# THE INTERNATIONAL CRIMINAL COURT IN A WORLD RETREATING FROM INTERNATIONAL RULE OF LAW

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*Abstract*

For many, the International Criminal Court (ICC) has been a stunning disappointment. Its overall achievements in the fight against impunity leave much to be desired. The ICC's leadership recognizes that. To address the many pronged technical problems plaguing the Court, the ICC has launched a review process. However, it is argued here, the principal challenges facing the Court are political, not technical.

Political hurdles are of two types. The first one being noncooperation from States Parties, which continues to undermine the Court's effectiveness. With fresh political negotiations and conscientious commitment to ensure that crimes of utmost seriousness do not go unpunished, this challenge can be surmounted. The second challenge relates to the global political landscape that lies beyond the purview of the Rome Statute system, including the palpable retreat from international rule of law, the deterioration of the global security and human rights situations, the hostility of big powers towards the Court, and the decline of multilateralism, among others. Even with political will, there is only so much that can be done within the framework of the Rome Statute to reverse these trends. There is thus a need to tone down expectations of the ICC's contribution in deterring atrocities and enhancing international rule of law

## Introduction

The establishment of the International Criminal Court (ICC or Court) in 1998 as the first permanent criminal tribunal with worldwide jurisdiction over genocide, war crimes, crimes against humanity, and,

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later, aggression was greeted with a soaring sense of optimism.[1] It was seen as a revolutionary moment in international law.[2] The ICC was profusely dubbed as the "last greatest international institution of the twentieth century."[3] It was described as "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."[4] The adoption of the Rome Statute was further praised as an "international epiphany."[5] Its rapid ratification seemed to confirm that the optimism was well–placed. Against the prevailing buoyancy and triumphalism, however, few advised for caution as states (especially powerful ones) may use the Court as a vehicle to advance their own interests, which may not always coincide with the collective interest of humanity.[6] Some even flatly dismissed the ICC as a "Court of Dreams,"[7] meaning an institution with unrealistic promises that may follow the path of the League of Nations.[8]

As if to prove the skeptics right, the ICC has yet little to show outside of Africa. Not a single non–African has been brought before the ICC in the Court's two decades of existence. The Office of the Prosecutor (OTP) has opened a total of thirty-one cases (forty-seven defendants) so far, all from Africa. Even in Africa, the Court's record is unflattering. It has handed down just ten convictions in twenty years.[9] Of these, only six

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1. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, Article 5(1), U.N. Doc. A/CONF.183/9 (July 17, 1998).

2. *See, e.g*, Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. OF INT'L L. LAW. 144, 145 (1999); Leila N. Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 387-88 (2000).

3. Sonali B. Shah, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L L. REV. 351, 351-56 (2002).

4. Press Release, Former UN Secretary-General Kofi Annan, Secretary-General Says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law, U.N. Press Release L/2890 (July 20, 1998).

5. John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361, 361 (1999).

6. *See Daniel* H. Derby, *An International Criminal Court for the Future*, 5 TRANSNAT'L & CONTEMP. PROBS. 307, 310 (1995); Douglass Cassel, *The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step*, 6 BROWN J. WORLD AFF. 41, 47-50 (1999); *see also generally* DAVID HOILE, JUSTICE DENIED: THE REALITY OF THE INTERNATIONAL CRIMINAL COURT (The Afr. Rsch. Ctr., 2014).

7. David Rieff, *Court of Dreams*, The New Republic, (Sept. 7, 1998), at 16-17.

8. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 89-104 (2003).

9. *See Defendants,* INTERNATIONAL CRIMINAL COURT, *available at* https://www.icc-cpi.int/defendants?k=convicted (last visited Aug. 26, 2022). For perspective, the International

resulted from violations of core crimes the ICC was established to combat; the other four were convicted of offences against the administration of justice.[10] It must also be stressed that all convictions resulted from situations self-referred by African governments, and the convicts are all former leaders of rebel groups.[11] The only exception is the case of a rebel leader turned politician, Jean-Pierre Bemba, who was arrested in Brussels while serving as a Senator in the Democratic Republic of the Congo (his conviction has since been overturned on appeal).[12] So, the Court that was built on a grandiose promise that "no ruler, no State, no junta and no army anywhere can abuse human rights with impunity," [13] has only managed to convict a handful of African rebels.

If the ICC's dismal conviction record is not enough, its conviction rate has sharply declined in recent years—just two convictions since 2016 is hardly a success story. As a result, many believe that the Court has gone off the rails.[14] Even former Presidents of the Court's Assembly of States Parties had to come out publicly, calling for an external investigation of the divergence between the vision in the Court's constitutive instrument and its actual operations.[15]

The Court's near exclusive focus on Africa has unsurprisingly brought the ICC into collision with African governments that have

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Criminal Tribunal for the Former Yugoslavia (ICTY) has completed proceedings of 147 defendants in its first twenty years of operation; *see Key Figures of the Cases*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *available at* http://www.icty.org/en/cases/key-figures-cases (last visited Oct. 17, 2022).

10. *See* Rome Statute of the International Criminal Court, art. 70, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

11. Convicts of core crimes are: Ahmad Germain Katanga, Thomas Lubanga Dylio, Bosco Ntaganda, Jean-Pierre Bemba (all from DRC), Al Faqi Al Mahadi (Mali), and Dominic Ongwen (Uganda), whereas those convicted for offences against the administration of justice are: Aimé Kilolo Musamba, Fidèle Babala Wandu, Jean-Jacques Mangenda Kabongo, and Narcisse Arido. *See Defendants,* International Criminal Court, *available at* https://www.icc-cpi.int/defendants?f%5B0%5D=accused_states%3A358 (last visited Oct. 17, 2022).

12. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 A, Judgement (June 8, 2018).

13. Press Release, Kofi Annan, International Criminal Court Promises Universal Justice, Secretary Tells International Bar Association, U.N. Press Release SG/SM/6275 (June 12, 1997).

14. *See* Douglas Guilfoyle, *Part I- This is not Fine: The International Criminal Court in Trouble*, EJIL: TALK!, (March 21, 2019), available at https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/ (last visited Sept. 2, 2022); *See generally* Leila Nadya Sadat, *Reforming the International Criminal Court: "Lean in: or "Leave,"* 62 WASH. U. J. L. & POL'Y 51, 51-76 (2020).

15. Zeid Raad Al Hussein et al, *The International Criminal Court Needs Fixing*, Atlantic Counsel (Apr. 24, 2019), *available at* https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/ (last visited Oct. 17, 2022).

mounted fierce resistance against what they consider as an imperialistic assault. The absence of investigations elsewhere and the hypocritical role of the United Nations Security Council (SC) played in their hands, as it fed the perception of neo–colonial bias against Africa.[16] At the height of the confrontation, African states even threatened to pull out of the Rome Statute *en masse*.[17] When targeted some, both in Africa and beyond, have already pulled out (Burundi, Philippines) or threatened to pull out (Gambia) of the Rome Statute.[18]

As African states intensified their resistance, the ICC had to look elsewhere to justify its existence. After fourteen years in the business, the OTP opened an investigation in Georgia, its first outside of Africa, paving the way for a possible prosecution of members of the Georgian and Russian armed forces.[19] In March 2020, the Appeals Chamber gave the greenlight to the OTP to investigate the situation in Afghanistan, which implicates Afghan and U.S. personnel.[20] In March 2021, following an authorization by the Pre-Trial Chamber I, the OTP announced its commencement of investigation into alleged crimes in Palestine, which

16. *See generally* TIMOTHY MURITHI, JUDICIAL IMPERIALISM: THE POLITICISATION OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA (Fanele, 2019); Motsoko Pheko, *The ICC is now an instrument of imperialism*, THE HERALD (July 1, 2015), available at https://www.herald.co.zw/the-icc-now-an-instrument-of-imperialism/ (last visited Sept. 2, 2022); Diana Jonstone, *What Does the ICC Stand For? The Imperialistic Crime Cover-Up?*, GLOBAL RESEARCH (June 3, 2011), available at https://www.globalresearch.ca/what-does-the-icc-stand-for-the-imperialist-crime-cover-up/25100 (last visited Oct. 17, 2022); some even interpret the acronym ICC as an 'international colonial court.' Mwangi S. Kimenyi, *Can the International Criminal Court Play Fair in Africa?*, BROOKINGS (Oct. 17, 2013), available at https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa/ (last visited Oct. 17, 2022); *See also* DAVID HOILE, THE INTERNATIONAL CRIMINAL COURT: EUROPE'S GUANTÁNAMO BAY (Africa Research Centre, 2010).

17. After all kinds of accusations (discrimination, racism, imperialism, etc.), the African Union (AU) General Assembly even adopted an ICC mass withdrawal strategy. African Union (Afr. Union), *Decision on the International Criminal Court (ICC)*, Doc. EX.CL/1006(XXX), at 1 (Jan. 30-31, 2017), *available at* https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf (last visited Oct. 17, 2022).

18. Even South Africa, a democracy, which has little to be afraid of the ICC, threatened to withdraw because it was politically inconvenienced due to the ICC's disproportionate intervention in Africa.

19. *See* INT'L CRIM. CT. (ICC), *Situations Under Investigation*, *available at* https://www.icc-cpi.int/pages/situations.aspx (last visited Oct. 17, 2022).

20. The Appeals Chamber's decision reversed the rather controversial earlier decision of the Pre-Trial Chamber II, which rejected the Prosecutor's request for authorization on the basis of a speculative argument that an investigation "would not serve the interests of justice." *See* Int'l Crim. Ct. (ICC), *ICC Judges Reject Opening of an Investigation Regarding Afghanistan Situation* (Apr. 12, 2019), *available at* https://www.icc-cpi.int/Pages/item.aspx?name=pr1448 (last visited Oct. 17, 2022).

potentially targets Israelis.[21] The ICC Prosecutor has also opened investigations in Ukraine, which may lead to the indictment of Ukrainians and Russians. It is also engaged in investigations in Myanmar/Bangladesh, Venezuela, and the Philippines.[22] These moves are supposed to resuscitate the Court's damaged reputation. The vexing question, however, is: In the face of political obstruction, even hostility from superpowers, is there a reasonable prospect of success for the ICC in prosecuting citizens of powerful nations and of their allies? Conversely, if the ICC fails, what are the implications for the beleaguered Court?

Clearly, the ICC has been a stunning disappointment. It is at a crossroads. It faces a veritable danger of being driven into irrelevance. Still, many believe that with a much needed soul searching and necessary corrective measures, the ICC can redeem its authority and effectiveness.[23] Indeed, the ICC has already launched an expert review process.[24] Granted, there are several technical issues experts have already pointed out, which can be addressed through appropriate judicial policy. However, the challenges facing the ICC are primarily political. First, the political competence of the SC over ICC affairs undermines the Court's legitimacy. That is the ICC's birth defect. Second, the hypocritical role of big powers that dominate the SC has made state cooperation look as though it were optional.[25] Third, and this has hardly been explored, the ICC's disappointing performance is directly linked to the palpable retreat from international rule of law in the broader sense.[26] Accordingly,

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21. The Palestine situation was one of self-referral made in 2018. However, given the complexity of the situation the Prosecutor had to request the Pre-Trial Chamber for clarification regarding "the territorial scope of the Court's Jurisdiction" in the situation. Int'l Crim. Ct. (ICC), *Situation in the State of Palestine*, ICC-01/18, *available at* https://www.icc-cpi.int/palestine (last visited Oct. 12, 2022).

22. Of the 17 investigations currently underway, 8 are outside of Africa. *See Situations Under Investigation*, *supra* note 19.

23. *See, e.g.*, Jeremy Julian Sarkin, *Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process*, 21(1) INT'L AND COMPARATIVE L. Rev. 7, 7-31(2021); Todd F. Buchwald, *The Path Forward for the International Criminal Court: Questions Searching for Answers*, 52(1) CASE W. RES. J. INT'L L. 417, 417-31 (2020); Milena Sterio, *The International Criminal Court: Current Challenges and Prospect of Future Success*, 52(1) CASE W. RES. J. INT'L L. 467, 467-78 (2020); Sadat, *supra* note 14.

24. *See infra* Section 3(a).

25. Part 9 of the ICC Statute imposes general obligation on State Parties to cooperate with the ICC. In practice, however, states, big and small, cooperate with the ICC only when doing so is in their interest. That is a disadvantage, compared to ad hoc tribunals that were guaranteed UN funding (since they were created by the SC) and were empowered to compel UN member states' cooperation. *See* Art 29(1) of the ICTY and Art 28 of the ICTR Statutes

26. *See generally* HEIKE KRIEGER ET AL., THE INTERNATIONAL RULE OF LAW: Rise or Decline? (2019).

without fresh political negotiations and a renewed political commitment to international criminal justice, it is submitted here, the Court will struggle to maintain its "selective prosecution" of African suspects, let alone successfully prosecute an American, an Israeli or a Russian.

## Fighting the Fight against Impunity

With the adoption of the Rome Statute, the possibility of putting an end to impunity for core crimes of genocide, crimes against humanity and war crimes seemed feasible.[27] After all, it marked the culmination of a long struggle for a permanent international criminal tribunal with sufficient insulation from political influence.[28] On paper, the ICC is indeed the first international criminal tribunal that can operate without the political approval of the SC or of a state. The reality is much more complicated.[29] The ICC assumes jurisdiction in four different ways.[30] The first is when a State Party refers a situation to the Court.[31] The second route is via a SC referral.[32] Third, a non-State Party may accept the Court's jurisdiction on an ad hoc basis by lodging a declaration with the Registrar.[33] Finally, the Prosecutor may initiate investigations *proprio motu*.[34] The first three are essentially political determinations, and both States Parties and the SC use the ICC for political purposes.[35] It is only the last path that requires following legal criteria in selecting situations. Yet, even this path is not apolitical altogether.[36] Conventional wisdom

27. Note that, as hyperbolic as it may seem, ending impunity by ensuring that crimes of utmost seriousness would not go unpunished, is an explicitly stated goal of the ICC. *See* Rome Statute, *supra* note 10, at Preamble, paras. 4-5.

28. *See generally* CENAP ÇAKMAK, A BRIEF HISTORY OF INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL CRIMINAL COURT (Palgrave Macmillan, 2017).

29. The ICC's former Chief Prosecutor described this paradox as "the ICC is independent and interdependent at the same time. It cannot act alone..." Luis Moreno-Ocampo, Chief Prosecutor of the ICC, Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC (June 16, 2003), *available at* https://asp.icc-cpi.int/sites/asp/files/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf (last visited September 1, 2022).

30. Rome Statute, *supra* note 10, at art. 13.

31. Rome Statute, *supra* note 10, at art.13(a) & 14.

32. Rome Statute, *supra* note 10, at art. 13(b).

33. Rome Statute, *supra* note 10, at art. 12(3).

34. Rome Statute, *supra* note 10, Articles 13 (c) & 15.

35. *See generally* DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS (Oxford, 2014); PHILIPP KASTNER, INTERNATIONAL CRIMINAL JUSTICE IN BELLO? THE ICC BETWEEN LAW AND POLITICS IN DARFUR AND NORTHERN UGANDA 2 (Martinus Nijhoff Publishers, 2012).

36. Indeed, the Court's operation "is inherently political." Sarah M. H. Nouwen and Wouter G. Warner, *Doing Justice to the Political: The International Criminal Court in*

dictates that the Prosecutor ought to exercise her discretion taking into political realities, as there is little that the ICC can do without state cooperation.[37]

With the SC unable to agree on referrals and self–referrals on the decline,[38] the ICC Prosecutor must increasingly rely on its *proprio motu* authority.[39] Such interventions require walking a fine line in a largely uncooperative world. The pedigree of *proprio motu* interventions is a painful reminder. None of the *proprio motu* investigations so far have resulted in a conviction. On the contrary, all interventions that led to indictments ended up disastrously. The high-profile collapse of the Kenyan situation, the acquittal of former Côte d'Ivoire President Laurent Gbagbo and Charles Blé Goudé (a Minister in Gbagbo's government), and the withdrawal of Burundi from the ICC have shown the limitations of *proprio motu* interventions.[40] The changing global order along with the growing sophistication of weaker states in their engagement with the ICC will only make *proprio motu* interventions all the more difficult.[41] In view of the spectacular failures against relatively small states, the ICC needs nothing short of a miracle to succeed in prosecuting citizens of big powers and their allies. After all, the Court apparently was not designed to touch the privileged.[42]

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*Uganda and Sudan, 21 (4) EUR. J. OF INT'L L., 941, 946 (2011); see also Philipp Kastner, supra note 35.*

37. Unlike the ad hoc tribunals, like the ICTY and ICTR or hybrid courts, such as the Special Court for Sierra Lion or the Special Tribunal for Lebanon, the jurisdiction of the ICC is based on the principle of complementarity, which in itself ordinarily calls for cooperation. Rome Statute, supra note 10, at art. 1.

38. There has been just one self-referral by Palestine since 2015 and no SC referral in over a decade. *See* Int'l Crim. Ct.,*Situation in the State of Palestine*, ICC-01/18, *available at* https://www.icc-cpi.int/palestine (last visited Oct. 16, 2022).

39. Between 2002-2015, the OTP has initiated two *proprio motu* investigations (Kenya, Côte d'Ivoire), compared to five since 2016 (Georgia, Burundi, Bangladesh/Myanmar, Afghanistan, and Philippines). *See* INT'L CRIM. CT. (ICC), *Situations and Cases, available at https://www.icc-cpi.int/cases?f%5B0%5D=state_of_%3A130* (lasted visited Oct. 16, 2022).

40. The ICC's intervention in Kenya was particularly unfortunate. To start with, the case for the ICC's intervention in Kenya was unconvincing that it has caused discord even among ICC judges. If the intervention has not already dented the ICC's credibility, the prosecution's inability to prove the charges dealt a blow to the Court. It also brought the AU-ICC already strained relationship closer to breaking point. *See* Bosco, *supra* note 35 at 160.

41. Chris Mahony, *The Justice Pivot: U.S. International Criminal Law Influence from Outside the Rome Statute*, 46 GEO. J. INT. LAW, 1071, 1123-24 (2015).

42. The ICC "is not a court set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States." Robin Cook, former UK Foreign Minister, quoted in Jonathan Graubart & Latha Varadarajan, *Taking Milosevic Seriously: Imperialism, Law, and the Politics of Global Justice*, 27(4) International Relations, 439 (2013).

Although governments continue to declare their support of the ICC, and a potentially disastrous mass walkout of African states has been averted, genuine commitment, be it in self-referral, ratification of the Rome of Statute and its amendments, or enforcement of ICC decisions, has conspicuously declined. It is well known that some of the permanent members of the SC (P5) have acted sanctimoniously since the Rome negotiations. What is less emphasized is that other major powers have not been enthusiastic about the ICC either. The top five most populous countries remain outside of the ICC's fold. France and the U.K. are the only nuclear powers that recognize the ICC.[43] After the stunning failure of the ICC in its *proprio motu* interventions in Africa, however, even smaller nations seem to have realized that they have enough room to maneuver and compromise the ICC's effectiveness.[44] Nothing sums up such an attitude better than President Rodrigo Duterte's contemptuous remark. Speaking about his country's withdrawal from the Rome Statute, he challenged the Court: "[w]hat is your authority now? You cannot exercise any proceedings here without basis. That is illegal and I will arrest you."[45] This statement was inspired by or borrowed from the U.S. playbook that "[a]s far as America is concerned the ICC has no jurisdiction, no legitimacy, and no authority."[46] It should not come as a surprise that the unparalleled competence the P5 has over the ICC and their hypocritical (and hostile, in the case of the U.S.) relationship with the Court reinforces defiance and noncooperation on the part of medium and small nations, and there is little that can be done concerning noncooperation.[47]

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43. Although 123 of the 193 UN member states are parties to the Rome Statute, many of the largest countries, including all of the top five most populous countries; namely, China, India, USA, Indonesia, and Pakistan have not ratified the Rome Statute. *See* INT'L CRIM. CT., *States Parties to the Rome Statute*, *available at https://asp.icc-cpi.int/states-parties* (lasted visited Oct. 16, 2022).

44. That big powers lack the moral authority to put strong political pressure means governments cooperate with the ICC only when it is in their self-interest. *See generally* COOPERATION AND THE INT'L CRIM. CT.: PERSPECTIVES FROM THEORY AND PRACTICE (Olympia Bekou & Deley J. Birkett, eds., 2016).

45. The Guardian, *Duterte Threatens to Arrest International Criminal Prosecutor*, THE GUARDIAN, (Apr.13, 2018), *available at* https://www.theguardian.com/world/2018/apr/13/philippines-duterte-threatens-to-arrest-international-criminalcourt-prosecutor (last visited Oct. 17, 2022).

46. UN News, *US President Trump Rejects Globalism in Speech to UN General Assembly's Annual Debate*, UN NEWS, (Sept. 25, 2018), *available at* https://news.un.org/en/story/2018/09/1020472 (last visited Oct. 16, 2022).

47. See Rome Statute of INT'L CRIM. CT. art.87, Jul.17, 1988, 2187 U.N.T.S 126; Article 87 (7) states that noncooperation shall be referred to the Assembly of Sates Parties or Security Council (for cases referred by the UNSC), without providing for the types of measures these two bodies may take. It reads: "Where a State Party fails to comply with a request to cooperate

## Justice and Pentarchy: The Security Council

Selectivity and double standards have always been fundamental blemishes of international criminal tribunals that came before the ICC.[48] The standard accusation against the ICC's predecessors, from the Nuremberg and Tokyo tribunals to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), is that only those lacking political power were targeted.[49] In truth, it could not have been otherwise, as all of those tribunals were created and operated under the political control of essentially the same powers that dominate the SC.[50] Accordingly, whether and to what extent the SC should have a role in the affairs of the ICC became a hotly contested issue during the Rome negotiations. On the one hand, there was an overwhelming desire to break away from the "victor's justice" legacy. Most states wanted an impartial judicial body, insulated from SC politics.[51] On the other hand, the P5 was unprepared to accept an independent criminal court that may dilute their oligopolistic powers in the Council. The U.S. in particular insisted on having veto power over ICC investigations right through the final day of the Rome Conference.[52] Most nations rejected the U.S. demand, arguing that SC control would undermine the independence of the court. Although the issue was framed in palatable terms, as a question of judicial

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by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

48. RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIBUNALS 54-55 (Cambridge Univ. Press., 2011).

49. *See generally* Christopher H. Wellman, *Does the Existing Human Rights Regime Have Political Authority,* 50 SAN DIEGO L. REV. 931 (2013).

50. The Nuremberg Tribunal was established by Allied Control Council, composed on the U.K, U.S., France, and USSR, and only the vanquished were selectively prosecuted. Few would have seriously expected the victors to prosecute themselves. Even among the Axis powers, those who were thought to be politically useful were spared from prosecution. For instance, as Italy had become to be seen as a potential ally of the West at the time when the East West rivalry was brewing, Italian suspects included in the initial list of defendants were turned over to the Italian government. Richard Overy, *The Nuremburg Trials: International Law in the making, in* FROM NUREMBURG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE, 8-9 (Philippe Sands eds., 2003).

51. Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiation Process*, 93 AM. J. OF INT'L. LAW. 2, 2-12 (2017).

52. BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 82 (Oxford Univ. Press, 2nd ed. 2003).

independence and impartiality, the resolve of small and medium powers "was both inspired and driven by unhappiness with the SC as the organ of control."[53] In effect, it was a showdown between the P5 trying to create a court that would be under their effective control and other nations trying "to do indirectly what they could not do directly: [C]reate an institution that has a degree of independence from the SC and that could act without its approval."[54]

Eventually they reached a compromise following a proposal by Singapore.[55] The Singapore compromise formed the basis for Articles 13(b) and 16 of the Rome Statute, which respectively confer upon the SC the power to trigger and defer ICC investigations. The competence of the SC in the affairs of the ICC can thus be explained more by the desire of the P5 to exercise control over the Court than by a concern on their part for international peace and security.[56] Still, the compromise marked a significant improvement from the 1994 draft statute proposed by the International Law Commission (ILC), which envisioned a court in which only the SC and member states could trigger prosecution.[57] In the end, while European powers accepted the compromise, the U.S. was not to be satisfied with anything short of a Court that it may control via the SC.[58] Accordingly, when 120 countries voted for the adoption of the Rome Statute, the U.S. found itself aligned with China, Israel, Libya, Qatar, Iraq, and Yemen (the last two were under the U.S.'s rouge states list at the time) in voting against the Statute—a strange position for a nation that prides itself as the "leader of the free world."[59]

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53. William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 539-40 (2010).

54. *Id* at 539.

55. WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 328 (Oxford Univ. Press, 2010).

56. Kamari Maxine Clarke & Sarah-Jane Koulen, *The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise*, 7 AFR. J. OF LEGAL STUD. 297, 298 (2014).

57. WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT 120 (2nd ed. 2004); *See Generally,* Bradley E. Berg, *The 1994 ILC Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure,* 28 CASE W. RES. J. OF INT'L L., 221, 223 (1996).

58. *See* William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUROPEAN J. OF INT'L. L., 701, 712–14 (2004); *see also generally,* JASON RALPH, DEFENDING THE SOCIETY OF STATES, WHY AMERICA OPPOSES THE INTERNATIONAL CRIMINAL COURT AND ITS VISION OF WORLD SOCIETY 87–120 (2007).

59. The overwhelming support the world has shown to the establishment of the ICC "represents a singular defeat for American diplomacy." Schabas, *supra* note 59, at 720

## The Cost of Hypocrisy

Although the SC holds both referral and deferral powers, three of the P5: China, Russia, and the United States are not even parties to the ICC Statute. In its objection to the SC's power back in 1998, India presciently argued that such a role "would imply that some members of the Council do not plan to accede to the ICC, will not accept obligations . . . but want the privilege."[60] Although the Singapore compromise was crucial in facilitating the conclusion of the Rome negotiations, it has not convinced most of the P5 to come to the ICC's fold. But why should they? It cannot get much better than a deal that allows them to direct the ICC from outside at nationals of other states, while their own citizens and citizens of their allies remain practically immune from the Court's jurisdiction.[61] They decide both on the powers of the ICC and the fate of other outsiders, without assuming any corollary obligation themselves. In fact, the SC holds monopoly power on the ICC's jurisdiction over non-States Parties.

The triggering power of the SC extends to the crime of aggression as well, even though none of the P5 has ratified the Kampala amendment.[62] It is curious to note that the SC may exercise its referral power without even determining the existence of an act of aggression.[63] When it comes to aggression, a State Party may neutralize the Prosecutor's *proprio motu* power by simply declaring "that it does not accept such jurisdiction."[64] Thus, in reality, the SC holds monopoly power in triggering jurisdiction on the crime of aggression.[65] That is ironic in view of the fact that the most blatant acts of aggression tend to come from the powerful nations, as the U.S. led invasion of Afghanistan and Iraq, and the Russian invasion of Ukraine, demonstrate. As a matter of fact, the U.S. is the only nation that routinely reminds its foes that "all options are on the table,"—a thinly veiled threat of military action. It

60. Dilip Lahiri, Head of Delegation of India, *"Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Court"*, United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Ninth Plenary Meeting, (July 17, 1958) *available at* https://www.legal-tools.org/doc/9f86d4/pdf/

61. Schabas, *supra* note 55, at 328.

62. The jurisdiction of the ICC on the crime of aggression extends only to States Parties that have accepted the amendments on the crime of aggression. *See* Rome Statute art. 15(2).

63. Article 15 of the Rome Statute does not require that the SC determines the existence of an act of aggression in accordance with Article 39 of the UN Charter to trigger an ICC investigation; *Id.* at art.15(7).

64. *Id.* at art. 15 (4).

65. The irony is that the most blatant acts of aggression, such as the 2003 invasion of Iraq, the 2014 and 2022 invasion of Ukraine, are committed by members of the P5.

appears clear, therefore, that "powerful States continue to reserve for them, openly or more discreetly . . . the option to go to war for their interests."[66] Their practical monopoly on the ICC jurisdiction over crimes of aggression means that they can "invade weaker states with impunity."[67] When has the world seen a situation where states enjoy such power over an international institution they refuse to recognize?

A political process that insulates the powerful from elementary accountability procedures is bound to undermine the credibility and legitimacy of the Court. The ICC "was established in such a way that the world's most powerful countries were able to keep themselves—and often their allies—out of its reach." [68] That lies at the core of the accusation that the ICC is biased against Africa. African states' "why only us?" outcry has never been about the merit of cases or situations under investigation; it is basically a claim that if African leaders are held to account, then the same procedures of accountability should be demanded of the leaders of other, more powerful states and their allies. It is an indictment of the hypocrisy and double standards in the SC referrals. The African Union (AU) has gone as far as challenging the SC's monopoly over the political control of the ICC and has proposed for the amendment of Article 16 of the Rome Statute so that the SC is displaced by the United Nations General Assembly (UNGA).[69] African leaders own hypocrisy and disingenuity notwithstanding,[70] one cannot

66. Hans-Peter Kaul, *Is it Possible to Prevent or Punish Future Aggressive War-Making?*, Forum for Int'l Criminal and Humanitarian Law (2011), *available at* https://www.toaep.org/ops-pdf/1-kaul (Last visited Oct. 17, 2022).

67. Mahony, *supra* note 41, at 1090.

68. Somini Sengupta, *Omar al-Bashir Case Shows International Criminal Court's Limitations*, THE NEW YORK TIMES, (June 15, 2015), *available at* https://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html (Last visited Oct. 15, 2022).

69. The Assembly, *African Union, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly /AU/Dec.270 (XIV), the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly /AU/10 (XV), at ¶ 7, AU Doc. Assemb./AU/ Dec. 296 (XV)*, AFRICAN UNION (July 27, 2010), *available at* https://archives.au.int/handle/123456789/1178 (last visited Oct. 15, 2022).

70. African states' outcry against the ICC has been pointedly selective, only with respect to Kenyan and Sudanese situations, where heads of states were implicated, while continuing to refer cases to and cooperating with the Court when it is in their political interest. No one better embodies this hypocrisy than Ugandan President Yuwery Musoveni, a fierce critic of the ICC, but when it comes to his political foes, his government not only made the first ever referral to the ICC, but also continued to cooperate with the Court even at the height AU's showdown with the ICC. *See Uganda's Museveni calls on African nations to quit the ICC*, REUTERS (Dec. 12, 2014), *available at* https://www.reuters.com/article/us-africa-icc-idUSKBN0JQ1DO20141212 (last visited Oct. 15, 2022). Yet, when it comes to rebel leaders, Uganda continues to cooperate with the ICC. In 2015, for example, Lord's Resistance Army (LRA) commander Dominic Ongwen was handed over to Uganda, before the latter transferred

dispute the legitimacy of the claim.[71] Crucially, major-power control of the Court flies in the face of the overriding goal of the Rome conference—breaking away from the legacy of selective justice.[72] That is without delving into the legitimacy the SC itself–an embodiment of institutional inequality—which every member state of the UN, with the exception of the P5 would want to be overhauled. [73]

Practically, the palpable paralysis of the SC in recent years (due to geopolitical rivalry among its powerful members) means that it has not been able to make referrals to the ICC since Libya in February 2011.[74] Although the temptation to use veto power has always been undermining consensus at the SC,[75] the changing geopolitical order has made decisive action at the SC all the more difficult.[76] Russia and China have, for example, acted together in blocking several SC draft resolutions on Syria, including a referral of the situation to the ICC.[77] To what extent the alleged abuse by Western powers of the 2011 SC authorization for use of force to protect civilians in Libya as a license to orchestrate regime change swayed the Russian and Chinese vote on Syria is anyone's guess.[78] It is conceivable that the change in the global power balance

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him to the Hague, where he was tried and convicted. *LRA commander Dominic Ongwen 'in Ugandan custody*,' BBC (Jan. 14, 2015), *available at* https://www.bbc.com/news/world-africa-30810501 (last visited Oct. 15, 2022).

71. How can one explain, let alone justify, the power of some members "to cause the commencement or the suspension of an investigation or prosecution of cases under the Rome Statute, but themselves reject, and not be bound by, the Rome Statute?" Jeremy Julian Sarkin, *Understanding South Africa's Changing Positions on International Criminal Justice: Why the Country Wanted to Withdraw from the International Criminal Court (ICC) and Why it may Remain in the ICC for the Time Being?*, 40 CADERNOS DE ESTUDOS AFRICANOS, 91, 100 (2020).

72. *See generally* Schabas, *supra* note 53, at 539.

73. There have been calls for overhauling the UN system, particularly the distribution of power in the SC, for a long time. *See* U.N. GAOR, G.A. Res. 48/26, xx (Dec. 3, 1993).; *See generally*, UNITED NATIONS REFORMS AND THE NEW COLLECTIVE SECURITY (Peter G. Danchin & Horst Fischer eds. 2010).; United Nations, *A More Secure World: Our Shared Responsibility," Report of the High-level Panel on Threats, Challenges and Change* (2004), *available at*
https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/hlp_more_secure_world.pdf (Last visited Oct. 15, 2022).

74. S.C. Res. 1970, (Feb. 16, 2011).

75. *See* Anjali V. Patil, THE UN VETO IN WORLD AFFAIRS, 1946–1990: A COMPLETE RECORD AND CASE HISTORIES OF THE SECURITY COUNCIL'S VETO (1992).

76. *See generally* Mahony, *supra* note 41.

77. U.N. SCOR, 69th Sess., 7180th mtg., U.N. Doc. S/PV.7180 (May 22, 2014).

78. The African Union, China, and Russia, believe that NATO's bombing campaign over Libya breached the mandate for military intervention. And of course, the consequence has been, predictably, disastrous for Libya and Libyans. *See* for example, *NATO war in Libya violates U.N. mandate, Russia says*, Reuters (Apr. 19, 2011), *available at*

may also have played a role on the extent of using the force on Libyans.[79] What is unmistakable, however, is that while its hypocritical role remains a liability to the credibility of the ICC, the SC has been unable to make a single referral in over a decade, and the chance of future consensus among the P5 on issues of international criminal justice is only getting slimmer.[80] The price ICC pays in terms of its independence and legitimacy due to its relations with the SC is thus for little gain.

### United States: Between Acquiescence and Hostility

Many states, small and big, have displayed remarkable hypocrisy in their engagement with the ICC; using the Court when it is in their own interest and undermining it when it is not.[81] Yet, no nation has demonstrated aggressive hostility towards the ICC to the degree the United States has.[82] When the British advocated for summary execution of Nazi generals in the wake of WWII, it was the U.S. that insisted on criminal prosecution.[83] The U.S. also played a leading role in the establishment of the ICTY and ICTR. However, in its opposition to the ICC, the U.S. is isolated from virtually all its European allies. The U.S. believes that the Court should operate under the supervision of the SC in

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https://www.reuters.com/article/us-russia-libya-idUSTRE73I26D20110419 (last accessed Oct. 10, 2022). *See generally* Geir Ulfstein and Hege Føsund Christiansen, *The Legality of the NATO Bombing in Libya*, 62(1) INT'L AND COMPARATIVE LAW QUARTERLY 159-171 (2013).

79. It is suggested that China and Russia could only acquiescence in the establishment of the ICTY. However, they opposed the referral of the Syrian situation as they grew relatively stronger. *See* Mahony, *supra* note 41 at 1123.

80. *Id.*

81. As indicated already, African governments were happy to self-refer situations, focusing exclusively on domestic rebel leaders. When the ICC dared to indict government leaders, however, they fought back tooth and nail, individually and collectively via the AU. "The major deriving force for the AU's action is the fear of the prospect of any sitting head of state being indicted by the ICC, and thereby forced to relinquish power. In other words, the cabal of the present African leadership is concerned with its own survival than its commitment to justice and elimination of impunity across the continent. It is not about peace, sovereignty, or independence", observes Juma. *See* Laurence Juma, *Unclogging the Wheels: How the Shift from Politics to Law Affects Africa's Relationship with the International System*, 23 TRANSNAT'L L& CONTEMP. PROBS. 353 (2014).

82. *See generally*, Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV.1 (2005); HUMAN RIGHTS WATCH, *"The United States and the International Criminal Court: The Bush Administration's Approach and a Way Forward,"* (Aug. 2, 2009), *available at* https://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administrations-approach-and-way (Last Visited Oct. 17, 2022).

83. To be sure, there was no unanimity even within the U.S. government. However, the Soviet government's support for trials swung the balance in favor of prosecution. *See* Overy, *supra* note 50, at 2-4.

the same way ad hoc tribunals that came before it operated. The U.S. attitude towards the ICC oscillates between cautious accommodation and open hostility, depending on whether a democrat or a republican is in the Whitehouse. The Clinton Administration reluctantly signed the Rome Statute, albeit at the "eleventh hour."[84] During the Bush Administration, however, the U.S. took extraordinary legislative, executive, and diplomatic measures to undermine the ICC. First, the U.S. "unsigned" the Rome Statute, which was unprecedented.[85] Then it launched a global campaign to pressurize countries around the world into signing bilateral agreements (as per Article 98 of the Rome Statute) that would make U.S. military personnel immune from the jurisdiction of the ICC.[86] While rich nations stood firm to the U.S. pressure, over a hundred other countries, many of them recipients of U.S. military or financial aid, "succumbed to such geopolitical blackmail."[87] While the U.S. raises several legal arguments for its opposition of the ICC in general, and such Article 98 agreements in particular, its real motive can be gathered from John Bolton's blunt admission. Bolton, who is one of the fiercest campaigners against the ICC, stated that Article 98 Agreements are "essential to ensuring that the ICC will not become an impediment to U.S. activities around the world."[88] The legality of such treaties is a separate issue that we shall not delve into here.[89] It is also interesting to note that most countries that have signed Articles 98 bilateral agreements with the U.S. are States Parties to the Rome Statute.[90]

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84. Schabas, *supra* note 57, at 21

85. *See* Ralph, *supra* note 58. Since then Israel, Russia and Sudan have withdrawn their signatures.

86. ERROL P. MENDES, PEACE AND JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: A COURT OF LAST RESORT 19 (1st ed. 2010).

87. *Id.*

88. John R. Bolton, *American Justice and the International Criminal Court*, AMERICAN ENTERPRISE INSTITUTE, (Nov. 3, 2003), *available at* https://www.aei.org/research-products/speech/american-justice-and-the-international-criminal-court/ (last visited Oct. 17, 2022); *See also* John R. Bolton, *The Risks and Weaknesses of The International Criminal Court from America's Perspective*, 64(1) L. AND CONTEMP. PROBS.. 167, 167-180 (2001).

89. The ICC's jurisdiction is limited to the gravest crimes that amount to violation of peremptory norms of international law (*jus cogens*) that impose obligations *erga omnes*. It may be argued, therefore, that states may not lawfully ignore their obligation to prosecute or cooperate. *See generally* International Law Commission (ILC), Commentary on Article 40 *para.* 4 of the Draft Articles on Resp. of States for Int'l Wrongful Acts, G.A. 53rd Sess. (A/56/10) (2001).

90. *International Criminal Court - Article 98 Agreements Research Guide - Countries that have Signed Article 98 Agreements with the U.S.* GEORGETOWN LAW LIBRARY, available at https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099 (last visited Oct. 17, 2022).

Meanwhile, President Bush signed into law the American Service Members Protection Act, also called the Hague Invasion Act.[91] This Act authorizes the use of military force to liberate Americans or citizens of ally countries being held or brought before the ICC.[92] It simultaneously criminalizes in the U.S. any assistance to the ICC without a special exemption from the President.[93] Accordingly, the U.S. contributes to the UN peacekeeping efforts only on conditions that its troops are immune from the jurisdiction of the ICC.[94] The U.S. threatened to veto the renewal of the UN mission in Bosnia–Herzegovina, demanding that the ICC be barred from proceeding against peacekeeping forces.[95] The U.S. was likewise willing to contribute military officers to the peacekeeping effort in Mali after the latter pledged to protect U.S. officers from the ICC.[96] Yet, the U.S. had no problems sponsoring and voting in favor of SC Resolution 1970 (2011), referring the situation in Libya to the ICC, although Libya is not a party to the Rome Statute.[97] The U.S. also played a leading role in trying to refer the situation in Syria (also a non-state party) to the ICC.[98] What is even more extraordinary is that Paragraph 7 of the draft resolution states that, with the exceptions of Syrians, officials and personnel who are nationals of a non-State Party to the Rome Statute shall be immune from the jurisdiction of the ICC.[99] The legality of whether the SC can circumscribe the ICC's jurisdiction based on nationality while referring a situation is questionable. The ICC believes that in making referrals, a State Party or the SC cannot instruct the Prosecutor which crimes or individuals to investigate (thereby implicitly rejecting the legality of SC immunity clause).[100] Indeed, that is the reason

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91. *U.S.: 'Hague Invasion Act' Becomes Law,* HUM. RTS. WATCH (Aug. 4, 2002), *available at* http://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law (last visited Oct. 17, 2022)

92. 22 U.S.C. §7424 (2008)

93. *Id.*

94. Indeed, it was within days from the entry into force of the Rome Statute that the U.S. announced that it would veto over all future peacekeeping missions unless the SC shields missions from ICC jurisdiction, using its power under Article 16 of the Rome Statute. *See* Schabas, *supra* note 57, at 83.

95. Broomhall, *supra* note 52, at 180.

96. Kristina Daugirdas and Julian Davis Mortenson (eds.), *International Criminal Law: President Barack Obama Certifies that U.S. Peacekeepers in Mali are Immune from ICC Jurisdiction*, 108 AM. J. INT'L L. 547 (2014).

97. S.C. Res. 1970 (Feb. 16, 2011).

98. Daily Press Briefing, U.S. Department of State (May 8, 2014), http://www.state.gov/r/pa/prs/dpb/2014/05/225831.htm.

99. S.C. Draft Res. 348 (May 22, 2014)

100. Prosecutor v. Callixte Mbarushimana, Decision on the "Defense Chal-lenge to the Jurisdiction of the Court", ICC- 01/ 04- 01/ 10, ¶ 27 (26 October 2011).

why States Parties and the SC refer situations rather than cases in the first place.

Following the ICC's commencement of preliminary investigations into alleged crimes committed in Afghanistan, the United States went a step further and imposed sanction on ICC officials.[101] Former President Trump issued an executive order establishing a sanctions program that would target not only ICC officials and their assets but also anyone involved in the investigation of U.S. personnel and those of U.S. allies.[102] The Biden Administration has since lifted the sanction on ICC officials. That should not suggest, however, that the U.S. hostility towards the ICC has ceased. The U.S. hitherto engagement with the ICC suggests that this is only a tactical shift in favor of shaping the international criminal justice system from outside, without any corollary commitment.[103]

## The Retreat from International Rule of Law

The aura of optimism that dominated the scholarship in the 1990s regarding the prospect of International Courts and Tribunals (ICTs) advancing international rule of law has visibly waned. One of the main themes of academic debates around the turn of the century revolved around the proliferations of international norms and institutions (including of ICTs), the concomitant fragmentation of international law, and how it ought to be harmonized.[104] That was indeed a legitimate concern, as some of the most prominent institutions, including judicial ones, were created outside of the UN system, without any systemic hierarchy in place.[105] Legal scholars even debated about

101. *International Criminal Court Officials Sanctioned by US*, BBC, (Aug. 28, 2022), *available at* https://www.bbc.com/news/world-us-canda-54003527. (Aug. 28, 2022)

102. *See* Milena Sterio, *The Trump Administration and the International Criminal Court: A Misguided New Policy*, 51 CASE WEST. RES. J. INT. LAW, 201, 202-210 (2019); Nicole Jones, *Sanctioning the ICC: Is This the Right Move for the United States?*, 39 WIS. INT. LAW J., 175, 175-204 (2022).

103. *See generally* LEE FEINSTEIN & TOD LINDBERG, MEANS TO AND END: U.S. INTEREST IN THE INTERNATIONAL CRIMINAL COURT, (2009).

104. Int'l. L. Comm'n, Rep. of the Study Group of its Fifty-Eighth Session, U.N. Doc. A/CN.4/L.682 (2006), *see also* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); MARGARET A. YOUNG, REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION (2012); PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION (2013).

105. See Andreas Fischer-Lecanto and Gunther Tuber, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 1045 (2004).

constitutionalism in international law.[106] Two decades later, the concern is about the decline of international rule of law, [107] the downslide of freedom and democracy,[108] rising inequality, grave global insecurity, and even a possible nuclear apocalypse, with the doomsday clock at its closest to midnight ever.[109] In 2019, the U.S. withdrew from the International Nuclear Forces (INF) Treaty, accusing Russia of non-compliance.[110] After ballooning for seven straight years, the global military expenditure has hit a record high $2.1 trillion in 2021.[111] That was before the Russian invasion of Ukraine, and as economies struggle to recover from the effects of the Covid-19 pandemic. Multinationalism is on the decline. There is thus an unmistakable downslide from the world order based on international rule of law.

The expansion of international law seems to go in tandem with globalization. The proliferation of norms of international law in the aftermath of WWII was mainly triggered by the need to "catch up with the dramatic changes in globalization . . . that had overtaken the inherited framework."[112] Similarly, as globalization gathered pace following the fall of the Berlin Wall, it looked as though world leaders recognized the need for collective action that gave precedence to global public goods

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106. See RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE, (Jeffrey L. Dunoff and Joel P. Trachtman eds., 2009), THEODOR MERON, THE HARMONIZATION OF INTERNATIONAL LAW (2006), CHRISTINE E. J. SCHWÖBEL, GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE (2011).

107. HEIKE KRIEGER ET AL., THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE?, (2019). Shirley V. Scott, *The Decline Of International Law As A Normative Ideal*, 49 (4) VICTORIA UNIV. WELLINGTON L. REV. 627-643 (2018), *See also generally* Simon Chesterman, *Can International Law Survive a Rising of China?* 31 (4) EUR. J. INT'L. L. (2021).

108. *See* SARAH REPUCCI AND AMY SLIPOWITZ, FREEDOM IN THE WORLD 2022: THE GLOBAL EXPANSION OF AUTHORITARIAN RULE, (Elisa Aaron, David Meijer, Shannon O'Toole, Tyler Roylance, Lora Uhlig eds., 2022).

109. J John Mecklin, *At doom's doorstep: It is 100 seconds to midnight 2022 Doomsday Clock Statement*, BULLETIN OF THE ATOMIC SCIENTISTS, (Jan. 20, 2022), *available at* https://thebulletin.org/doomsday-clock/current-time/ (last visited Oct. 15, 2022).

110. *See* Press Statement, Michael R. Pompeo, U.S. Secretary of State, U.S. Department of State Statement on U.S. Withdrawal from the INF Treaty on August 2, 2019 (Aug. 2, 2019), https://2017-2021.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/index.html (last visited Oct. 15, 2022).

111. *World military expenditure passes $2 trillion for the first time*, STOCKHOLM INT'LPEACE RSCH. INST., (Apr. 25, 2022), *available at* https://www.sipri.org/media/press-release/2022/world-military-expenditure-passes-2-trillion-first-time (last visited Oct. 15, 2022).

112. Keneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 456 (2000).

over parochial interests. Many were convinced that the world was witnessing a historic shift towards rule of law and liberal international order. Some were clearly carried away and concluded that history was at an end.[113] The period between 1990 and 1999 was even declared as the United Nations Decade of International Law.[114] Beyond symbolic pronouncements, the decade was indeed marked by an acceleration in the development of international norms and institutions that in some ways parallels the immediate aftermath of WWII. The World Trade Organization (WTO), with its robust dispute settlement system, was created in 1994. The same year, the UN Convention on the Law of the Sea (and the tribunal it created) entered into force. The ICC was created four years later. The adoption in 1992 of the UN Framework Convention on Climate Change and the succeeding Kyoto Protocol (1997) and the Vienna Declaration and Programme of Action (1993), were also reasons for optimism. The Declaration of Millennium Development Goals in 2000, promising, among others, to collectively tackle global hunger, disease, and environmental degradation, seemed to set the tone for a brighter new century. In the 1990s, rule of law, good governance and human rights protection were presented as the triad tests of political legitimacy. Even institutions that are fantastically undemocratic themselves, such as the World Bank and the IMF, did not see any irony when they jumped on the bandwagon, and set rule of law and democratic governance as conditions for securing loan and financial aid.

In reality, international legality has always been fragile at best.[115] The rare moment of unity and cooperation among the P5 witnessed, for example, in the response to the Iraqi invasion of Kuwait in 1990, was quick to fade. The intervention against Iraq was a legitimate and necessary action to restore the territorial integrity of Kuwait. However, the SC did not (care enough to) prevent the 1994 genocide in Rwanda. The aerial bombing of Yugoslavia by NATO and the subsequent intervention in Kosovo was not authorized by the SC, as China and Russia were opposed to it, and might be considered an act of aggression.[116] It was a clear signal that for Western powers, even the SC (in which they have unparalleled privilege) can be sidelined if it fails to support their goal. As a result, the Independent International Commission

113. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1st ed. 1992).

114. G.A. Res. 44/23, (Nov. 17, 1989).

115. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (1st ed. 2006).

116. *See* Mahony, *supra* note 41, at 1079.

on Kosovo had to come with a creative conclusion that the intervention was "illegal but legitimate."[117]

Following the September 11, 2001 terrorist attack, however, all pretense of multilateralism and rule of law was replaced by "à la carte multilateralism."[118] The policy recast was also accompanied by a rhetorical shift from international legal order to rule based world order.[119] The changing global power distribution may also have contributed to such shift.[120] Nothing better captures that rhetorical shift than President Bush's (in)famous "you are either with us or with the terrorists" false dichotomy.[121] The human rights abuse and disregard for basic rule of law associated with the U.S. counterterrorism program are well documented.[122] What is less reported is the extent to which trumpeting terrorism and aligning themselves with the U.S. war on terror soon became the preferred survival strategy for many dictatorships around the world. For foreign aid dependent states in particular, being an ally of the U.S. led war on terror provided almost a guarantee of aid and, hence, of political survival. Many governments enacted draconian laws and used and abused them to clamp down on political dissent and human rights activities.[123]

The 2003 invasion of Iraq marked a turning point in the international legal order like no other.[124] The intervention in Kosovo was made somewhat palatable as "illegal but legitimate." The invasion of Afghanistan, although legally dubious, benefited from the global

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117. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL INTERVENTION AND LESSONS LEARNED 4 (2000).

118. Philippe Sands, *Lawless World - The Bush Administration and Iraq: Issues of International Legality and Criminality,* 29(3) HASTINGS INT'L & COMP. L. REV. 312, (2006).

119. Scott, *supra* note 107, at 637-43.

120. *Id.*

121. *Bush: 'You Are Either With Us, Or With the Terrorists'*, VOICE OF AM., (Oct. 27, 2009), available *at* https://www.voanews.com/a/a-13-a-2001-09-21-14-bush-66411197/549664.html (last visited Aug. 29, 2022).

122. Laurie R. Blank, *The Consequences of A "War" Paradigm for Counterterrorism: What Impact on Basic Rights and Values?* 46 GA. L. REV. 719, 719-41(2012).

123. Amnesty International Annual Report, *The State of the World's Human Rights*, Amnesty Int'l Publ'n 1, 1-6 (2006), *available at* https://www.amnesty.org/en/documents/pol10/0001/2006/en/ (last visited Oct. 17, 2022); tThe International Advisory Commission of the Commonwealth Human Rights Initiative, *Stamping Out Rights: The Impact of Anti-Terrorism Laws on Policing*, Commonwealth Hum. Rts. Initiative 2, 2-52 (2007), *available at* https://www.humanrightsinitiative.org/publications/chogm/chogm_2007/chogm_report_2007.pdf. (last visited Oct. 17, 2022).

124. Ian Johnstone, *US-UN Relations after Iraq: The End of the World (Order) As We Know It?* 15(4) EUR. J. INT'L L. 813, 813-38 (2004); *see generally* Sands, *supra* note 118, at 295-313; Scott, *supra* note 107, at 632-643.

sympathy of the 9/11 attacks and the presence of al-Qaeda in the country. The invasion of Iraq did not have any of that. The invasion was justified on two grounds, preemptive self-defense against terrorism and getting rid of weapons of mass destruction in Iraq, without any evidence for either claim.[125] There was no eminent Iraqi threat to justify preemptive self-defense, nor were weapons of mass destruction to be found. It was thus a classic case of naked aggression that shook the foundations of the international legal order. It tore down the normative and institutional apparatus of the UN, particularly of the SC, which was contemptuously sidelined for standing on the path of military action.[126] The idea that the SC was more than a vehicle for advancing the interests of the powerful was dealt a blow. Unlike in the case of Kosovo, the U.S. was unable to make a case that would convince even its NATO allies.

The Russian annexation of Crimea in 2014 was yet another blow to an already anarchic international order. Now, not only the U.S.—a superpower that believes in its "exceptionalism" in its engagement with international law[127]—but also second-tier powers could invade a sovereign nation with impunity.[128] Russia's attempt to justify its aggression based on the right to self-determination of the people of Crimea remains legally suspect. It also flies in the face of its own rhetoric about the sanctity of territorial integrity, which seems to matter only in dealing with its own separatists and when pointing fingers at the West.[129] The overwhelming condemnation of the annexation, and the lack of international recognition, has not deterred Russia from its recent invasion of Ukraine—an act which is a *prima facie* violation of Article 2(4) of the UN Charter. It has also confirmed once again that the SC is unable to do anything to stop aggression by a veto wielding power. It is a manifestation of the tyrannical nature of veto power, where the will of one member prevails over the combined will of every other member.

The decline of international rule of law is palpable in other spheres of the postwar international order. The WTO is in a profound crisis.[130]

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125. *Id.* 4.1

126. *Id.* at 830-36.

127. Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. OF TRANSNAT'L L. 1307, 1307-54 (2008); *see also* Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L. J. 1,1-54 (2011).

128. That is, of course, without considering the political ostracization, economic sanctions, and other costs on Russia following its annexation of Crimea.

129. Lauri M. . .lksoo, *The Annexation of Crimea and Balance of Power in International Law*, 30 EUR. J. INT'L L. 303, 303-19 (2019).

130. Destaw A. Yigzaw, *On the Obituary of the Doha Round: A Path for Reinventing the WTO's Future,* 22 ESTEY J. OF INT'L L. AND TRADE POL'Y 31, 31-63 (2021).

The Doha Round is all but dead.[131] WTO's dispute settlement mechanism, once considered as the "jewel" of the organization, is in paralysis (the Appellate Body currently has no members).[132] As the global distribution of power shifted, and emerging powers began to assert their demands, consensus and compromise have become difficult to come by.[133] On the contrary, some members have reverted back to protectionism, in total disregard of WTO rules, as the recent US–China tit-for-tat tariffs have demonstrated.

The state of human rights is not in a positive trajectory either, which is unsurprising in view of the decline in international criminal accountability, the rise of authoritarian nationalism, and the obscene level of income and wealth inequality between and within nations. Studies show an alarming backslide in human rights protection globally.[134] In a 2018 study, the World Justice Project reported that fundamental human rights have been eroded in seventy-one of the 113 countries surveyed.[135] Overall, the gentle civilizer seems on a downward trajectory.

With respect to international criminal accountability in particular, the initial enthusiasm has unmistakably dried. During the initial years of the ICC, most situations were self-referred by member states

131. The Doha Round, the first and only trade negotiations round under the WTO, was launched in 2001 and was supposed to be concluded in 2005. However, both emerging powers who feel disadvantaged by past agreements and industrialized nations who have lost millions of jobs as their corporations moved their productions abroad (and as a consequence are facing social and political backlash at home), found it difficult to make any further concessions. *See generally* Yigzaw, *Id.*

132. With the term of the last remaining member having expired in November 2020, and the U.S. blocking the appointment of new members, the Appellate Body is currently vacant. See WTO, *Dispute Settlement: Appellate Body, available at* https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Sept. 30, 2022).

133. Having failed to save the Doha Round, the U.S. and other WTO members turned towards regional and transcontinental trade alliances. The Trans-Pacific Partnership (TPP), which was apparently designed as a counterweight to China, is the most prominent example. *See* generally Matthew Yeung, *China and the Trans-Pacific Partnership Agreement: Misfit or Missed Opportunity?*, 23(1) Agenda, 73-88 (2016).

134. Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000); Eric A. Posner, *The Twilight of Human Rights Law* (2014); Stephen Hopgood, *The End Times of Human Rights* (2013); Doutje Lettinga & Lars van Troost (eds.), *Debating the End times of Human Rights: Activism and Institutions in a Neo-Westphalian World* (Amnesty Int'l Neth., 2014), *available at* https://www.amnesty.nl/content/uploads/2016/12/debating_the_endtimes_of_human_rights.pdf.

135. World Justice Project, *WJP Rule of Law Index 2017-2018, available at* https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf (last visited Oct 22. 2019)

themselves.[136] That has visibly changed. Since Central African Republic II in 2012, Palestine is the only member state to self-refer the situation in its territory. No major country has ratified the Rome Statute for a long time now. Côte d'Ivoire (2013), Palestine (2015), El Salvador (2016), and Kiribati (2019) are the only states that ratified the Rome Statute since 2012. At the conclusion of the Rome Conference, many predicted that the sixty ratifications required for the entry into force of the Rome Statute could take decades. However, the ratification threshold was met within four years.[137] By contrast, only forty-three states have ratified the 2010 amendments on the crime of aggression.[138] None of the states in the top fifteen military ranking has ratified the amendment.[139] "Aggression is in some sense the arch-crime which most menaces international society."[140] Without the crime of aggression, we would not be discussing about alleged crimes in Iraq, Afghanistan, or Ukraine. Thus, the apparent lack of commitment to criminal accountability for the crime of aggression is hardly illustrative of states' resolve to fight impunity for core crimes.

## The Way Forward: What Should be Done?

If the road for the ICC has so far been bumpy, the future looks deeply precarious, if not one of existential struggle. The challenges facing the Court are multidimensional. Some are self-inflicted wounds. The judges' unfortunate dispute over pay has attracted unwanted publicity.[141]

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136. Between 2004 and 2014, there were five self-referrals, two SC referrals and two *proprio motu* interventions. Since then, there has been just one self-referral (Palestine), not a single SC referral. *See* INT'L CRIM. CT. (ICC), *Situations and Cases*, *available at* https://www.icc-cpi.int/cases?f%5B0%5D=state_of_%3A130 (lasted visited Oct. 22, 2022).

137. For more on the ratification process, *see* Bosco, *supra* note 35, at 56-72,

138. Rome Statute of the International Criminal Court Res., Rc/Res.6, C.N. 651.2010. (May 13, 2010), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (last visited Oct. 14, 2022).

139. 2022 Military Strength Ranking, Global Firepower, *available at* https://www.globalfirepower.com/countries-listing.php (last visited Oct.14, 2022).

140. Cassese, *supra* note 2, at 146.

141. Owiso Owiso, *Remuneration Debacle at the International Criminal Court: Should ICC Judges Get a Pay Rise? Part II*, OPINIO JURIS (Dec. 23, 2020), *available at* http://opiniojuris.org/2020/12/23/remuneration-debacle-at-the-international-criminal-court-should-icc-judges-get-a-pay-rise-part-ii/ (last visited Oct.14, 2022); Marlise Simons, *In The Hague's Lofty Judicial Halls, Judges Wrangle Over Pay*, NEW YORK TIMES (Jan. 20, 2019), *available at* https://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html (last visited Oct.14, 2022); *see generally* Douglas Guilfoyle, *Part I- This is not Fine: The International Criminal Court in Trouble*, EJIL: Talk! (Mar. 21, 2019), *available at* www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/ (last visited Oct. 14, 2022).

Their public altercation over who should preside over an appeal in the Gbagbo case has also generated a perception of breakdown in collegiality among judges.[142] It also raises suspicions, especially in view of the controversial conclusion of the case. Crucially, the Court's disappointing performance has prompted many, including States Parties, to call upon the Court to justify its cost.[143] To address these and other deficiencies, commentators offer various recommendations.[144] Suggestions are often about how the ICC ought to operate, which is a legitimate concern. The ICC leadership has also finally come to grips with the sorry reality and undertaken corrective measures through a review process, which has already identified a longlist of serious technical problems.

However, the most daunting challenges to the ICC remain crippling noncooperation and hostility, which cannot be addressed by expert review. It cannot be stressed enough that state noncooperation is not limited to big powers. There is, for example, an overblown criticism of the ICC disproportionately targeting Africans. What is seldom emphasized is that the ICC's limited success in Africa almost exclusively concern cases in which the ICC and African governments have mutual interest. African states have always supported the ICC when it is in their political interest. As a matter of fact, five of the ten African situations were self-referred by African governments. When the ICC went after sitting heads of State, Omar Al Bashir of Sudan (2009) and Kenyan President Uhuru Kenyatta (2016), however, African governments realized the danger the ICC poses and began to fight back. When it comes to situations that implicate those in power, African states have not only been uncooperative, but also engaged in a hostile campaign, individually and collectively, against the ICC.[145] As a result, the ICC has only managed to convict just one African government official so far, and even that conviction has already been overturned.[146]

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142. Kevin Jon Heller, *Well, the Gbagbo "No Case to Answer" Appeal Should be Interesting*, Opinio Juris (Jan. 22, 2019), *available at* http://opiniojuris.org/2019/01/22/well-the-gbagbo-no-case-to-answer-appeal-should-be-interesting/ (last visited Oct. 14, 2022).

143. *See* Osvaldo Zavala, *The Budgetary Efficiency of the International Criminal Court*, 18 Int'l Crim. L. Rev., 461-88 (2018); Foreign & Commonwealth Office, UK Statement to the ICC Assembly of States 17th Session, (Dec 5, 2018), *available at* https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session (last visited Oct. 14, 2022).

144. *See, e.g.*, Sarkin, *supra* note 23; Buchwald, *supra* note 23; Sterio, *supra* note 23; Sadat, *supra* note 14.

145. *See supra* text accompanying note 17.

146. *See supra* text accompanying note 12.

## Beyond Expert Review

Few international institutions have been subjected to as heavy a criticism as the ICC. It is criticized both by its supporters who feel that the Court has failed to live up to expectations and detractors who argue that the court is either just ornamental or illegitimate. Crucially, since some of its staunchest critics are states, both members and non-members, the ICC's operations have practically become increasingly difficult. The ICC leadership recognizes the problems facing the Court. "*Gravely concerned* by the multifaceted challenges" besetting the ICC, and in recognition of the inescapable reality that the ICC's achievements in terms of investigations, prosecutions, conviction rate, and overall impact in combating impunity have been limited, the Assembly of States parties (ASP) established a formal review process in 2019, mandating an Independent Expert Review (IER) to identify deficiencies and come up with recommendations that would bolster the performance of the Court and of the Rome Statute system.[147] The IER was tasked to make technical recommendations on cluster issues of governance, judiciary, and investigations and prosecution.[148]

In September 2020 the IER issued its final report, containing extensive short-term and long-term recommendations to improve the Court's operations.[149] Later that year, the ASP adopted a Resolution, requesting the ICC to respond to the findings of the IER and to regularly report to the States Parties on the implementation of IER recommendations.[150] The Resolution also created a "Review Mechanism," to assess the IER recommendations and develop an action plan to ensure their implementation. There is no dispute that the review process is important in addressing the many pronged issues that are plaguing the Court. However, the IER recommendations remain purely

147. ICC ASSEMBLY OF STATE PARTIES Resolution ICC-ASP/18/Res. 7 (Dec. 6, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf

148. ICC Assembly of States Parties to the Rome Statute, *Resolution ICC-ASP/18/Res.7*, at 3 ¶ 2 (Dec. 6, 2019), *available at* https://asp.icccpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf (last visited Nov. 1, 2022).

149. ICC Assembly of States Parties to the Rome Statute, *Independent Expert Review of the International Criminal Court and the Rome Statute System*, at 1 (Sept. 30, 2020), *available at* https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf (last visited Nov. 1, 2022).

150. ICC Assembly of States Parties to the Rome Statute, *Resolution ICC-ASP/19/Res.7* (Dec. 18, 2020), *available at* https://asp.icccpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-Res7-ENG.pdf (last visited Nov. 1, 2022).

technical, as was the mandate.[151] Hence, they cannot address the fundamental malaise that lies at the core of the ICC-politics. The ICC may not be as state driven an institution as realists might have it.[152] However, the reality remains that the ICC depends on the cooperation of States Parties in virtually all aspects of its operations.[153] Therefore, if genuine progress is to be made, states must demonstrate a conscientious commitment to ensure that crimes of utmost seriousness do not go unpunished.

Some of the political problems that require political solutions can be addressed within the Rome Statute framework, while others are external. I have argued that the global political landscape has become less conducive to international rule of law than one would have predicted two decades back. There is little that can be done within the Rome Statute framework to reverse that trend. The global distribution of political power, particularly in the SC, hardly reflects the realities of the twenty-first century. If the SC's pentarchy is not anachronistic enough, veto power is antithetical not only to the sovereign equality of states as stipulated under Article 2(1) of the UN Charter, but also to an idea of global order based on international rule of law, as opposed to post facto decision dictated by the self-interest of a handful of nations.[154] But that too lies beyond the purview of the Rome Statute system. Despite suggestions to the contrary, the power of the ICC leadership, including the ASP in persuading powerful non-State Parties to come to the ICC's fold or be supportive is also limited. However, with political will, there are several measures that the ICC and its States Parties can take to shore up the legitimacy and effectiveness of the Rome Statute system, which includes revisiting the role of the SC in ICC affairs, as hypocrisy and double standards produce the antithesis of justice.

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151. The IER report covers a wide range of issues, including staff training, performance appraisal, ethics in the workplace, efficiency in budget utilization, external relations, and so on. ICC Assembly of States Parties to the Rome Statute, *supra* note 149, at 7.

152. Mark Kersten, *Taking the Opportunity: Prosecutorial Opportunism and the International Criminal Court*, *in* THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 181, 185 (Margaret M. Deguzman ed., 2020).

153. Cassese, *supra* note 2, at 164-67.

154. The "imperial status" of the P5 in the SC is based on 1945 reality. If at all veto power is justified, on what basis does, for example, France have veto power now, while India, representing more people than the entire continent of Europe, with bigger gross domestic product (GDP), and with higher military ranking does not? *See* The World Bank, *Gross Domestic Product 2021*, *available at* https://databankfiles.worldbank.org/data/download/GDP.pdf (last visited Nov. 1, 2022). *See also* Global Firepower, *2022 Military Strength Ranking*, *available at* https://www.globalfirepower.com/countries-listing.php (last visited Nov. 1, 2022).

## Replacing the Security Council?

It was not due to its permanent nature that the ICC has been cherished, at least initially. It is rather its relative political independence (as a treaty-based institution), and hence its legitimacy that has offered reason for optimism about international criminal justice. It is obvious, therefore, that the referral and deferral powers of the SC undermine the Court's independence, and hence its legitimacy.[155] The stunning (given the gravity of allegations) but unsurprising failure to refer the Syrian situation and the total lack of consideration of the situation in Palestine (despite UN reports of alleged international crimes) show nothing but inevitable selectivity in SC referrals.[156] And, of course, there is no point for the SC to even consider referring the situation in Iraq, Afghanistan or Ukraine. The SC's involvement, which, experience has shown, is bound to be based on big power political interest, sets a bad example for other states as well. In practice, the two referrals the SC has made (Sudan & Libya) have made it clear that such referrals are ineffective in a climate of non-cooperation, which SC politics reinforces.[157]

On paper, SC referrals expands the ICC's reach. However, any such advantage is eclipsed by the political cost it comes with. To reduce such political cost, some suggest for the P5 to adopt a "code of conduct" that requires them to voluntarily refrain from exercising their veto in ICC referrals.[158] The AU's proposal is to turn the SC's referral and deferral powers over to the UNGA.[159] None of these suggestions is likely to address the problem. First, it is unrealistic to, for example, expect the U.S. to, out of courtesy, refrain from exercising its veto if the SC were to refer the Palestine situation to the ICC. The P5—the imperial states—

155. It is not simply due to the anachronist and undemocratic nature of the SC, or even the veto power (which has no parallels anywhere), but also because SC has practically and consistently pursued a policy of double standards in exercising its powers under Article 13 (b) of the Rome Statute. *See Rome Statute of the International Criminal Court*, U.N. Treaty Series Vol. 2187 No. 38544, *available at* http://treaties.un.org (last visited Nov. 1, 2022).

156. United Nations Fact-Finding Mission on the Gaza Conflict, "Human Rights in Palestine and Other Occupied Arab Territories," HRCOR, 12th session, A/HRC/12/48, (2009).

157. African governments, including South Africa, rallied behind Bashir. The SC's lack of equity, consistency and effectiveness in its actions has long been recognized by the UN itself. *See* United Nations, *A more secure world: Our shared responsibility*, *supra* note 73, at ¶ 246.

158. Kristen E. Boon, *Implications of Security Council Veto on ICC Referral of Syrian Situation*, OPINIO JURIS EDS. (May 23, 2014), *available at* http://opiniojuris.org/2014/05/23/implications-security-council-veto-icc-referral-syrian-situation/ (last visited Oct. 26, 2022).

159. *See supra* note 69.

have always acted and will continue to act based on their self-interest and political expediency. On the other hand, the UNGA replacing the SC is not only improbable but also misses the principal reason why the SC was given such powers in the first place, which is to prevent a situation where the SC would create a parallel ad hoc tribunal as per Article 41 of the UN Charter, thereby undermining, even overriding the ICC.[160] It is the same old concern the ILC had in preparing its 1994 draft statute.[161] Importantly, what justification is there for conferring a referral power on the UNGA, when more than a third of its members are non-State Parties to the Rome Statute (not to mention its bureaucracy and ineffectiveness)?

However, Articles 13 (b) and 16 of the Rome Statute can be amended. A case can be made for withdrawing the SC's powers. How can one explain, let alone justify, a system where non-State Parties enjoy a superior power over a treaty-based institution than States Parties? The ICC is a treaty-based institution with full-fledged legal personality. It is an autonomous institution, created independently of UN system, with only a cooperation agreement.[162] The power of a state on any such international institution has always been predicated on membership. Only the Rome Statute holds the distinction of conferring upon non-members the power of triggering or stalling proceedings at an institution they refuse to recognize. The arrangement has always had suspect legitimacy. It deserves to change. Removing the role of the SC may not be easy, especially if the U.K.'s departure from the U.S. position in the first place was "a calculated move to provide itself and its U.S. ally influence from within the ICC," as some suggest.[163] However, that is no reason not to try. Crucially, the chief concern of realists has been that unless the SC is accommodated within the Rome Statute system, it would be forced to create new ad hoc tribunals. That is not much of a concern now. A SC that has been unable to agree on ICC referrals is unlikely to

160. According to Article 103 of the UN Charter, obligations under the Charter prevail over obligation in other international treaties. Accordingly, some argue that the peremptory status of the Charter includes SC decisions. *See* VAUGHAN LOWE ET. AL. (EDS.), THE UNITED NATIONS SECURITY COUNCIL AND WAR: EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 37-38 (Oxford, 2008).

161. ILC, *Summary records of the meeting of the forty-sixth session, Summary records of the 2361st meeting* (1994), Doc. A/CN.4/SR.2361/1994, para 78, *available at* https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr2361.pdf (last visited Oct. 26, 2022).

162. Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Adopted by the ASP ICC-ASP/3/Res 1 (Sept. 7, 2004), UNGA 58/318 (Sept. 13, 2004), UN Doc A/Res/58/318. (2005).

163. Mahony, *supra* note 41 at 1083.

achieve consensus on a dramatic (and potentially unpopular) measure of establishing an ad hoc tribunal that operates in parallel with the ICC.

The other argument is that the ICC was created as part of the global architecture for the maintenance of international peace and security.[164] The potential contribution of the ICC in deterring atrocities is explicit in the preamble of the Rome Statute. Although there is no empirical evidence to that effect, and such expectations need to be toned down, it is still plausible to assume that international criminal accountability must have some deterrent effect.[165] The link between international criminal justice and peace and security is obvious enough. Therefore, some form of cooperation between the SC and the ICC may still be necessary, without the former intruding in the works of the latter, and thereby undermining its independence.

The link between international criminal justice, peace, and security is obvious enough. Therefore, some form of cooperation between the SC and the ICC may still be necessary, without the former intruding in the works of the latter, and thereby undermining its independence.

The SC's involvement in the works ICC, both in referrals and deferrals, has been controversial. In its two referrals, SC Resolutions 1593 (2005) and 1970 (2011), the SC tried to delimit the jurisdiction of the ICC based on suspects' nationality.[166] Similarly, the SC invoked its deferral powers twice, SC Resolutions 1422 (2002) and 1487 (2003). Both resolutions request the ICC to refrain from investigating peacekeepers from non-ICC member states, without providing any ground related to international peace and security.[167] The SC, at the insistence of the U.S., inserted the same exemption clause in the draft resolution on Syria.[168] These attempts are inconsistent with the referral and deferral powers of the SC under Article 13(b) and 16 of the Rome

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164. *See generally* DEBORAH RUIZ VERDUZCO, THE LAW AND THE PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 31 (Stahn ed., Oxford 2015)

165. Sang-Hyun Song, the 2nd President of the ICC, remarks: "Ministers from some African States personally told me that the risk of prosecution by the ICC was a crucial factor that prevented large-scale violence surrounding elections in those countries." Sang-Hyun Song, *Keynote Speech for the 20th Anniversary of the Rome Statute* (July 17, 2018), *available at* https://www.icc-cpi.int/itemsDocuments/20a-ceremony/20180717-sang-speech.pdf (last visited Oct. 26, 2022).

166. *See* SC Draft Resolution, *supra* note 99.

167. Many believe that SC Resolution 1422, which granted immunity to UN peacekeeping personnel from ICC jurisdiction (extended by SC Resolution 1487 as per Article 16 of the Rome Statute) was part of the broader U.S. campaign to undermine the ICC. *See The ICC and the Security Council: Resolution 1422 Legal and Policy Analysis*, HUMAN RIGHTS NEWS, *available at* https://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm (last visited Oct. 26, 2022).

168. *See* SC Draft Resolution, *supra* note 99, at 18.

Statute. That is at least the position of the ICC.[169] States parties or the SC can only refer "situations," not cases. That is a deliberate legislative safeguard meant to avoid politically motivated selectivity and maintain prosecutorial independence.[170] In the context of referrals, the term *situation* covers the entirety of "situation in crisis," from which several *cases* may arise (the OTP has opened thirty-one cases out of seventeen situations so far).[171] The immunity clause inserted by the SC, circumscribing jurisdiction *ratione personae* of the Court may, therefore, be considered as an attempt to amend the Rome Statute. It is fair to conclude, then, that the exercise of referral and deferral powers by the SC so far can be explained by powerplay rather than concern for international peace and security.

There are also arguments that without the support of big powers, particularly that of the U.S., the ICC will fail.[172] The track record does not bear out that claim. While the ICC is still a work in progress, what little success the Court may claim has not come as a result of U.S. support. Rather, it has come despite U.S. hostility. China and Russia, too, have worked to undermine the ICC. They vetoed a referral of the Syrian situation.[173] They also blocked SC condemnation of the military coup in Myanmar, making consideration of ICC referral pointless.[174] There are no indications to expect that the relationship of these powers with the ICC will improve in the foreseeable future. With or without the SC, only truly optimist souls will expect the OTP to successfully conclude its investigations in Afghanistan, Palestine, and Ukraine and see a U.S, Israeli, or a Russian commander in the dock of the ICC.

During the Rome negotiations, the Indian representative stated that "the role for the Security Council built into the Statute of the ICC sows

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169. *See supra* note 100.

170. William A. Schabas, *Selecting Situations and Cases*, The L. AND PRAC. OF THE INT'L CRIM. CT. (Carsten Stahn ed. 2015); *see also* Verduzco, *supra* note 164, at 365-80; *see generally* Thomas Körner & Nicolai von Maltitz, *Defining Situations at the International Criminal Court*, THE PAST, PRESENT, AND FUTURE OF THE INT'L CRIM. CT. 649, 649-78 (Alexander Heinze & Viviane E. Dittrich eds. 2021).

171. Rod Rastan, *The Jurisdictional Scope of Situations Before the International Criminal Court*, 23 CRIM. L. F. 1, 1-34 (2012).

172. Goldsmith, *supra* note 8, at 89.

173. *Russia and China Veto UN move to Refer Syria to ICC,* BBC (May 22, 2014), *available at* https://www.bbc.com/news/world-middle-east-27514256 (last visited Oct. 26, 22).

174. *China, Russia Block UN Security Council Condemnation of Myanmar Coup*, France24 (Mar. 2, 2021), *available at* https://www.france24.com/en/americas/20210203-china-russia-block-un-security-council-condemnation-of-myanmar-coup (last visited Oct. 11, 2022).

the seeds of its destruction."[175] Predictably, nothing has arguably compromised the legitimacy of the ICC as SC politics. That is without mentioning accusations of the P5 members using their powers under Article 16 of the Rome Statute as a bargaining chip for political ends.[176] Therefore, if the ICC were to redeem its independence and legitimacy, it must operate as an autonomous international institution. The ASP should be the only political body that should have a role in the ICC affairs.

## Depoliticizing States Parties Referrals

State referrals tend to be as politically motivated as SC referrals. Like the SC, states have attempted to circumscribe jurisdictional parameters in referring situations. In the first ever referral, for example, Uganda requested the ICC to specifically deal with "the situation concerning the Lord's Resistance Army," rather than the situation in Northern Uganda.[177] Accordingly, the OTP initially stated that the priority will be "locating and arresting members of the LRA leadership."[178] It later clarified that the investigation will be based on territorial parameters, regardless of which side of the conflict suspects might be. To be fair, Article 14 (2) of the Rome Statute requires that a referring state "shall specify the relevant circumstances" of the situation, which is open to interpretation.

*Amend Article 14 of the Rome Statute*

Referrals by States Parties are two kinds. The first is self-referral, a State Party seeking the ICC's intervention (implying its own inability to deal with the situation). The second is an Article 14 referral by a State Party of a situation in another state that has accepted the ICC's jurisdiction—"third party referral." Of the two, the second one is more prone to political manipulation, and is potentially more damaging to ICC's credibility. There have been two referrals of this kind so far, Venezuela I and Ukraine. The Venezuelan situation was referred by a

175. Government of India, *supra* note 60, at 12.

176. *French Official Offers Sudan a Deal to Settle ICC Row*, SUDAN TRIBUNE (Sept. 4, 2008), *available at* https://sudantribune.com/article28461/#:~:text=September%204%2C%202008%20(KHARTOUM),according%20to%20a%20news%20report (last visited Oct. 26, 2022).

177. Press Release, ICC, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004)," https://www.icc-cpi.int/news/icc-president-uganda-refers-situation-concerning-lords-resistance-army-lra-icc.

178. ICC, *Situation in Uganda*, *available at* https://www.icc-cpi.int/uganda (last visited Nov. 1, 2022).

group of South American States Parties and Canada.[179] The referral came at the height of diplomatic confrontation between the U.S. and Venezuela, and all the referring states are allies of the former.[180]

The recent referral of the situation in Ukraine is even more dramatic. On February 28, 2022, the Prosecutor announced his decision to seek authorization from the Pre-Trial Chamber to open an investigation into the Situation in Ukraine, further stating that a "third party referral" would be a more expeditious alternative.[181] On March 1, 2022, Lithuania spared the Prosecutor from the trouble and uncertainty of seeking judicial authorization by submitting a letter of referral. The very next day, Lithuania was joined by thirty-eight other (mainly Western) States Parties in the referral.[182] None of the referring States Parties is a friend of Russia, or more precisely, all of them voted in favor of UNGA Resolution deploring the Russian invasion of Ukraine. The extraordinary speed and coordination of the joint referral, not to mention the political alliance of the States Parties involved, cannot but reinforce the perception that the ICC is just an instrument of the West. The manner of the referral was as swift and coordinated as the economic sanctions against Russia. Meanwhile, Ukraine, a non-State Party which had declared its acceptance of the ICC's jurisdiction as per Article 12(3) of the Rome Statute in 2014, has renewed its declaration on an open-ended basis, including alleged crimes committed in its recent war with Russia.[183]

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179. Referring states are Argentine, Canada, Colombia, Chile, Paraguay and Peru. ICC, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the referral by a group of six States Parties regarding the situation in Venezuela* (Sept. 27, 2018), *available at* https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-referral-group-six-states (last visited Nov. 1).

180. The 2018 controversial presidential election in Venezuela has been generally rejected by the West. Even in 2022, the U.S. does not recognize the government of Venezuela. Press Statement, Ned Price, Department Spokesperson, U.S. Department of State, U.S. Recognition of Venezuela's 2015 National Assembly and Interim President Guaidó (Jan. 4, 2022).

181. ICC, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation."* (Feb. 28, 2022), *available at* https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening (last visited Nov. 1, 2022).

182. The referring States Parties are Albania, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, New Zealand, Norway, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the U.K. *See* ICC, *Situation in Ukraine*, ICC-01/22, https://www.icc-cpi.int/ukraine (last visited Nov. 1, 2022).

183. *See* the Second Declaration by Payo Klimkin, Minister for Foreign Affairs of Ukraine (Sept. 8, 2015), *available at* https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukrainece (last visited Nov. 1, 2022).

Article 14 of the Rome Statute has been a subject of criticism for long, albeit in connection with self-referrals.[184] However, the implication of a politically motivated interpretation of Article 14 in self-referrals is limited to the domestic politics of the referring State Party. In the context of third-party referrals, however, there is a clear danger of the ICC being used for geopolitical purposes. States Parties may thus consider amending Article 14, clarifying the provision and requiring some form democratic procedure for its application. If all States Parties had the opportunity to vote on the referral of the situation in Ukraine, for example, the outcome would most likely be the same. However, it would have been more credible than like-minded States Parties synchronously imposing sanctions and making referrals.

*Rethinking Article 12(3)*

Articles 12 of the Rome Statute sets, among others, the territorial jurisdiction (*ratione loci*) of the ICC. The jurisdiction of the Court over crimes committed in the territory of member states goes without saying, subject to the principle of complementarity. Article 12(3) gives non-State Parties the discretion of accepting the jurisdiction of the ICC on an ad hoc basis by submitting a declaration. A state so declaring its acceptance of ICC jurisdiction is required to cooperate with the ICC (as it ordinarily should since it is in its interest). However, there are no clear consequences for noncooperation.[185] That is primarily meant to expand the reach of the Court, with an implicit hope that ad hoc acceptance may be followed by accession. So far, only two such declarations have been made, by Palestine and Ukraine.[186] Palestine has eventually acceded to the Rome Statute, while Ukraine has not.[187]

Some argue that ad hoc declarations of acceptance demonstrate the confidence even non-State Parties have in the Court.[188] It is possible, however, that the opposite is true. Accession with all its obligation, not using the Court when it is politically convenient, is a mark of confidence in the Court. Indeed, it is not obvious why a non-State Party would make an Article 12(3) declaration unless it is in its political interest.[189] It may also disincentivize accession. What incentive would a State have in

184. *See* van der Wilt in Stahn, *supra* note 164 at 211.

185. Schabas, *supra* note 57, at 77.

186. *See* ICC, *Situation in the State of Palestine*, available at https://www.icc-cpi.int/palestine (last visited Nov. 1, 2022); *see Situation in Ukraine*, *supra* note 182.

187. *See Situation in the State of Palestine*, *supra* note 186; *see Situation in Ukraine*, *supra* note 182.

188. Song, *supra* note 165, ¶ 7.

189. James Chan, *Judicial Oversight over Article 12(3) of the ICC Statute*, TORKEL OPSAHL ACAD. EPUBLISHER (2013), *available at* https://www.toaep.org/pbs-pdf/11-chan (last visited Nov. 1, 2022).

ratifying the Rome Statute, when it has the option to invite the ICC's intervention only when it is in its self-interest, without accepting any obligations?

The case of Venezuela is a good example. The ICC has opened an investigation in the country. However, had Venezuela not been a State Party to the Rome Statute, any such investigation would have required a SC referral, which may not have occurred, given the prevailing geopolitical climate. The other scenario would be if Venezuela declared its acceptance of the jurisdiction of the ICC, which would be unlikely. There are reasons why States are shying away from ratifying the Rome Statute. There is a palpable reluctance. Malaysia, for example, acceded to the Rome Statute on March 4, 2019, only to dramatically backtrack and announce its withdrawal thirty-one days later.[190] Thus, there is a need to reconsider provisions that disincentivize membership. Arguably, Article 12(3) is one of those provisions.

## Enhancing State Cooperation

State cooperation is central to the ICC's operations. The Court depends on States Parties for funding, intelligence, evidence gathering, apprehension of fugitives, witness protection, and overall enforcement of its decisions. Unfortunately, however, States Parties have been cooperative only in matters that serve their self-interest. It is even more worrisome that state cooperation has deteriorated over time, as the ICC's experience in Africa demonstrates. Following the indictment of Omar al-Bashir, for example, African governments were divided. Few were willing to come to the defense of al-Bashir. Even when they did, they often had to coat their opposition of the indictment with a palatable concern for peace. Indeed, peace was the official rallying cry of the AU. There were others, however, who made it clear that they would arrest the suspect should he enter their territories, like South Africa. As a result, al-Bashir was unable to attend both former President Jacob Zuma's inauguration in 2009 and the FIFA World Cup South Africa hosted the following year, as South Africa warned al-Bashir that he would risk arrest should he set foot on its soil.[191] After the ICC's ill-advised intervention in Kenya, however, South Africa did not feel obliged to arrest al-Bashir

190. *Malaysia: Don't Quit International Criminal Court*, Hum. Rts. Watch (Apr. 5, 2019, 8:00 PM), *available at* https://www.hrw.org/news/2019/04/05/malaysia-dont-quit-international-criminal-court (last visited Nov. 1, 2022).

191. Peter Fabricius, *What does Pretoria stand to gain from welcoming Bashir?*, INST. FOR SEC. STUD. (June 18, 2015), *available at* https://issafrica.org/iss-today/what-does-pretoria-stand-to-gain-from-welcoming-bashir (last visited Nov. 1, 2022).

when he attended the AU summit hosted by Pretoria in 2015.[192] The AU's hitherto ostensible concern for peace also evolved into a flagrant contempt and threat of mass withdrawal from the ICC altogether.[193]

Article 86 of the Rome Statute imposes on States Parties a general obligation to cooperate with the ICC. The obligation includes, among others, enforcing arrest warrants, seizing and sharing evidence, facilitating ICC officials' investigations, protecting witnesses, and so on.[194] But what happens in the event of non-cooperation? What can be done if a state bans ICC officials from entering its territory (as the Trump Administration did), or threatens them with arrest (as the Philippines did), or simply ignores its obligation (as many African States Parties did)?[195] Technically, the Court may make a determination of noncooperation and refer the matter to the ASP or the SC (if the situation had originally been referred by the SC) as per Article 87(7) of the Rome Statute. However, the Statute does not specify the nature of action the ASP or SC may take. The ASP procedure with regard to noncooperation, however, shows a clear leaning towards a flexible, diplomatic solution rather than a legally defined approach.[196] Such flexibility has its own critics who suggest that tougher approaches, including sanctions, need to be adopted.[197] However, in view of the fragility of the existing state support to the Court, the hypocrisy of big powers, the inclination of small and medium states to leverage their numbers in their engagement with the ICC, and evolving global power distribution, diplomacy seems the best approach. States Parties need to first demonstrate genuine political commitment to fight impunity themselves before thinking of sanctioning a non-cooperating member State.

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192. *Wanted Sudan leader Bashir avoids South Africa arrest*, BBC News (June 15, 2015), *available at* https://www.bbc.com/news/world-africa-33135562 (last visited Nov. 1, 2022).

193. The indictment of Kenyatta has resulted not only in heightening the AU's anti-ICC rhetoric but also seems to have stirred anxiety among the African leadership that they found it urgent to reconsider the continent's relationship with the ICC. Alongside the threat of mass withdrawal, the AU has even considered seeking the Advisory Opinion of the International Court of Justice on the question of immunity of African heads of states as a bar on their possible prosecution before the ICC. *See generally* Sascha-Dominick Dov Bachmann & Naa A. Sowatey-Adjei, *The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?*, 29 Wash. Int'l. L.J. 247, 247-301 (2020).

194. Cassese, *supra* note 2, at 164.

195. THE GUARDIAN, *supra* note 45.

196. Int'l Crim. Ct. [ICC], *Assembly procedures relating to non-cooperation*, ICC-ASP/10/Res.5, annex (Dec. 21, 2011), https://asp.icc-cpi.int/sites/asp/files/asp_docs/Non-coop/ICC-ASP-10-Res.5-extract-annex-ENG.pdf.

197. *See* Olympia Bekou, *Dealing with Non-cooperation at the ICC: Towards a More Holistic Approach*, 19 INT'L. CRIM. L. REV. 911, 911-37 (2019).

## Conclusion

There is no argument that the ICC has not lived up to expectations. Part of that may be because expectations were too high in the first place. But the inescapable reality remains that the ICC's achievements in terms of successful investigations, prosecutions, conviction rate, and overall impact in combating impunity for core crimes leave much to be desired. Contempt for human rights and mass atrocities continue to blight the international community. Yet not a single non-African suspect has been brought before the ICC in the Court's twenty years of existence. The modest success the Court may claim even in Africa fades when one realizes the fact that almost all the convicts are former rebel leaders whose prosecution is in the political interest of their own governments. This trend is not encouraging either. Since 2016, the Court has convicted only two defendants. The ICC is at a crossroads, and its leadership recognizes that. With a view of addressing the many-pronged issues that are plaguing the Court, a review process has been undertaken resulting in a long list of technical recommendations. That is necessary and commendable.

However, the fundamental malaise that lies at the core of the ICC's rueful performance is political, not technical. Regrettably, contempt and non-cooperation continues to undermine the Court's legitimacy and effectiveness. Ultimately, the ICC remains just a judicial body with no enforcement mechanism of its own. It depends on States Parties for funding, intelligence, evidence gathering, apprehension of fugitives, witness protection, and overall enforcement of its decisions. Therefore, if genuine progress is to be made, fresh political negotiations are needed. States Parties need to demonstrate a conscientious commitment to ensure that crimes of utmost seriousness do not go unpunished. The power of the SC over the ICC needs to be reconsidered as well. The political power of the P5 over the ICC—an institution most of them refuse to recognize—simply defies elementary requirements of legitimacy.

Even though the ICC has been a disappointment, it must be remembered that its mere existence represents the international community's condemnation of the gravest and extraordinary crimes of international law. It is also the first permanent international criminal court with worldwide jurisdiction that can (at least on paper) operate independently, which is in and of itself an achievement of historic proportions. Thus, it would be tragic to back the clock and revert to the era marked by the absence of a permanent accountability mechanism for core international crimes. At the same time, there is a need to tone down

expectations of the ICC's contribution in deterring atrocities and enhancing international rule of law. The ICC operates not only in an uncooperative world, but also in one that is retreating from international rule of law in general.