislature and normative legitimacy of an international legal norm may be equivocal. Moreover, in the field of international law the sources of law are abundant, and there is often merely a thin line of distinction between hard law and soft law. Under such circumstances, it is no wonder normative legitimacy is still important, particularly in the field of international law. Normative legitimacy is also referred to as procedural legitimacy because it is believed, especially by positivists, that the legitimacy of the norm is derived from the legitimacy of the procedures that transform a norm into a legal norm.¹⁴ To the extent that normative legitimacy is contingent on either a law or an authority and therefore worthy of obedience in accordance with due process, it is seen as corresponding with legality.¹⁵ However, substantive legitimacy is wider than lawfulness or the issue of legality since it encompasses a broader assessment of a law or an authority than lawfulness does, including morality or a sense of justice.¹⁶

⁹ Ibid. See also J.M. Coicaud, 'Introduction' in: H. Charlesworth & J. Coicaud (eds.), *Fault Lines of International Legitimacy*, New York: Cambridge University Press 2010, p. 2.

¹⁰ Bodansky 1999, *supra* note 5, p. 601; A.M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', *American Journal of International Law* 2003-97, pp. 510, 535.

¹¹ *Idem*, p. 601; See also I. Clark, *Legitimacy in International Society*, Oxford: Oxford University Press 2005, pp. 18-19; A. Nollkaemper, 'The Legitimacy Of International Law in The Case Law Of The International Criminal Tribunal for the Former Yugoslavia' in: T.A.J.A. Vandamme & J. Reestman (eds.), *Ambiguity in the Rule of Law: the Interface between National and International Legal Systems*, Groningen: Europa Law Publishing 2001, p. 13.

¹² Nollkaemper 2001, *supra* note 11, p. 13.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ K. Eltis, 'The Democratic Legitimacy of the "International Criminal Justice Model": The Unilateral Reach of Foreign Domestic Law and the Promise of Transnational Constitutional Conversation' in: C.P.M. Waters (ed.), *British and Canadian Perspectives on International Law*, Leiden: Brill Publishers 2006, pp. 349, 359.

¹⁶ R. Müllerson, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals: Comments' in: R. Wolfrum & V. Röben (eds.), *Legitimacy in International Law*, Heidelberg: Springer 2008, pp. 189, 191.

Sociological legitimacy is sometimes called ‘popular legitimacy’ since it refers to popular attitudes about authority.¹⁷ Therefore, sociological legitimacy depends on perceptions held by the populations with regard to the authority or the law. This legitimacy is subjective.¹⁸ This substantive approach to legitimacy questions the values embedded in the norms in question.¹⁹ In this substantive approach to legitimacy, a particular actor’s subjective feeling that some rule or authority is legitimate is important.²⁰ Accordingly, the constituent members, that is, the stakeholders of the institution that exercises authority or addresses the norm in question, should be clarified in discussions of sociological legitimacy.

Since the ICC is a treaty-based organisation, its stakeholders clearly comprise the State Parties of the ICC Statute. The ICC is institutionally independent from the United Nations, but when a case is referred by the Security Council under its authority of Chapter VII of the United Nations Charter, the United Nations’ member states also become stakeholders of the ICC. Though these stakeholders are stakeholders of the ICC since they are related to the ICC as an international organisation, the ICC also has characteristics of an international court dealing with criminal cases for individuals. Therefore, individuals are also important stakeholders, particularly victims, afflicted populations and perpetrators.²¹ Human rights NGOs and regional organisations such as the African Union may also be stakeholders, as they evaluate the activities of the ICC and are very vocal about the ICC, as discussed below.

The stakeholders of the ICC evaluate a law or authority in order to persuade people or states to accept or criticise it. Such a popular or state acceptance may be a link between normative and substantive legitimacy. It has been pointed out that some draw a closer link between these two types of legitimacy by making popular acceptance an important element of a regime’s normative justification.²² In either case, normative legitimacy may be verified by positivistic means. The deliberation of factors of normative legitimacy is clarified through factors perceived by populations or states as legitimate or illegitimate when they evaluate a law or authority. This process of clarification of normative legitimacy requires social considerations or considerations by the international society. Moreover, the high evaluation of normative legitimacy definitely contributes to the perception of the addressees of a norm, that is, its stakeholders. Therefore normative and substantive legitimacy cannot be considered completely irrelevant.

Although the two approaches to legitimacy may be distinguished conceptually from one another, they appear to be closely related. In any case, the distinction still appears important in the following respect: there may be a situation in which sociological legitimacy, that is the perceptions held by the stakeholders or the addressees of the norm, is not satisfactory, while the procedural aspect of legitimacy is fully ensured, and *vice versa*.

Both procedural and sociological legitimacy try to specify the factors that serve as justifications of authority.²³ After the meaning and contents of legitimacy are clarified, the next step is to elucidate the factors of legitimacy. The legitimacy of a particular order stems

¹⁷ Bodansky 1999, *supra* note 5, p. 601.

¹⁸ I. Hurd, ‘Legitimacy and Authority in International Politics’, *International Organization* 1999-2, pp. 379–81.

¹⁹ Nollkaemper 2001, *supra* note 11, p. 13.

²⁰ Hurd 1999, *supra* note 18, p. 381.

²¹ Professor Ramji-Nogales enumerated “afflicted populations, perpetrators and political elites as societal stakeholders in the post conflict societies”; J. Ramji-Nogales, ‘Designing Bespoke Transitional Justice: a Pluralist Process Approach’, *Michigan Journal of International Law*, 2010-1, pp. 1, 11.

²² Bodansky 1999, *supra* note 5, p. 601.

²³ Bodansky 1999, *supra* note 5, p. 601.

from its satisfaction of certain criteria.²⁴ A search for the factors of legitimacy approximates a search for the legitimacy of authority.²⁵ Thomas Franck enumerated four factors of the legitimacy of a law and the rule-making process, which may be categorised as either normative or procedural legitimacy, as discussed above. The indicators of rule-legitimacy in the community of states are the following: determinacy, symbolic validation, coherence and adherence.²⁶ On the surface, such indicators show the procedural legitimacy and justification of authority.²⁷ In actuality, these indicators are regarded as factors “which may affect a norm’s ability to influence conduct”.²⁸ However, Franck’s attempt to clarify the notion of legitimacy in the context of international relations has continuously carried much weight among publicists. Franck describes the rules of the international system as resembling the house rules of a club.²⁹ According to him,

[m]embership in the club confers a desirable status, with socially recognised privileges and duties and *it is the desire to be a member of the club, to benefit by the status of membership, that is the ultimate motivator of conformist behaviour: that and the clarity with which the rules communicate, the integrity of the process by which the rules were made and are applied, their venerable pedigree and conceptual coherence. In short, it is the legitimacy of the rules which conduces to their being respected* [emphasis original].³⁰

Franck’s definition of legitimacy succinctly describes it as “a property of rule-making institution which itself exerts a pull towards compliance on those addressed normatively”.³¹ Franck is well-aware of the importance of stakeholders’ perceptions of an authority or norm, which he describes as “the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process”.³²

In the context of the ICC, the indicia of the procedural legitimacy may include the legality of the legal norms relating to the ICC and the activities of the ICC, which are important for the procedural aspects of legitimacy. With regard to the sociological and the substantive legitimacy of the ICC, the perceptions of the stakeholders of the ICC, particularly those addressed by the Rome Statute, are critical. The next section focuses on both procedural and substantive aspects of legitimacy of the ICC, and the indicia of the legitimacy of the ICC are further clarified through the arguments of the actual legitimacy of the ICC.

²⁴ K. Eltis, ‘The Democratic Legitimacy of the “International Criminal Justice Model”: The Unilateral Reach of Foreign Domestic Law and the Promise of Transnational Constitutional Conversation’ in: C.P.M. Waters (ed.), *British and Canadian Perspectives on International Law*, Leiden: Brill Publishers 2006, pp. 349, 357.

²⁵ According to Thomas Franck, “Deployed by students of national legal systems, the concept of legitimacy is often used to postulate and explain what, other than a command and its enforcement, is required to create a propensity among the citizens generally to obey the rulers and the rules”. T. M. Franck, *The Power of Legitimacy Among Nations*, New York: Oxford University Press 1990, p. 16.

²⁶ *Idem*, p. 49.

²⁷ For example, Clark notes that ‘Franck – at least in his earlier work – is a good example of a ‘procedural’ legitimacy theorist in the context of international relations’. I. Clark, *Legitimacy in International Society*, Oxford: Oxford University Press 2005, p. 18.

²⁸ Bodansky 1999, *supra* note 5, p. 601.

²⁹ Franck 1990, *supra* note 25, p. 38.

³⁰ *Ibid.*

³¹ *Idem*, p. 16.

³² *Idem*, p. 19.

II. Legitimacy Evaluation of the Current Status of the ICC

II.1 The Procedural Approach to Legitimacy

So far, the arguments about the legitimacy of the ICC and international criminal law appear dominated by the procedural aspects of the ICC. Nonetheless, the arguments about the legitimacy of the ICC may, in theory, be classified in three categories: the procedural approach to ICC legitimacy; the interactions between the procedural and sociological approach to ICC legitimacy, that is, the interactive approach; and the sociological approach to ICC legitimacy.

First among the arguments is the procedural approach to legitimacy. This approach is strongly advocated by David Luban. He postulates that the legitimacy of international tribunals does not come from the political authority that creates them, but from the manifested fairness of their procedures and punishments.³³ Luban supplements his argument by holding that:

Tribunals bootstrap themselves into legitimacy by the quality of justice they deliver; their rightness depends on their fairness. During the first Nuremberg trials, prosecutors fretted that acquittals would delegitimize the tribunal; in hindsight, it quickly became apparent that the three acquittals were the best thing that could have happened, because they proved that Nuremberg was no show trial.³⁴

Although it is important that the ICC “secure convictions to ensure its credibility as a deterrent to future perpetrators”,³⁵ it is more important that innocent persons are not convicted and that basic human rights are protected, even those of suspects of international crimes.

The ICC has already faced its first big challenge of securing its procedural legitimacy. The Trial Chamber ordered a stay on the proceedings of the first case tried at the ICC, the case against Thomas Lubanga Dyilo, because “the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial”.³⁶ In this case, the Office of the Prosecutor had disobeyed the Chamber’s order to disclose potentially exculpatory evidence to the defence. They had refused to disclose this since they obtained such evidence under the provisions of Article 54(3)(e) of the Statute, which provides that: “The Prosecutor may: [...] (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents”. The Trial Chamber “has unhesitatingly concluded that the right to a fair trial—which is without doubt a fundamental right—includes an entitlement to disclosure of exculpatory material”.³⁷ This led to the Trial Chamber’s decision to release the accused,

³³ D. Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of the International Criminal Law’ in: S. Besson & J. Tasioulas (eds.), *The Philosophy of International Law*, New York: Oxford University Press 2010, pp. 569, 579.

³⁴ *Ibid.*

³⁵ N. Gronon & A. O’Brien, ‘Justice in conflict? The ICC and the Peace Process’, in: N. Waddell & P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, London: Royal African Society 2008, p. 17.

³⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues Raised at the Status Conference on 10 June 2008’, Trial Chamber I, Case No. ICC-01/04-01/06, 13 June 2008.

³⁷ *Idem*, § 77. See also § 92.

Lubanga, on the condition of a decision from the Appeals Chamber.³⁸ Although the Appeals Chamber reversed the Trial Chamber's decision to release Lubanga,³⁹ the Appeals Chamber confirmed the Trial Chamber's decision on the stay on the proceedings.⁴⁰ As one author pointed out, the Lubanga trial could be the ideal test for the ICC to prove procedural legitimacy, although the situation of refusal of disclosure of exculpatory evidence by the Office of the Prosecutor was of course unwelcome in the first place.⁴¹

II.2. The Interactive Approach to Legitimacy

More technically and somewhat empirically, the work of the Office of the Prosecutor moved to the spotlight when people evaluated both the procedural and the sociological aspects of the ICC's legitimacy. For example, the ICC's ability to conduct investigations properly is said to be linked to the legitimacy of the ICC.⁴² Such an argument relates to both the procedural and the sociological aspect of the legitimacy of the ICC. The issue ultimately concerns the fair application of law and the perception of states and the international community with regard to whether the universal application is guaranteed. It has been pointed out that "[t]he legitimacy of the International Criminal Court ultimately depends on its capacity to persuade observers that the exercise of its powers to investigate, prosecute, and punish violations of international criminal law is consistent with the application of rules that are universal in nature".⁴³

As for the universal application of norms to cases, the Office of the Prosecutor is sometimes perceived as pro-government because of its prosecutorial policy. The current policy of the Office of the Prosecutor upholds a positive approach to the principle of complementarity, meaning that it encourages genuine national proceedings where possible; it relies on national and international networks; and it participates in a system of international cooperation.⁴⁴ However, such a 'national and international network' policy easily gives local people the impression that "the ICC was associating too closely with one party to the conflict, thus undermining perceptions of the Court's impartiality. [...] The absence of investigation of the

³⁸ *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Release of Thomas Lubanga Dyilo', Trial Chamber I, Case No. ICC-01/04-01/06, 2 July 2008, § 35-36.

³⁹ *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Release of Thomas Lubanga Dyilo"', Appeals Chamber, Case No. ICC-01/04-01/06, 21 October 2008.

⁴⁰ *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues Raised at the Status Conference on 10 June 2008"', Appeals Chamber, Case No. ICC-01/04-01/06, 21 October 2008.

⁴¹ S. Anoushirvani, 'The Future Of The International Criminal Court: The Long Road To Legitimacy Begins With The Trial Of Thomas Lubanga Dyilo', *Pace International Law Review* 2010-1, pp. 213–235.

⁴² J. Falligant, 'The Prosecution of Sudanese President Al Bashir: Why a Security Council Deferral Would Harm the Legitimacy of the International Criminal Court', *Wisconsin International Law Journal* 2010-4, pp. 751–727.

⁴³ M. J. Struett, 'The politics of discursive legitimacy underlying the dynamics and implications of prosecutorial discretion at the International Criminal Court' in: S. C. Roach (ed.), *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford: Oxford University Press 2009, p. 107.

⁴⁴ The Office of the Prosecutor, *Report on Prosecutorial Strategy*, 14 September 2006, at: http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (accessed on 12 April 2012).

UPDF (Uganda People's Defence Force) has often been presumed to be the result of bias rather than as the consequence of the ICC's application of its criteria for case selection".⁴⁵

In the case of the African Union, its perception negatively affected the procedural legitimacy of the ICC. The African Union adopted quite a few decisions against the proceedings initiated by the ICC against Sudanese President Omar Hassan Al-Bashir and called the African Union Member States to non-cooperation with the ICC pursuant to Article 98 of the Rome Statute on the basis of the immunity and privileges of Heads of State.⁴⁶ The African Union also raised its voice against the Prosecutor by expressing "concern over the conduct of the ICC prosecutor, Mr. Moreno Ocampo who has been making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir [*sic*]"⁴⁷. As a result, some African State Parties to the ICC, among which the Republic of Malawi⁴⁸ and the Republic of Chad,⁴⁹ are now accused by the Pre-Trial Chamber of failing to cooperate with the ICC. Such non-cooperation by African States would damage the procedural aspects of the legitimacy and consequently the effectiveness of the activities, particularly because the seven situations in which the Office of the Prosecutor was officially able to open investigations are all situated on the African continent.⁵⁰

The Chairperson of the African Union, Jean Ping, strongly criticised the Chief Prosecutor for the universal application of norms to these situations. Ping was repeatedly reported to say that "[f]rankly speaking, we are not against the ICC. What we are against is Ocampo's justice. What have we done to justify being an example to the world? Are there no worst countries, like Myanmar?"⁵¹ Such criticism may stem from the fact that the current situation selections by the Office of the Prosecutor do not persuade states and their people that the Office of the Prosecutor applies the same selection criteria across continents. Facing such

⁴⁵ M. Otim & M. Wierda, 'Justice at Juba: International Obligations and Local Demands in Northern Uganda' in: N. Waddell & P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, London: Royal African Society 2008, p. 22.

⁴⁶ African Union, Assembly, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII)', 3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1, § 10; African Union, Assembly, 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV)', 27 July 2010, Assembly/AU/Dec.296(XV), § 5-6; African Union, Assembly, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII)', 30-31 January 2011, Assembly/AU/Dec.334(XVI), § 5; African Union, Assembly, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court - Doc. EX.CL/670(XIX)', 30 June-1 July 2011, Assembly/AU/Dec.366(XVII), § 5.

⁴⁷ African Union Assembly, 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10 (XV)', 27 July 2010, Assembly/AU/Dec.296(XV), § 9.

⁴⁸ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir', the Pre-Trial Chamber I, Case No. ICC-02/05-01/09, 12 December 2011.

⁴⁹ *Le Procureur c. Omar Hassan Ahmad Al Bashir*, 'Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir', la Chambre Préliminaire I, No. ICC-02/05-01/09, 13 Décembre 2011.

⁵⁰ The seven situations currently opened for investigations involve the Democratic Republic of the Congo, the Central African Republic, Uganda, Sudan, the Republic of Kenya, Lybia and the Republic of Côte d'Ivoire.

⁵¹ F. Chothia, 'Africa's Fatou Bensouda is new ICC Chief Prosecutor', *BBC Africa* 12 December 2011, at: <http://www.bbc.co.uk/news/world-africa-16029121> (accessed on 3 April 2012); see also R. Lough, 'African Union accuses ICC prosecutor of bias', *Reuters Africa* 30 January 2011, at: <http://af.reuters.com/article/topNews/idAFJ0E70T01R20110130> (accessed on 3 April 2012).

criticism, the Office of the Prosecutor officially expressed the irrelevance of geographical considerations for situation selections. Arguably, both the lack of universal ratification of the Statute and the complementarity principle of the Statute might put the Office into a difficult position for applying the Statute in a truly universal way. The Office of the Prosecutor repeatedly stated that;

[t]here are no other statutory criteria. Factors such as geographical or regional balance are not relevant criteri[a] for a determination that a situation warrants investigation under the Statute. While lack of universal ratification means that crimes may occur in situations outside the territorial and personal jurisdiction of the ICC, this can only be remedied by a UN Security Council referral.⁵²

In order to ensure proper exercise of prosecutorial discretion, Danner stresses the need for public, *ex ante* standards governing prosecutorial discretion.⁵³ She believes that “the promulgation of such guidelines will materially assist the Prosecutor in accomplishing both the achievement of legitimacy and the perception of legitimacy. By contributing to the impartiality and consistency of his decision making, they will enhance its legitimacy”.⁵⁴ On 13 June 2005, Danner was invited to address the guest lecture series of the Office of the Prosecutor, giving a lecture entitled ‘Prosecutorial Discretion and Legitimacy’.⁵⁵ Subsequently, the Office of the Prosecutor published the ‘Report on the activities performed during the first three years (June 2003 – June 2006)’ on 12 September 2006. This report reflects on the activities of the first three years of the Office. It especially focuses on the selection of situation in the Office of the Prosecutor.

With regard to the selection of situations, once the requirements of temporal and subject-matter jurisdiction are met, the Office is guided by the standard of gravity. Although any crime falling within the jurisdiction of the Court is a serious matter, the Rome Statute (Articles 53(1)(b), 53(2)(b) and 17(1)(d)) clearly foresees and requires an additional consideration of “gravity” whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court. In the view of the Office, factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and impact of the crimes. After thorough analysis, the Office concluded that the situations in the Democratic Republic of the Congo (“DRC”) and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court. The situation in Darfur, Sudan, referred to the Prosecutor by the Security Council, also clearly met the gravity standard. The situations selected contributed to a problematic perception as to the existence of an intentional geographically-based prosecution strategy. The Office understands this concern, but regional balance is not a criterion for situation selection under the Statute.⁵⁶

⁵² The Office of the Prosecutor, ‘Draft Policy Paper on Preliminary Examinations’, 4 October 2010, available at: http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf (accessed on 3 April 2012) § 11; the Office of the Prosecutor, ‘Report on Preliminary Examination Activities’, 13 December 2010, § 9.

⁵³ Danner 2003, *supra* note 10, p. 540.

⁵⁴ *Idem*, p. 541.

⁵⁵ The manuscript is available on the ICC website:

http://212.159.242.181/iccdocs/asp_docs/library/organs/otp/050613_Danner_presentation.pdf (accessed on 3 April 2012).

⁵⁶ The Office of the Prosecutor, ‘Report on the activities performed during the first three years (June 2003 – June 2006)’, 12 September 2006, pp. 6-7, at: http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf (accessed on 3 April 2012).

Although the description of the selection of situations appears abstract, such an attempt at least enhances the accountability of the Office of the Prosecutor.

Subsequently, the Office of the Prosecutor published its first official Prosecutorial Strategy 2009-2012 on 1 February 2010. This 18-page document “provides strategic guidance for the Office and clarity for other actors. It allows the Office to be predictable and transparent and allows others to plan their own activities taking into consideration the Office work”.⁵⁷ This guideline can be seen to embody “public *ex ante* standards governing prosecutorial discretion”,⁵⁸ which was proposed by Danner, to some extent. The stakeholders of the ICC are now able to rely on this prosecutorial strategy to evaluate procedural legitimacy. Nonetheless, even when the Prosecutor seems to act in conformity with the prosecutorial strategy, the stakeholders can perceive the contents of the document as illegitimate. The issue of the latter aspect of legitimacy is called ‘substantive or sociological legitimacy’, as categorised above. The same must apply to the ‘Draft Policy Paper on Preliminary Examinations’, which was made public by the Office of the Prosecutor on 4 October 2010. This document articulates the procedure to follow when a situation is identified by the Office of the Prosecutor, and the Office needs to determine whether there is a reasonable basis to proceed with an investigation into the situation.⁵⁹ Nonetheless, the Office of the Prosecutor published a rather cursory two-page statement when they decided not to open an investigation of the situation in Palestine on 3 April 2012.⁶⁰ After three years of its own examination, the Office shut the door on the situation of Palestine on the grounds that “the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under Article 12(1)”.⁶¹ Such a cursory statement and evaluation of the preliminary examination would damage the sociological legitimacy of the ICC. Some NGOs immediately criticized this statement by the Office of the Prosecutor. For example, Amnesty International voiced the opinion that “this dangerous decision opens the ICC to accusations of political bias and is inconsistent with the independence of the ICC”.⁶²

The question whether the ICC itself and the actors of the ICC, especially the Prosecutor, are in conformity with due process and procedure as set out in the Statute is not only a question of procedural legitimacy but also a question of the legality of the Court. It is often pointed out that the two situations can exist, that is, they can be both ‘legal but illegitimate’ and ‘illegal but legitimate’. However, if any criminal procedure before the ICC is illegal, then legitimacy inevitably becomes seriously doubtful. Legality may be regarded as a precondition for embarking on an evaluation of legitimacy, as Robert Cryer points out: “[l]awfulness ought

⁵⁷ The Office of the Prosecutor, ‘Prosecutorial Strategy 2009-2012’, 1 February 2010, at: <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf> (accessed on 3 April 2012).

⁵⁸ *Ibid.*

⁵⁹ The Office of the Prosecutor, ‘Draft Policy Paper on Preliminary Examinations’, 4 October 2010, at: http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf (accessed on 3 April 2012).

⁶⁰ The Office of the Prosecutor, ‘Situation in Palestine’, 3 April 2012, at: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (accessed on 12 April 2012).

⁶¹ *Idem*, § 6.

⁶² Amnesty International, ‘ICC Prosecutor statement: fears over justice for Gaza victims’, 4 April 2012, at: http://www.amnesty.org/en/news/icc-prosecutor-statement-fears-over-justice-gaza-victims-2012-04-04?utm_source=CICC+Newsletters&utm_campaign=437e328791-Palestine_Follow_up_EN4_5_2012&utm_medium=email (accessed on 12 April 2012).

to precede legitimacy in debate, not least on the basis that the lawful or otherwise nature of an action has an important effect on its legitimacy”.⁶³

As discussed above, procedural legitimacy could be incorporated into sociological legitimacy since the due process of an international criminal tribunal may be one factor of sociological legitimacy. In the long run, external perception of the legitimacy of the Office of the Prosecutor will mirror the Prosecutor’s actual practices,⁶⁴ and the actual practices of the Prosecutor will hopefully accord with both the procedure set out by the Statute and the case and situation selection criteria set out by the Office of the Prosecutor. The Prosecutor of the ICC must bear the brunt of the procedure and his or her every word and deed is closely watched, even though the Prosecutor’s own power of opening an investigation (the *proprio motu* power) is checked by the Pre-Trial Chambers according to Article 15(3) and (4) of the Rome Statute.

II.3. The Sociological Approach to Legitimacy

In contrast to the procedural legitimacy of the ICC, few studies have examined its sociological legitimacy. However, some studies have focussed on this perspective, particularly in relation to the perception of the population of the countries into whose situation the Office of the Prosecutor of the ICC has opened an investigation. Surveys conducted in northern Uganda,⁶⁵ the Central African Republic⁶⁶ and the Democratic Republic of Congo⁶⁷ show that people who had heard about the Court in the Central African Republic had most positive perception of the ICC. Apart from this study’s outcome, however, “other studies have shown that, elsewhere, populations have a range of opinions, and sometimes competing demands, about how to deal with the past”.⁶⁸ In the three countries selected, about a quarter of the population had heard of the ICC (27% in the Democratic Republic of Congo between September and December 2007;⁶⁹ 27% in northern Uganda between April and May 2005;⁷⁰ one third of respondents had heard of the International Criminal Court, with figures by prefectures ranging from 7% in Ouham to 63% in Bangui, Central African Republic, in November and December 2009).⁷¹

⁶³ R. Cryer, ‘Sudan, Resolution 1593, and International Criminal Justice’, *Leiden Journal of International Law* 2006-19, pp. 195–205.

⁶⁴ Danner 2003, *supra* note 10, p. 536.

⁶⁵ P.N. Pham, P. Vinck, M. Wierda, E. Stover & A. di Giovanni, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda*, International Center for Transitional Justice and the Human Rights Center, Berkeley: University of California 2005; P.N. Pham, P. Vinck, E. Stover, A. Moss & M. Wierda, *When the War Ends. A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda*, Human Rights Center, Berkeley: University of California; Payson Center for International Development, Tulane University; International Center for Transitional Justice, New York 2007; P. Pham & P. Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda*, Human Rights Center, Berkeley: University of California 2010.

⁶⁶ P. Vinck, P.N. Pham, *Building Peace, Seeking Justice: A Population-Based Survey on Attitudes about Accountability and Social Reconstruction in the Central African Republic*, Human Rights Center, Berkeley: University of California 2010.

⁶⁷ P. Vinck, P.N. Pham, S. Baldo & R. Shigekane, *Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Congo*. Human Rights Center, Berkeley: University of California; Payson Center for International Development, Tulane University; International Center for Transitional Justice, New York 2008.

⁶⁸ P. Vinck & P.N. Pham, ‘Outreach Evaluation: the International Criminal Court in the Central African Republic’, *International Journal of Transitional Justice* 2010-3, p. 20.

⁶⁹ Vinck, Pham, Baldo & Shigekane 2008, *supra* note 66, p. 47.

⁷⁰ Vinck, Pham, Wierda, Stover & Giovanni 2005, *supra* note 64, p. 2.

⁷¹ Vinck & Pham 2010, *supra* note 65, pp. 31-32.

People's perceptions of the neutrality of the ICC differ by country. Among those who had heard of the ICC in the Democratic Republic of Congo, "[n]early one third (28%) of respondents believed the ICC was not neutral because it did not do anything to help (27%), worked with the government (24%), was only after one ethnic group (14%), or did not arrest the criminals (12%)".⁷² Conversely, people in northern Uganda who had heard of the ICC appreciated the neutrality of the ICC. It was pointed out that in Uganda, "the ICC is perceived more frequently as neutral and less corrupt than the Ugandan courts".⁷³ Among those in northern Uganda who had heard of the ICC, 70% said the ICC should be in charge of prosecuting those who committed the most serious international crimes in northern Uganda, whereas 28% answered it should be the Ugandan courts.⁷⁴ Like Ugandans, the perception of people in the Central African Republic toward the ICC appears very positive. While a minority (10%) believed that the ICC is not neutral, over four out of five respondents (81%) said the ICC is neutral, will have a positive impact, and is important to them.⁷⁵

Whereas the results of the interview research in the Central African Republic suggest that increased knowledge is associated with positive perceptions and attitudes toward the Court, it seems that the people who had heard of the ICC are partial and mainly dominated by members of the urban, male, educated and wealthy elite.⁷⁶ Such intellectuals and local leaders seem broadly overlapped with the intended target of the outreach program of the ICC.⁷⁷ The situation may be true not only in this country but across the world. On the one hand, the intellectuals are cultivated enough to think about and evaluate the activities of the ICC, having learned about the ICC through the media. On the other hand, those lacking information do not have enough grounds to evaluate the activities of the ICC in the first place. If people's perception of the sociological legitimacy of the ICC can only be obtained from people who have heard of the ICC, there is a danger that such sociological legitimacy will become slanted. In particular, considering that "the information-poor, or hard-to-reach populations, can include key victim groups",⁷⁸ acquiring a proper picture of the sociological and substantive legitimacy would only be made possible under the premise that victims are better informed about the ICC. In summary, the Central African Republic is an example of a country where the outreach program of the ICC is relatively successful, but even that outcome is not without problems from the perspective of representativeness.

There is also a lack of argument and analysis of the sociological legitimacy of the ICC in an important constituency, specifically the Assembly of State Parties of the Rome Statute. Although it is authorised to both elect and remove the Prosecutor from the Office in accordance with Articles 42(4) and 46(1) and (2), respectively, it has not fulfilled a supervisory function for the Prosecutor.⁷⁹ With regard to the organs of the Court, the Chambers seem to be the main supervisory organ for the Office of the Prosecutor. Though the five biggest contributories amongst the ICC Member States, Japan, Germany, the United Kingdom, France and Italy, were reported to have pushed for zero growth in the Court's budget of 2012, such budget claims were seemingly not based on an objective or even

⁷² Vinck, Pham, Baldo & Shigekane 2008, *supra* note 66, p. 48.

⁷³ Vinck & Pham 2010, *supra* note 64, p. 44.

⁷⁴ *Ibid.*

⁷⁵ Vinck & Pham 2010, *supra* note 67, p. 19.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Idem*, p. 20.

⁷⁹ Danner 2003, *supra* note 10, p. 524.

subjective assessment of the Court's activities.⁸⁰ On the contrary, the United Kingdom, France and Germany voted in favour of the United Nations Security Council Resolution 1970 referring the situation of Libya to the Court.⁸¹ Of course, the Assembly of State Parties have the power to decide the budget of the Court in accordance with Article 112(2)(d), thereby indirectly controlling the investigations of the Office of the Prosecutor and the other activities of the Court. Nonetheless, such budget control should be based on an objective assessment of the activities of the Court. In this sense, the perception of the State Parties to the ICC towards the Court's activities should be revealed to the public. From the standpoint of the State Parties, such disclosure of the substantive legitimacy of the Court is required in order to improve the Court's activities.

Conclusion: Enhancing the Legitimacy of International Criminal Court

As indicated in other discussions of the legitimacy of international norms and actors, the legitimacy of the ICC can be measured according to either the procedural aspect or the sociological or substantive aspect of legitimacy. In order to receive a positive evaluation, the ICC needs to offer fair trial by due process of law. It must also be perceived to perform its activities well by its stakeholders. This article aims to reveal, to some extent, the interactions between the procedural aspect of legitimacy and the sociological or substantive aspect of legitimacy in relation to the legitimacy of the ICC. In order to enhance substantive or sociological legitimacy, it is important to guarantee procedural legitimacy by abiding by all the relevant legal norms. In particular, the activities of the Office of the Prosecutor tend to attract the attention of the constituencies of the Court because the business of the Court mainly depends on the decisions made by the Office. Thus, in theory, the stakeholders of the ICC are inevitably responsive to the activities of the Office of the Prosecutor and the Court itself.

The *raison d'être* of the legitimacy arguments of international norms and organisations is to enhance the credibility and the authority of the Court and eventually strengthen the functioning of international system. In order to obtain a fair evaluation of both procedural legitimacy and sociological or substantive legitimacy, the constituencies of the Court are expected to be attentive to the activities of the Court. In other words, general indifference to the ICC is the great enemy to the enhancement of the legitimacy of the Court. Not only indifference but also the lack of media attention and media infrastructure has a negative impact on the legitimacy of the ICC. The intention of the ICC is to serve not only diplomats and intellectuals but also the most vulnerable groups in post-conflict societies and those where conflict is ongoing, particularly children and women. Outreach and education of the public by the ICC are key preconditions for assessing the organisation's legitimacy.

⁸⁰ See R. Hamilton, 'Member Countries Fight over International Court's Budget', *Reuters Africa*, 20 December 2011, at: <http://af.reuters.com/article/commoditiesNews/idAFN1E7BJ0C420111220> (accessed on 13 April 2012).

⁸¹ *Ibid*; UN Doc. S/RES/1970, 26 February 2011.