International Criminal Justice between the Imperative of Legitimacy and the Constraints of Politics: A Critical Reading of the Rome Statute

العدالة الجنائية الدولية بين مطلب الشرعية وإكراهات السياسة: قراءة نقدية في نظام روما الأساسي



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Abstract: This article examines the trajectory of international criminal justice from the ICC's founding to its persistent constraints. Anchored in the Rome Statute, it analyses jurisdictional design (subject-matter, temporal, territorial, and personal), the complementarity regime, and procedural safeguards, alongside the Court's dependence on state cooperation. The study highlights structural frictions with the UN Security Council-referral, deferral, and the activation conditions for the crime of aggression-that risk politicization and selective enforcement. It revisits debates over immunities (Articles 27/98), bilateral non-surrender agreements, and the uneasy interaction with universal jurisdiction. Through doctrinal analysis and selected case practice, the article assesses achievements in norm codification and victim participation, yet identifies credibility gaps stemming from uneven compliance. It concludes with reform pathways: insulating prosecutorial discretion, clarifying cooperation duties, narrowing Article 16 deferrals, and deepening domestic implementation.

key words: International Criminal Court; Rome Statute; Complementarity; Security Council.

الملخص : يتناول هذا المقال مسار العدالة الجنائية الدولية منذ تأسيس المحكمة الجنائية الدولية حتى الإشكالات البنيوية التي ما تزال تعيق فاعليتها، بالاستناد إلى نظام روما الأساسي بوصفه إطارًا مؤسسيًا وقانونيًا لترتيب الاختصاص الموضوعي والزماني والمكاني والشخصي، ويحلّل نظام التكاملية وضمانات الإجراءات إلى جانب اعتماد المحكمة على تعاون الدول. يركّز البحث على جدلية العلاقة مع مجلس الأمن من حيث الإحالة والتأجيل وشروط تفعيل جريمة العدوان، وما يثيره ذلك من مخاطر التّسييس والانتقائية. كما يعيد قراءة إشكاليات الحصانات في ضوء المادتين 27 و98، واتفاقات عدم التسليم الثنائية، وتقاطعات الولاية العالمية مع اختصاص المحكمة. ويخلص إلى أنّ مكاسب التقنين ومشاركة الضحايا تصطدم بفجوات الامتثال، ويقترح مسارات إصلاح عملية تشمل تحصين سلطة الادعاء، وتوضيح التزامات التعاون، وتقليص نطاق تأجيلات المادة 16، وتعميق الإدماج التشريعي الداخلي

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Introduction

The establishment of the International Criminal Court (ICC) represents a pivotal milestone in the evolution of international criminal law, embodying for the first time the collective will of the international community to create a permanent judicial institution entrusted with holding individuals accountable for the most serious crimes threatening international peace and security. The Rome Statute of 1998 thus stands as the culmination of decades of legal and political efforts to move beyond the limitations of ad hoc tribunals established in the aftermath of the world wars—tribunals that were often constrained by political considerations and selective justice. Yet, despite its advanced legal and institutional design, the Statute remains surrounded by profound challenges concerning the independence of the Court and the effectiveness of its jurisdiction in the face of the pervasive influence of global political dynamics.

In practice, the interplay between legal logic and political reality within the international system has raised fundamental questions about the Court's capacity to deliver genuine international criminal justice, free from the influence of major powers. This tension is particularly evident in the structural link between the ICC and the United Nations Security Council, as established by the Rome Statute, which grants the Council significant authority capable of politicizing, suspending, or selectively activating the Court's jurisdiction.

Hence arises the **central research question** guiding this study:

To what extent has the International Criminal Court been able to fulfil its mandate of delivering international criminal justice, given the legal and institutional constraints imposed upon it and the growing impact of political considerations on its jurisdiction?

From this central question emerge several subsidiary inquiries:

- What are the boundaries of the relationship between the ICC and the Security Council under the Rome Statute?
- Has this relationship contributed to strengthening international justice, or has it undermined the Court's independence?
- To what extent can the ICC overcome the selective application of international criminal law and genuinely uphold the principle of equality before the law?

The significance of this article lies in its analytical examination of the legal and political challenges confronting the ICC as the primary international mechanism for combating impunity. It offers a critical assessment of the double standards and inconsistencies that continue to hinder the realization of universal

justice, while exploring the prospects for consolidating the independence of international criminal adjudication from political influence.

Methodologically, the study adopts a **comparative and analytical approach**, bridging the gap between legal doctrine and practical implementation. The paper is structured into two main sections:
Section One explores the conceptual and organizational framework governing the Court's jurisdiction, while **Section Two** examines the substantive and political constraints that impede the achievement of international criminal justice within the current global order.

Section One: The Rome Statute of the International Criminal Court as the Embodiment of an International Penal Code

The establishment of the International Criminal Court (ICC) constituted one of the United Nations' major legal achievements and inaugurated an enlightened phase in the evolution of international criminal justice. It consolidated the international criminal protection of human rights and gave effect to the rules of international humanitarian law in the face of grave violations suffered by millions who became victims of genocide, crimes against humanity, and war crimes[1]. By assigning responsibility for the prosecution and punishment of individuals who commit the most serious crimes—through precise legal characterization and definition—the **Rome Statute** acquired distinctive features as the first permanent international criminal code. It expresses the existence of a clear codification of international criminal law on which the prosecution and punishment of perpetrators of international crimes are based[2].

Subsection One: The Entry into Force of the Rome Statute as a Foundation for a Permanent International Criminal System

The creation of the Court—following intense contention between opponents and supporters—was a victory for the international community, which thereby acquired an independent international judicial body tasked with striking a balance between the primacy of international law and the consolidation of international criminal legality. The drafters of the Statute took care to respect state sovereignty by entrenching the **principle of complementarity**, under which national jurisdiction takes precedence over that of the Court. In this way, the ICC

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[1]- Joanne Les, "The International Criminal Court: An Historic Leap Forward for Humanity," *The Changing Face of International Law*, ICCRLR & CJP, June 2001, p. 185.

[2] - Mohamed Hassan Al-Qasimi, "The Establishment of the Permanent International Criminal Court: A Real Step toward the Development of the International Legal System?", *Journal of Law* (Kuwait), vol. 27, no. 1, March 2003, p. 94.

protects the common interests of the international community and provides a means to prosecute perpetrators of international crimes pursuant to the Statute, which embodies a permanent and independent organ exercising its judicial function within the powers conferred upon it.

Part One: The Particularity of the Statute Between Implementing International Obligations and Avoiding Threats to State Sovereignty

The United Nations played a major role in the emergence of the ICC; nevertheless, the Court is not one of its organs or subsidiaries, as was the case with the ad hoc criminal tribunals. Rather, their relationship is treaty-based. The ICC did not arise from direct intervention by either the General Assembly or the Security Council; it emerged as an expression of the will of the States Parties through their signature and ratification of the **Rome Statute**. The Statute defines the nature of the Court's relationship with the United Nations in **Article 2**[1].

The Rome Statute possesses multiple distinctive features. It is a **multilateral international treaty** governed by the law of treaties pursuant to the **1969 Vienna Convention on the Law of Treaties**. It binds only those States that ratify or accede to it. As a treaty, it is subject to all rules applicable to international agreements—interpretation and temporal/territorial application—except where otherwise provided [2]The ICC is thus a treaty-based institution binding upon the States Parties, insofar as each is capable of fulfilling its international legal obligations. Established by a special international treaty concluded by fully sovereign States, the Court is a **permanent** body exercising jurisdiction over individuals with respect to the most serious crimes of concern to the international community.

Under this conception, the ICC is a permanent international institution endowed with international legal personality—distinguishing it from the military tribunals of **Nuremberg** and **Tokyo**, and from the **ad hoc Tribunals for the Former Yugoslavia and Rwanda**. As noted earlier, the Statute is an international treaty; this follows from **Article 4(2)** and **Article 2**, which confirm that the Court is a permanent, independent organ established by agreement, linked to the UN

[1] - Richard Goldstone, "The Role of the United Nations in the Prosecution of International Crimes," *Journal of Law and Policy*, vol. 5 (2001), p. 19.

[2] -Ibrahim Al-Daraji, *The Crime of Aggression and the Extent of International Legal Responsibility*, Damascus: Al-Halabi Publications, p. 931.

system, and working to realize the Statute's purposes for the benefit of present and future generations [1]

The Statute is further marked by its **universalist balance**, reflected in the methods of the **Preparatory Committee** and the **Assembly of States Parties**, and in procedures that blend diverse legal traditions. **Article 44** and **Assembly Resolution 10** emphasize equitable **geographical representation** and representation of the world's principal legal systems in staffing. A second dimension is the scope of crimes within the Court's jurisdiction, focusing on the gravest crimes known to humanity under **Articles 8** and **17(d)** [2]

Accordingly, the Statute established a careful balance that bars the Court from exercising jurisdiction unless national courts are genuinely unable to act. This preventive framework—intended to forestall politicization—appears in the **Prosecutor's** duties and the role of the **Pre-Trial Chamber** (**Articles 15, 54, 57, 58**), in appellate review, and in the safeguards of **Article 109** [3]Together they reflect the maturation of international criminal legislation across three classes of rules essential to protecting international criminal justice: **substantive norms of criminalization**, **procedural norms for initiating prosecutions**, and **penal norms determining sanctions**—all entrenching the principle of **legality**. Arguments alleging interference in domestic affairs are thus unfounded: the Statute is governed by **treaty law** grounded in consent; States engage with a judicial organ they helped create as Parties. **Preamble paragraph 9** confirms that the Court is **complementary** to national criminal jurisdictions and was established by the States Parties themselves, expressly providing complementarity rather than supremacy; state sovereignty is therefore the basis of its jurisdiction[4].

Each State is obliged to prosecute perpetrators of Statute crimes. The ICC does not represent a foreign sovereign detached from State will; it derives its legitimacy from the States that created it and recognized its **complementary**, not **superior**, competence. Absolute sovereignty is no longer tenable.

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[1] - Barah Al-Qudsi, "The International Criminal Court: Its Nature, Jurisdiction, and the Positions of the United States and Israel," *Damascus University Journal for Economic and Legal Sciences*, vol. 20, no. 2, p. 125

[2] - Leslie Godelaine, La Cour pénale internationale: Droit pénal humanitaire, Brussels: Bruylant, 2006, p. 74.

[3] - 1. Oscar Solera, "Complementary Jurisdiction and International Criminal Justice," International Review of the Red Cross, Selected Articles, Geneva, 2002, p. 164.

[4] - Saad Thaqil Al-Ajmi, "The Responsibility of Leaders and Presidents for International Crimes Committed by Their Subordinates," Journal of the Faculty of Law (Kuwait), no. 2, June 2008, p. 126

Globalization—normatively and institutionally—has affected international criminal law given its **repressive** function (protecting the common values and interests of the international community) and its **preventive** function (securing rights and freedoms under human rights law). Sovereignty is not absolute: domestically it is limited by constitutions and laws (**self-restraint**); externally it is limited by **treaty obligations** and customary commitments [1]

The ICC is not a substitute for national courts; it **complements** them—this is the **principle of complementarity** [2]From the outset of the preparatory work on the Rome Statute, it was agreed that ICC jurisdiction would be **complementary or subsidiary** to national criminal jurisdiction—unlike earlier tribunals that operated on the principle of **primacy**. Adoption of this principle was crucial to State consent; many States would not have accepted the Statute absent the reaffirmation of national sovereignty in criminal justice[3].

Part Two: The Regulatory Framework Governing Jurisdiction

The Rome Statute sets out an integrated criminal-law framework of central importance. International crimes, by their nature, violate fundamental norms of international law; international criminal law protects these norms through the imposition of criminal liability, thereby providing a genuine safeguard for human rights and establishing a system that upholds criminal justice[4].

ICC jurisdiction is restricted to **the most serious crimes of concern to the international community** (Article 5): **genocide, crimes against humanity, war crimes,** and **the crime of aggression**. Although aggression was included within the Court's competence, it initially remained inoperative because of its acute political sensitivity. **Article 5(2)** deferred consideration of aggression pending agreement on its definition—reflecting divergent State views on the crime's inclusion and the Security Council's role. Thus, initially, the Court effectively had three operative crimes whose elements drew upon international conventions and prior tribunal statutes, while aggression was postponed until an international

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[1] - Mohamed Al-Majdoub, Public International Law, Beirut: Al-Halabi Legal Publications, 2003, p. 309.

[2] - Khaled Akab Hassoun Al-Obaidi, The Principle of Complementarity in the International Criminal Court, Cairo: Dar Al-Nahda Al-Arabiya, 2006, p. 11.

[3] - 1. Abdelkader Saber Jaradah, International Criminal Justice, PhD Thesis, Faculty of Law, Cairo University, 2005, pp. 215–216.

[4] - Ahmed Jabri Al-Kabbash, Criminal Protection of Human Rights, PhD Thesis, Faculty of Law, Alexandria University, 2011, p. 11.

agreement seven years after entry into force. The Court also exercises jurisdiction, under **Article 80**, over **offences against the administration of justice** [1]
Recognition of subject-matter jurisdiction entails other dimensions, notably **personal jurisdiction**—a defining feature of the ICC. The Statute affirms **individual criminal responsibility** and excludes the **immunities** traditionally enjoyed by State officials, civilian or military; such claims cannot mitigate or excuse liability. This principle, entrenched in international criminal law, rests on the premise that States, as legal persons, cannot themselves directly commit crimes; it is the individuals within their organs who plan and execute criminal acts [2]

Nonetheless, a tension persists between the principle of non-immunity and the regime of **international cooperation**. **Article 27** eliminates immunities before the Court, while **Article 98** requires respect for states' other international obligations. This creates a contradiction that has enabled reliance on **Article 98** to circumvent the Statute's obligations [3]

The Statute also details **modalities for exercising jurisdiction**—to equip the Court to respond to serious human-rights violations. Beyond defining subject-matter, temporal, territorial, and personal jurisdiction, it prescribes rules for their exercise. Before proceeding, the Court must verify that a case falls within its jurisdiction and is **admissible**; it then moves to **investigation** to collect information and evidence in search of the truth. **Article 13** identifies who may trigger the Court's jurisdiction: a **State Party**, the **Security Council**, or the **Prosecutor** acting **proprio motu** [4]

Despite this framework, shortcomings remain. A close reading of **Articles 6, 7, and 8** shows that the Statute narrows the Court's reach to the gravest crimes, leaving lesser offences to other international mechanisms or domestic courts. The Court's evaluation of gravity is guided by the **Rules of Procedure and Evidence**, reflecting a **compromise policy** aimed at reconciling divergent State positions—yet one that has curtailed the Court's powers, narrowed its jurisdiction, and undermined its effectiveness and credibility.

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[1] - Ahmed Abdel-Hamid Al-Rifai, General Theory of International Criminal Responsibility, PhD Thesis, Faculty of Law, Cairo University, 2001, p. 50.
[2] - Morshed Ahmed Al-Sayed and Ghazi Al-Haramzi, International Criminal Justice, Amman: Al-Ilmiyya Publishing, 2002, p. 23.
[3] -Morshed Ahmed Al-Sayed and Ghazi Al-Haramzi, International Criminal Justice, Amman: Al-Ilmiyya Publishing, 2002, p. 23
[4] - Belkacem Makhlat, Trial of War Criminals before the International Criminal Court, PhD Thesis, Faculty of Law and Political Science, University of Tlemcen, Algeria, 2015, p. 215.

Subsection Two: The Deficiencies Surrounding the Substantive Crimes Within the Court's Jurisdiction

The Rome Statute represents a comprehensive international penal code shaped by the jurisprudence of earlier international tribunals. It seeks to balance the **repressive function** for which it was established with **due-process guarantees** for the accused, thereby giving effect to the first coherent codification of international criminal law.

Part One: Conceptual Challenges in Defining Forms of War Crimes

Article 8 enumerates war crimes and specifies that such crimes must be committed **as part of a plan or policy or as part of a large-scale commission**. The conception adopted reflects relevant **treaty law and customary norms** on acts constituting war crimes. In substance, **Article 8** provides a detailed enumeration of offences found in the **four Geneva Conventions of 1949** and **Additional Protocol I**, as well as other treaties and customs of warfare; thus, there is little controversy regarding crimes committed during **international armed conflicts** [1]

The Statute offers a precise classification of war crimes and delineates the **elements** of each offence. Yet certain deficiencies prevent it from being a flawless instrument [2]Two issues stand out: procedurally, the possibility of **suspending the Court's jurisdiction** over war crimes; and substantively, **ambiguities** in **Article 8**. The most controversial constraint is **Article 124**, a transitional clause allowing a State, upon ratification, to **opt out of jurisdiction over war crimes for seven years**—thereby suspending or freezing the Court's authority and undermining its deterrent and judicial roles. This facilitates **impunity**, preventing the prosecution and punishment of war-crime perpetrators [3]

This provision has been condemned by **NGOs** and **human-rights advocates** as a "scandal clause," granting States the right to suspend application of the Statute for **seven years**—an excessively long and legally perilous period. Although complementarity reassures that national courts retain primary

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[1] -Georges Abi-Saab and Rosemary Abi-Saab, "Les Crimes de guerre," in Le Droit international pénal, ed. Hervé Ascensio, Emmanuel Decaux, and Alain Pellet, Paris: A. Pedone, 2012, pp. 144–149.

[2] - Lamberto Dini, "Speech by the Italian Minister of Foreign Affairs at the Opening of the 53rd Session of the UN General Assembly (13 September 1998)," cited in Attia Abu Khair Ahmed, The Permanent International Criminal Court, Cairo: Dar Al-Nahda Al-Arabiya, 1999, p. 249.

[3] Sherif Atlam, "Punishment for War Crimes: Between Reality and Aspiration," in The International Criminal Court, Cairo: ICRC Publications, 2014, p. 87.

jurisdiction, the seven-year exemption remains a serious limitation during which **grave atrocities** may occur [1]

A second issue is the failure to **criminalize the use of nuclear weapons**, echoing dilemmas faced by post-WWII military tribunals. Given technological advances in weaponry and warfare, restrictions on the use of force must evolve. Modern technologies often contradict the **principle of distinction**, a cornerstone of humanitarian law. The definition of war crimes in **Article 8** should therefore have been adapted to ensure civilian protection under the **Fourth Geneva Convention of 1949**. Yet **Article 8** neither refers to **weapons of mass destruction** nor articulates the elements of such an offence. This omission undermines the Court's normative framework and could allow perpetrators of atrocities involving **nuclear weapons** to escape responsibility, rendering the careful definitions in **Article 5(a)–(c)** of little practical value [2]

Given the unique destructive capacity of nuclear arms, their exclusion contradicts **Article 8(2)(b)(i)**, which proscribes inherently indiscriminate weapons that cannot distinguish between **combatants and civilians** or **military and civilian objectives**. By omitting nuclear weapons, the Statute overlooks one of the most pressing issues in humanitarian law. The definition of "war crime" risks losing its meaning, and the Court's jurisdiction becomes severely impaired: if nuclear-weapon use is excluded, the ICC could prosecute only **less grave violations**, undermining deterrence and legitimacy.

Part Two: The Problem of Determining the Authority Competent to Qualify Acts of Aggression

On **24 December 2017**, during its **sixteenth session** in New York, the **Assembly of States Parties** adopted a historic decision to **activate the crime of aggression**, approving the **2010 amendments** that provided a specific definition of the crime, its elements, and the conditions for the Court's exercise of jurisdiction, thereby adopting the definition endorsed at the Review Conference [3]

International criminal justice would remain incomplete without a definition of aggression. Initially, aggression was included within subject-matter jurisdiction but **without** an operative definition. Under **Article 5(2)**, the Court could not

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[1] - Hassina Belkhiri, International Criminal Responsibility of Heads of State in Light of the Interaction between Public International Law and International Criminal Law, 1st ed., Aïn M'lila: Dar Al-Huda, 2006, p. 105.

[2] - Hans Köchler, trans. Mohamed Jlaid, International Criminal Justice at the Crossroads, 1st ed., Casablanca: Al-Salam Library, 2011, p. 222.

[3] - Philippe Kirsch, "La Cour pénale internationale: De Rome à Kampala," in Le Statut de Rome de la Cour pénale internationale, Paris: A. Pedone, p. 28.

exercise jurisdiction over aggression until an agreed definition was adopted—an issue outside the Court's competence and entrusted to the **Assembly of States Parties**. Divergent political interests at the diplomatic conference explain the omission of certain crimes and the ambiguity surrounding others, including the absence of a definition of aggression in the original Statute—an omission that made the exercise of jurisdiction impossible and obstructed the sound implementation of international criminal justice.

Even after activation, controversies persisted. The amendments added constraints on the Court's jurisdiction, particularly in light of the powers assigned to the **Security Council** by **Article 15 bis**, which preserves the Council's role. Disputes over the relationship between the crime of aggression and the Council's responsibility for international peace and security continue to impede the Court—especially through **referral** and **deferral** powers. Political considerations—especially among major powers—dominate decisions to characterize aggression, entrenching **selectivity** and undermining efforts to define the crime coherently [1]

Under the **UN Charter**, **Articles 39, 41, and 42** authorize the Security Council to **determine the existence of an act of aggression**. Consequently, the Court's competence is effectively conditioned on the absence of a Council decision precluding judicial proceedings. Although the Review Conference adopted a definition, jurisdiction over aggression remains contingent upon a further prerequisite: a determination that aggression occurred, a function reserved to the Security Council. Thus the Court remains constrained, and the Council retains other powers that restrict States Parties and the Prosecutor in addressing other crimes—by **deferring investigations or prosecutions** referred by a **State Party** (**Article 13(a)**) or initiated **proprio motu** under **Article 15(5–8)** through decisions adopted under **Chapter VII**. Kampala affirmed that the Council's role is not **exclusive** and that the Court may proceed in the absence of a Council decision within a set time; however, once the Council adopts a determination, the Court may not decide otherwise. Moreover, the Council may **halt investigations** at any time under **Article 16** [2]

The Council's competence in determining aggression opens the door to **selectivity**, especially where political considerations and conflicting interests

[1] - Martyna Falkowska, "L'interaction entre la Cour pénale internationale et le Conseil de sécurité en matière d'agression: L'issue de la Conférence de révision du Statut de Rome 2010," Revue belge de droit international (R.B.D.I), Brussels: Bruylant, 2010, pp. 588–594.

[2] - 1. Siham Shaheen, "Issues Related to the Substantive Jurisdiction of the ICC: The Crime of Aggression as a Model," paper presented at the Scientific Symposium The ICC and the Challenge of Immunity, Damascus: Faculty of Law, 2001, p. 8.

prevail. Practice shows the Council has not always acted objectively in confronting aggression. Empowering a **political organ** with such determinations conflicts with legal objectivity. Legitimate justice requires that the Council exercise its political functions while the Court determines the facts and legal characterization of wrongful conduct, identifying those responsible in line with **Articles 2** and **51** of the Charter [1]

Section Two: The Difficulties of Achieving International Criminal Justice Within the Constraints of the Global Environment

As of the **sixteenth session of the Assembly of States Parties**, held **17–24 December 2017**, the ICC comprised **124 States Parties**, had **20 cases across 10 situations**, issued **134 orders**, delivered **two final judgments**, and rendered **seven decisions on interlocutory appeals**—the aggregate of its activity to that date [2]

Yet the **failure to prosecute Kenyan President Uhuru Kenyatta**, alongside the overlooking of crimes in **Gaza, Myanmar, Syria, and Libya**, reflects the dilemma of realizing international criminal justice against the backdrop of post-Cold War realities, shifts in the international system and in interstate relations, and the entanglement of political considerations.

Subsection One: The Challenges to Realizing International Criminal Justice Amid the Weakness of International Cooperation Mechanisms

The fundamental factor shaping the ICC's jurisdiction and enhancing its prospects of success as an institution of international criminal adjudication lies in **affirming its authority vis-à-vis States**, whether Parties or non-Parties. Consequently, the Court's jurisdiction remains under constant contestation owing to anticipated legal and political conflicts between the ICC and national governments, centered on the Court's global role. The path of international criminal justice is persistently obstructed by State positions that can compromise the Court's independence and strike at its credibility.

Part One: The Problem of Activating State Cooperation with the ICC

The Rome Statute sought to establish mechanisms for **judicial cooperation** between the ICC and States; **Part IX** sets out rules on **international cooperation and judicial assistance**, attempting to balance Statute-based obligations with

[1] - Annual Report on the Activities of the ICC to the Assembly of States Parties, 16th Session, New York, 17–24 December 2017, p. 2.

[2] - El-Welhi Mokhtar, International Criminal Justice and Serious Violations of International Humanitarian Law, PhD Thesis, University of Algiers 1, 2016, p. 294.

those arising under international law. Practice, however, has often run counter to these aims.

First: The Turn to Bilateral Immunity Agreements.

From the outset, the **United States** adopted a hostile position toward the ICC and acted to obstruct its jurisdiction. On **6 May 2002**, it **withdrew its signature** and pressured the **Security Council** to adopt resolutions granting immunity to its personnel in peacekeeping operations [1]In line with a broader policy to neutralize the Court, the U.S. enacted the **American Service-Members' Protection Act (ASPA)** on **2 August 2002**, prohibiting cooperation with the ICC and even authorizing **all necessary means**, including the use of force, to free any U.S. national detained by the Court. It then pursued **bilateral immunity agreements** with as many ICC members as possible—nearly **one hundred** by 2006—under which States pledged **not to surrender U.S. nationals** to the ICC.

These agreements are instruments of **impunity**, grounded in a **misinterpretation** of **Article 98(2)**—a point implicitly acknowledged when the U.S. asked the **Preparatory Commission** to adopt a binding interpretation tying Article 98(2) to **status-of-forces agreements (SOFAs)**, existing and future. The American reading is **arbitrary**, conflicting with the **Vienna Convention on the Law of Treaties (1969)**, which requires **good-faith** interpretation. Article 98(2)'s purpose is to avoid conflicts with **pre-existing** obligations, not to validate subsequent agreements that would undermine the Statute. Exploiting the second paragraph of Article 98, the U.S. argued that the Court could not request surrender where doing so conflicted with obligations predating Rome Statute ratification. It then used this interpretation to secure immunities through diplomacy—placing **immunity rules** above the Court's cooperation requests, particularly under **Article 98(1)** (waiver requirement), thereby **obstructing** the Court and contradicting **Article 27** on the irrelevance of official capacity.

For **States Parties**, acceptance of the Court's jurisdiction implies a waiver consistent with the Statute. For **non-Parties**, the Statute contains **no explicit obligation** to cooperate. As a treaty, it binds only its Parties; thus, securing

[1] - Mohamed Mahfouz Sayed Abdel-Hamid, The Role of the ICTY in the Development of International Humanitarian Law: An Applied and Foundational Study of the Court's Judgments, Cairo: Dar Al-Nahda Al-Arabiya, 2009, p. 384; see also Khaled Abdullah Al-Ghamdi, Obstacles to the Application of International Criminal Law before the ICC, PhD Thesis, Naif Arab University for Security Sciences, Riyadh, 2013, p. 180.

cooperation from non-Parties is difficult. The ICC also lacks authority to **permit a State Party to use force** against another State to obtain cooperation [1]

Second: The Court's Inability to Enforce Its Authority Absent Executive Mechanisms.

A core difficulty lies in the absence of an integrated enforcement system covering investigation, trial, sentencing, and execution. The ICC is not a **supranational** court but a treaty-based international organ; it depends on **State cooperation** for arrests and transfers. This raises doubts about cooperation's effectiveness, given gaps in international criminal law and the **lack of precise, binding enforcement rules** [2]The Court cannot **compel** non-cooperative States: there are no sanctions or international enforcement powers attached to the ICC. Practically, the Court cannot ensure execution of arrest warrants where States refuse to cooperate. This structural problem persists while **state sovereignty** remains the cornerstone of the international order and while the Court's independent operation is linked to UN politics. If the five permanent members, plus four non-permanent members, agree to **defer** an investigation or prosecution, the ICC is effectively barred from acting. Even in **Security Council referrals**, although the Court may address cooperation requests to all States (Parties and non-Parties) under **Chapter VII** authority, practice shows this does not guarantee compliance [3]

Third: States' Adherence to Complementarity and Universal Jurisdiction as a Constraint on the ICC.

A further problem lies in the intersection between ICC jurisdiction and national criminal jurisdictions—specifically the application of **complementarity** and the adoption by some systems of **universal jurisdiction** extending beyond territorial limits. Under **Article 17**, the ICC may act as a **final arbiter** evaluating national proceedings in a given case; **Article 19(1)** vests the Court alone with determining **admissibility**, including unwillingness or inability. Formal interpretation of **Article 17(2–3)** can effectively **compel** a State Party to **relinquish jurisdiction**, making national jurisdiction contingent upon the Court's

[1] - Anna Rosén and Veronica Jorméus Gruner, "Article 98 Agreements: Legal or Not," Department of Behavioral, Social and Legal Sciences, Örebro University, Sweden, Spring 2007, p. 14.

[2] - See Articles (77) and (78) of the Rome Statute of the International Criminal Court.

[3] - William Schabas, "United States Hostility to the International Criminal Court: It's All about the Security Council," European Journal of International Law, vol. 15, no. 4 (2004), p. 702.

assessment of the **genuineness** of domestic action. This reveals a principal weakness in the complementarity regime [1]

Universal jurisdiction enables a State to prosecute those responsible for crimes threatening the **vital interests of the international community**, irrespective of where they were committed or the nationality of the accused or victims—deriving from the duty to protect common interests even absent a nexus[2]. Safeguarding these interests justifies universal jurisdiction over grave offences that trump special protections afforded to heads of State [3]In practice, immunity can obstruct universal jurisdiction, while expanding universal jurisdiction narrows the scope of immunity. Domestic systems seldom include explicit provisions; an exception was **Belgium's Law of 16 June 1993** (amended **10 February 1999**), which initially stated in **Article 3(5)** that official capacity did not preclude prosecution. Subsequent amendments (**23 April 2003** and **5 August 2003**) reinstated immunity for **heads of State, heads of government, foreign ministers**, and others during their term. **Germany**, on **30 June 2002**, adopted the **Code of Crimes against International Law (VStGB)** in alignment with the Rome Statute to allow the exercise of **international criminal jurisdiction** domestically [4]

The **arrest of Augusto Pinochet** in London in **1998**, following a **Spanish** request for extradition, marked the first concrete activation of universal jurisdiction; since then, about **35 cases** have been brought, resulting in significant judgments. Still, universal jurisdiction should not be applied on **geographical, ethnic, or diplomatic** bases or driven by **political/economic** interests—yet practice has often shown otherwise. Continued reliance on universal jurisdiction by national courts **alongside** the ICC risks **weakening** the Court and even jeopardizing its existence[5].

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[1] - Kamal Hammad, "The Crime of Aggression: One of the Grave Crimes under ICC Jurisdiction," in The ICC and the Challenge of Immunity, Damascus: Faculty of Law, 2001, pp. 270–271; see also Articles 34–49 and 82–84 of the Rome Statute of the International Criminal Court.

[2] - Karim Khalfane, "The Need to Reconsider the System of Criminal Immunity for Heads of State in Contemporary International Law," p. 193.

[3] - Ghislain Doucet, "La responsabilité pénale des dirigeants en exercice," Actualité et Droit international, January 2001, http://www.ridi.adi/org, p. 8.

[4] - Karim Khalfane, "The Legal Basis for the Decline of Criminal Immunity for Senior Officials in Contemporary International Law," Algerian Journal of Legal, Economic and Political Sciences, no. 4, Faculty of Law, University of Algiers, 2008, pp. 225–226.

[5] - Christine Laroque, "Les Enjeux de la compétence universelle," Le Dossier: La compétence universelle, une arme contre l'impunité, Courrier de l'ACAT, Sept.–Oct. 2014, p. 40, www.acatfrance.fr.

In its **Arrest Warrant** judgment (DRC v. Belgium), the **ICJ** held that treaties obliging States to extend jurisdiction over serious crimes do **not** abrogate **personal immunities**, which remain pleadable before foreign courts even when exercising jurisdiction pursuant to such treaties. While the gravest crimes are typically committed by senior officials—and universal jurisdiction is thus directed at prosecuting them—the Court did not need to resolve the universal-jurisdiction question as such. Many contend that universal jurisdiction logically precedes immunity and that its exercise is vulnerable to **politicization**. Some prosecutions appear politically motivated, undermining the credibility of international criminal justice. Consequently, genuine global justice should be exercised **through an international institution**—notably the ICC—so that international criminal law enjoys both **legitimacy and effectiveness**, free from political interference and **double standards** [1]

Subsection Two: The Restriction of the Court's Jurisdiction by Security Council Decisions

International relations have produced dilemmas that hinder the ICC's practical functioning and the proper application of international criminal justice—particularly gaps within the Statute—placing the Court in a vulnerable position, especially when confronted with the **Security Council** in situations of threats to peace and security.

Part One: Enabling the Security Council to Exercise Quasi-Judicial Powers

Powers granted to the Security Council by the Statute—especially **referral** and **deferral**—are among the gravest constraints on the Court's practice, jeopardizing its independence and credibility and opening the door to **impunity** for the most serious crimes that threaten international peace and security.

Under **Article 13(b)**, the Council—acting under **Chapter VII**—may refer to the **Prosecutor** any situation in which crimes within the ICC's jurisdiction appear to have been committed, regardless of other considerations. While such referrals may help maintain peace and security, they are dangerous, as Council action may reflect **political considerations** and the dominance of **permanent members** wielding the **veto**, thereby targeting weaker States [2]Moreover, the Council can **suspend** referrals by the Prosecutor or States under **Article 15(6)**,

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[1] -Saad Thaqil Al-Ajmi, "The Security Council and Its Relationship with the ICC Statute," Journal of Law (Kuwait), no. 4, December 2005, p. 20.

[2] - Mukhtar Omar Saeed Shanan, "The Relationship between the Security Council and the ICC," paper presented at the Scientific Symposium The ICC: Ambitions and Prospects, Tripoli: Academy of Graduate Studies, 10–11 January 2007, p. 17.

leaving the ICC only partially responsible for addressing international crimes[1]. The Prosecutor may not investigate **aggression** unless the Council determines that it occurred (**Article 15 bis(6)**). Although after **six months** without a decision the Prosecutor may proceed with **Pre-Trial Chamber** authorization, this remains contingent on the Council **not** invoking **Article 16** to freeze ICC jurisdiction [2]
A still greater constraint lies in **Article 16**, empowering the Council—under **Chapter VII**—to request the Court to **defer or suspend investigations or prosecutions** for **twelve months**, renewable[3]. This undermines the Court's independence by subjecting it to a political organ's discretion. Suspension halts all proceedings and, by implication, affects national jurisdictions whose competence may depend on the ICC's inability to act. The deferral power fosters **selectivity**, as the Court's work may be affected—or entirely halted—by political decisions of the Council's permanent members. As **Mauro Politi** observes, **Article 16** preserves a **negative power of influence** over the Court's performance [4]

Article 16 also conflicts with **fair-trial guarantees**: suspensions prolong proceedings, risk **loss of evidence**, and can enable perpetrators to evade accountability. While the Prosecutor may still **collect evidence** during suspensions—particularly during conflicts—this residual power does not remove the Court's **subordination** to the Council and invites **politicization** in a system lacking political balance. The possibility of **indefinite renewals** means not merely postponement but potential **paralysis** of the Court, rendering the judicial organ subordinate to a political one.

Part Two: The Interference of Political Considerations and the Entrenchment of Selectivity in Addressing International Crimes

The broad powers conferred on the Security Council by the Statute heighten fears of **selective justice**. The most contentious issue is the Council's authority under the **UN Charter**, especially as the concept of **peace and security** and the Council's **implied powers** have evolved—producing repercussions for the ICC's anticipated role. By **establishing special or hybrid courts** in some situations and not in others (e.g., **Iraq, Syria, Palestine, Timor-Leste**), the Council introduced

[1] - Mauro Politi, "Le Statut de Rome de la Cour pénale internationale: Le point de vue d'un négociateur," Revue de droit international public, no. 2 (1999), p. 843.
[2] - Paul Tavernier, "La Conférence de révision de la Cour pénale internationale," Journal de la C.D.I., Université Lyon 3, no. 7, 2011, pp. 9–10.
[3] - Flavia Lattanzi, "Compétence de la Cour pénale internationale et consentement des États," Revue générale de droit international public, 1992/2, p. 443.
[4] - Mauro Politi, Op. cit., p. 844.

arbitrariness into international relations. The persistence of **special and temporary tribunals**—often encouraged by the Council even **after** the Rome Statute entered into force—illustrates this politicization.

Hybrid or "internationalized" courts emerged in the 1990s. Some were based on agreements between a State and the UN—such as the **Special Court for Sierra Leone** (agreement of **16 October 2002**), whose jurisdiction covered crimes against humanity, violations of **Common Article 3** of the Geneva Conventions, other serious IHL violations, and selected domestic offences. Others were created by **Council resolutions** in exceptional cases—e.g., **Resolution 1595 (April 2005)** establishing the **Special Tribunal for Lebanon** to address the **Hariri assassination**—alongside the **ECCC (Cambodia)** and the **Special Panels for Serious Crimes in Timor-Leste**. Created under **Chapter VII**, these mechanisms entrench **selectivity**, especially after 2002, and **undermine** the ICC's work. By assuming the role of justice's guarantor, the Council paradoxically **worsened** the legitimacy problem of international criminal justice; ensuring the independence and transparency of such courts is exceedingly difficult. Moreover, by creating tribunals under Chapter VII, the Council effectively conditions **global criminal justice** on **political factors** determined largely by the **permanent members**.

This practice **nullifies** the ICC's core mandate and authority—still in an early stage of institutional consolidation[1]. Consequently, selectivity has persisted even after the ICC's establishment, producing jurisdictional collisions—especially over **peacekeeping**. The Council's repeated reliance on **deferrals** has been viewed as a constraint on the Court's independence. These concerns were confirmed by **Resolution 1422**, adopted at U.S. insistence under **Article 16**, granting **preventive, group immunity** to a whole category of persons—an unprecedented step that narrows the Court's jurisdiction and violates two fundamental principles of international criminal law: **the irrelevance of official capacity** and the **non-applicability of statutes of limitation**. This approach was reaffirmed by **Resolutions 1487 (12 June 2003)**, **1497 (1 August 2003)**, and **1502 (26 August 2003)**—all attempting to undermine and obstruct the Court through **legal/treaty-based manipulation** that entrenches **impunity**. It also reveals once more the refusal of major powers to accept the Court's jurisdiction in order to protect **U.S. armed forces** from accountability, exemplifying **selective**

[1] - Imad Gad, "The United States and War Criminals: From Sharon to Milosevic," International Politics Journal (Cairo: Al-Ahram Foundation), no. 641, vol. 73, October 2002, p. 811.

application and **double standards** designed to advance a particular political agenda [1]

Within this climate, the ICC faces an **existential crisis**. Threats of **withdrawal of signature or ratification** from the Rome Statute are blows to the Court's legitimacy and even its existence. **Burundi** withdrew first, followed by **South Africa** and **The Gambia**; **Kenya** and **Namibia** have indicated they are considering withdrawal. More may follow, possibly beyond Africa. The Court faces a **credibility problem in Africa**, often criticized for its **focus on African States** while grave atrocities elsewhere have gone unaddressed. This perceived **double standard** has shifted State attitudes and reduced cooperation just as the Court seeks greater international presence and respect amid criticism of **politicization**. Such skepticism undermines international criminal justice as a whole, even though the ICC remains the **only institution** capable of ensuring the application of **international humanitarian law** in armed conflicts and of securing **victims' rights** as a last resort. Ending **double standards** and **selectivity** is essential—especially given the Security Council's inability to preserve peace impartially amidst great-power rivalries—underscoring that achieving international criminal justice remains a formidable task relative to the goals for which the ICC was founded.

Conclusion

This study has demonstrated that, despite its status as a permanent international judicial institution, the International Criminal Court (ICC) continues to face profound structural challenges that hinder the full realization of international criminal justice. The delicate balance that the Rome Statute sought to establish—between respecting state sovereignty and ensuring accountability for the most serious crimes—has, in practice, become an institutional weakness exploited by major powers to shape justice through political selectivity and strategic influence. The complex relationship between the Court and the United Nations Security Council reveals that the Council's powers of referral and deferral have, in effect, undermined the Court's independence, transforming it into a partially constrained mechanism that often operates under the logic of power rather than the rule of law.

The Court's practical experience also shows that the persistent lack of effective international cooperation, combined with the absence of an executive enforcement mechanism, represents one of the most significant obstacles to its credibility and efficiency. This weakness becomes even more evident when juxtaposed with the ongoing double standards in prosecuting international crimes. The unequal application of justice among states and individuals, along with the political instrumentalization of judicial processes, has rendered international criminal justice more of a deferred aspiration than an established reality.

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[1] - Karim Khalfane, "The Security Council and the Challenges of Global Peace and Security: A Study in Light of UN Reform Proposals," Al-Mufakkir Journal, no. 10, Faculty of Law and Political Science, Biskra, p. 40.

Nevertheless, the ICC remains a landmark achievement in the historical development of international law. It has codified the principle that genocide, war crimes, and crimes against humanity are crimes that admit no impunity and no statute of limitations. In doing so, it has paved the way for a more mature and human-centered global system of accountability. What is urgently needed today is a recalibration of the relationship between the ICC and the Security Council—one that safeguards judicial independence—and the strengthening of international cooperation through the domestic incorporation of the Rome Statute's provisions into national legal systems.

Ultimately, achieving genuine international criminal justice is not merely a legal or procedural endeavor; it is a moral and civilizational project that requires genuine political will from states and a shared belief that justice must not be selective or subject to geopolitical interests. True justice must be exercised in the name of humanity—and for humanity.

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