

## **EXTERNAL CHALLENGES OF INTERNATIONAL CRIMINAL COURT**

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### **Introduction**

The International Criminal Court is the first and the only international court capable of prosecuting humanity's worst crimes. The "Conference of Plenipotentiaries" in Rome was held on 16<sup>th</sup> and 17<sup>th</sup> July, 1998 to hammer out a statute for International Criminal Court– which came to be known as the "Rome Statute of the International Criminal Court". This treaty gave birth to the "International Criminal Court" at Hague, Netherlands which came into force on 1 July 2002 with 66 ratifications. Currently, the "Rome Statute" has 123 States Parties.<sup>1</sup> This was the first time that the States accepted the jurisdiction of a permanent court in order to prosecute perpetrators of the "most serious crimes committed in their territories or by their nationals". On the contrary, in the classical international law, the states, and not individuals had always been the exclusive subjects.

The primary aim of the International Criminal Court is to help "put an end to impunity for the perpetrators" and contribute in preventing such crimes. The Rome Statute contains a broad codification of "crimes of genocide, crimes against humanity, war

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<sup>1</sup> Retrieved from <https://asp.icc-cpi.int/> on 2nd June 2022 at 6:20 pm IST.

crimes and of the crime of aggression”. Though it has evolved its practice with time, it continues to face new challenges by the day. These include internal challenges as well as external challenges in the form of critical relationships. The external challenges appear in the form of a difficult relation with the United Nations Security Council which leads to ICC’s politicization, lack of trust of the international community which manifests itself in the form of state withdrawals from the Rome Statute system and the very complicated relationship of the ICC with the non party states. The current paper focus on these issues.

### **ICC and UNSC: Politicization of the Court**

The ICC has faced criticism for catering to the “wishes of powerful nations, especially the *United States, Russia, and China*, when choosing situations to investigate”. The court, however, has maintained that its case selection is “based solely on a situation’s ability to meet the three requirements of jurisdiction, admissibility, and the interests of justice”. Nonetheless, the “Court’s failure to investigate situations involving states with ties to powerful UNSC member states, along with its insistent focus on Africa”, has raised serious doubts that the “ICC is subject to political influence”.<sup>2</sup>

The main responsibility given to the UNSC is the “maintenance of international peace and security under Article 24

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<sup>2</sup> Julie Butters, “External Factors affecting situation selection: Political Influences, The International Criminal Court Confronting Challenges on the Path to Justice”, Henry M. Jackson School of International Studies, Task Force 2013, University of Washington, p. 39.

of the UN Charter”. The members have been obligated to “agree and accept and carry out any decision made by the UNSC under Article 25 of the UN Charter”. Whereas the ICC is responsible for ending impunity for the world’s worst criminals. The “Negotiated Relationship Agreement between the United Nations and the ICC” recognizes the latter as an “independent permanent judicial institution capable of having international legal personality” under Article 2(1). Article 2(2) obligates both the institutions to respect each other’s mandate. These provisions bring out a commonality of the “pursuit of justice and peace” between the aims of both the ICC and the UNSC.

Despite the shared vision, they share a complex relationship. The main challenges between them are as follows:

#### **Security Council Referrals**

As we have already discussed in previous chapters, a case falls under the purview of the ICC only under four circumstances. “First, a state party to the Rome Statute can refer to the ICC a situation for the purposes of exercising jurisdiction to adjudicate such matters. Second, a state that has not yet ratified the Rome Statute can exceptionally accept the ICC’s mandate to investigate crimes committed by its nationals or on its territory. Third, the ICC prosecutor can *suo motu* initiate an investigation. And lastly, the UNSC can request the ICC to investigate a situation”. Article 13(b) of the Rome Statute “gives referral authority to the UNSC, even if it relates to a non-state party or by nationals thereof, to

exercise its jurisdiction in context of Chapter VII of the UN Charter”. This provision is controversial as it gives power to the UNSC to refer situations irrespective of ratification by the state of the Rome Statute.

The Council has used this power twice to refer situations of non-Party States to the ICC: “in *Sudan (Darfur)* in 2005, and in *Libya* in 2011”. The complex question that arises is whether there exist any criteria or grounds for referring a situation. There are no differentiating factors that cause the UNSC to use its power to refer a particular situation. There has been selective bias in the practice of referring cases. It is clear that the UNSC is a political body and therefore the decisions to refer a particular situation are rather prejudiced by this “political nature, especially the veto power of its permanent members”. Thus, politically influenced decisions make this particular referral system lack in consistency and predictability. “A set of objective criteria to assist in determining the specific grounds for a referral would offer more consistency and predictability in future referral practices”.<sup>3</sup>

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<sup>3</sup> Bethel Arigawi, “The Politicisation of International Criminal Court by United Nations Security Council Referrals, African Centre for Constructive Resolution of Disputes”, Retrieved from <http://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/> on 11<sup>th</sup> June 2022 at 4:16 pm IST.

### **Lack of Follow up Support**

There has been lack of support by the UNSC after using its referral power. The method in which the Council refers situations to the Court fails in empowering the Court to handle particularly difficult issues of cooperation. The Council does not obligate all states to cooperate.<sup>4</sup> Legal and diplomatic resources available to the Court and the States Parties are insufficient when “referred country refuses to cooperate”. Court lacks in technical and political resources needed to activate cooperation on part of non members. On the other hand, the UNSC though sound in this aspect, refuses to give a lending hand to the court. Time and again, the court has emphasized that there has been “lack of efforts in maintaining peace and security in referred situations” by not “providing necessary technical, political, peacekeeping and other appropriate resources to assist in investigations, arrests and other elements of cooperation.”<sup>5</sup> When such follow-up support is not

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<sup>4</sup> Tiina Intelman, “The International Criminal Court and United Nations Security Council: Perceptions and Politics”, Retrieved from [https://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council\\_b\\_3334006.html](https://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html) on 15th June 2022 at 5:15 pm IST.

<sup>5</sup> Bethel Arigawi, “The Politicisation of International Criminal Court by United Nations Security Council Referrals”, African Centre for Constructive Resolution of Disputes, Retrieved from <http://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/> on 11<sup>th</sup> June 2022 at 4:16 pm IST.

given by the Security Council to promote the cause of justice, the amount of progress the ICC can achieve becomes very limited.<sup>6</sup>

This is a serious limitation of the system, contributes to “delay in delivering justice and ultimately results in feelings of abandonment, desperation and continued injustice in affected communities”.

### **Unrepresentative Nature of UNSC**

Another issue that blows up in the face is the fact that the UNSC no longer represents the world opinion and stays unrepresented. It is more of a reflection of the world politics post Second World War. The fact that the power to refer has been given to countries that are not part of the Rome Statute is worrying. This is because “3 of the 5 permanent members of the UNSC including the *USA, China and Russia* have not ratified the Rome Statute” and yet being the “permanent members of UNSC” they have in their pockets the power to veto decisions taken by the political body. Thus it is like shots are called by the players that are not even in the playing field. This particular aspect is very unfair.

### **Costs of Investigations**

There has been a major issue with the UNSC referrals. They specify that “all costs resulting from the respective

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<sup>6</sup> Relationship between ICC and Security Council: Challenges and Opportunities, Retrieved from <https://www.ipinst.org/2013/03/the-relationship-between-the-icc-and-the-security-council-challenges-and-opportunities> on 7th June 2022 at 5:14 pm IST.

investigations have to be borne by the parties to the Rome Statute and voluntary contributions”. Thus in spite of making the referrals, the UNSC does away with bearing the financial burden of such investigations. On the other hand, the Rome Statute “specifies the UN funds as one of the sources for covering the expenses of the court in relation to UNSC referrals”.<sup>7</sup> This possibility has been further solidified under the “Negotiated Relationship Agreement between the International Criminal Court and the United Nations”.<sup>8</sup> Despite such provisions there has not been a positive step in this direction.

### **State Withdrawals and the Quest for Universality**

One challenge that the court faces is the low number of states that participate in the ICC system. Only 123 states are parties to the Rome Statute. Another issue that is of concern is that certain regions like Asia, North Africa and Middle East, despite determined efforts, continue to be “under represented in the ICC system”. Populous countries like the “United States, India, China

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<sup>7</sup> Article 115 (b), Rome Statute of ICC, 1998.

<sup>8</sup> UN General Assembly, Relationship Agreement between the United Nations and the International Criminal Court(August 20, 2004), UN Doc. A/58/874, Annex, Article 13(2). This agreement was approved by UN General Assembly Resolution 58/318 (September 20, 2004) and ICC Assembly of States Parties Resolution ICCASP/3/Res.1(September 7, 2004). It is available at [www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1_english.pdf) retrieved on 2nd June 2022

and Russia are not signatories to the Rome Statute”, leaving out of its scope a large proportion of world population.<sup>9</sup>

The universality has been further challenged by state withdrawals. The court has been on the receiving end of allegations, especially from the African continent. These allegations pertain to African countries being targeted by the ICC. The Court continues to face much resistance since cooperation has been requested “to comply with the arrest warrant against *Sudan’s al- Bashir*”. The perception of being targeted ran through the continent so much so that the African states of Burundi, South Africa and Gambia made announcements to withdraw from the ICC in 2016.<sup>10</sup> Where Gambia reversed its decision after a newly elected government came to power, Burundi made good on the announcement and went ahead with its withdrawal in October 2017, whereas South Africa retracted from the decision only after the country’s High Court declared the decision unconstitutional. The African Union called for a collective withdrawal of African nations at its Summit in January 2017. The approach that the

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<sup>9</sup> Amal Nassar, “The Rome Statute at Twenty (1998-2018): 10 Challenges to an Effective and Independent International Criminal Court”, International Federation for Human Rights, , July 2018, Retrieved from [https://www.fidh.org/IMG/pdf/report\\_20\\_years\\_icc\\_rome\\_statute-2.pdf](https://www.fidh.org/IMG/pdf/report_20_years_icc_rome_statute-2.pdf) on 11<sup>th</sup> June 2022 at 12:04 pmIST.

<sup>10</sup> *Ibid.*



African Union favoured was that of having a regional penal institution for the purposes of trying international crimes.<sup>11</sup>

In March 2018, as the ICC Prosecutor made an announcement to open “preliminary examination into the situation of the Philippines”, the state submitted a “written notification of withdrawal from the Rome Statute”. Philippines went on to withdraw in March 2019, yet the ICC retains jurisdiction over crimes that occurred “during the period it was a state party”.<sup>12</sup> Nevertheless, these withdrawals do suggest a strategy of quitting when about to be hit. It seems to be an admission of guilt even before being charged for the crimes.<sup>13</sup>

Running away from the system can never be a long term solution. Rather establishing domestic courts that can prosecute international crimes is a better option.<sup>14</sup> In this context, efforts by the African Union to create a regional court seem to be justified.

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<sup>11</sup> Ionel Zamfir, “International Criminal Court: Achievements and Challenges 20 years after the Adoption of the Rome Statute”, European Parliament Research Service, July 2018, retrieved from [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EP\\_RS\\_BRI%282018%29625127](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EP_RS_BRI%282018%29625127) on 11<sup>th</sup> June 2022 at 10:42 pm IST.

<sup>12</sup> Inne Flies, Monthly News update: International Criminal Court June 2021, Retrieved from <https://www.publicinternationalallawandpolicygroup.org/lawyring-justice-blog/2021/7/6/june-2021-2> on 12th June 2022 at 6:46 pm IST.

<sup>13</sup> Chris Dolan, “Quit before they get hit: Withdrawals from the ICC are an Indicator of the Court’s Success”, 7<sup>th</sup> February 2017, Retrieved from <https://www.opendemocracy.net/en/openglobalrights-openpage/quit-before-they-get-hit-withdrawals-from-icc-are-indicator-of-court-s/> on 12<sup>th</sup> June 2022 at 4:56 pm IST.

<sup>14</sup> *Ibid.*

After all, ending impunity is the main objective of the Rome Statute and if establishment of domestic and regional courts for this purpose happens, it directly benefits the ICC as an institution as it means lesser cases to pursue with the given budget which in turn means better and efficient investigations as well as prosecutions.

### **ICC and Non State Parties**

The performance of ICC depends to a great extent on the level of co-operation it receives. This co-operation concerns “not only states party to the ICC but also non-party states”. Getting the “co-operation of non-party states” has been a challenge to the functioning of the ICC. But the real question that arises is “whether the non party states are obliged to cooperate with the ICC that has been created under the Rome Statute? As per the norms of international law, “treaties are binding only on state parties”. The general principle of the law of treaties as given in the “Vienna Convention on the Law of Treaties” is that “the obligation of non-party states to cooperate differs from that of state parties”.<sup>15</sup> Rome Statute too embodies this difference in its provisions. “State cooperation and judicial assistance” is given in

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<sup>15</sup> Article 35 of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, clearly provides that “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.” Article 34 of the said Convention also clearly provides that a treaty does not create either obligations or rights for a third state without its consent. This is also one of the general principles of treaty law.

Article 86, whereas Article 87(5) stipulates “cooperation by non party states” with the language being used in the two provisions bringing out a clear difference.

To state parties, the ICC “is entitled to present co-operation requests” and they are “obliged to co-operate fully”. As for non-party states, the ICC only “may invite them to provide assistance on the basis of an ad hoc arrangement”. This brings out the voluntary nature of cooperation from non party states. The only mandatory obligation to cooperate for non party states is when UN Security Council referral is involved. This is because decisions made by the “UN Security Council bind all UN member states”. As a result the UN Security Council can, “when it refers to the ICC a criminal case; ask all UN member states to co-operate in the Court’s process of investigating that case”. Because of the nature of the UN Security Council, such requests are binding upon all UN member states .<sup>16</sup> What legal consequences then follow if a non party state fails to cooperate? The answer lies in Article 87(5) of the Rome Statute, which states, “Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to co-operate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council”.

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<sup>16</sup> Zhu Wenqi, “On Cooperation by States Not Party to the International Criminal Court”, *International Review of the Red Cross*, Vol 88 No 861, p. 91.

Thus, if the matter is referred by the UN Security Council to the Court, the ICC may notify the Security Council of the failure of the non-party state to cooperate. The Security Council is authorized to handle it in accordance with the UN Charter. However, when the matter is not referred by the Security Council, and the Non-Party State fails to co-operate with the Court, the Assembly of States Parties clearly does not have the capacity to reprimand it or ask it to take state responsibility.

When the Security Council fails to refer any issue as provided by chapter VII of the UN charter, then the question arises as to “whether there is any scope to invoke the jurisdiction of the ICC over individuals of non-party states who have supposedly committed the crimes”. This question arose in the Rohingya issue where the Prosecutor of the ICC on April 09, 2018 sought advisory opinion of the Pre-Trial Chamber as to “whether ICC had jurisdiction against Myanmar for the crime of deportation of Rohingyas, Myanmar not being a member state”. The matter before the chamber was whether the “conduct” means only that “at least one legal element of the crime has to occur on the territory of a State Party or all elements of a crime have to be committed on the territory of the state party”. The Pre-Trial Chamber extended the legal implication of Article 12(2) (a) of the Rome Statute and answered in favour of one legal element approach. Exercise of jurisdiction was allowed as the “crime of deportation was committed in Bangladesh which is a state party to the Rome

Statute”.<sup>17</sup> This decision has had the effect of extending the jurisdiction of ICC over Myanmar, a non party state. A clear point that has been established with this decision is that a part of the conduct in question taking place on the territory of a non party state does not disqualify ICC from exercising its jurisdiction in that state.<sup>18</sup> Similar issues have arisen in a number of situations namely, “situation in the *Republic of Korea* with respect to *North Korean* nationals, the situation in *Georgia* with respect to *Russian* nationals, the situation in *Ukraine* with respect to *Russian* nationals, the situation in *Afghanistan* with respect to *US* nationals and the situation in *Palestine*, and the *Comoros* situation with respect to *Israeli* nationals”.<sup>19</sup> A vital challenge for the court’s third Prosecutor will be evidently to manage potentially obstinate and open ended investigations into the conduct of all these non-state parties. It will be most challenging as the Rome Statute does not oversee ICC’s relations with non party states, rather customary international law does. No precedent supports this practice as “no

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<sup>17</sup> Rashedul Islam, “ICC Jurisdiction and Non Party States”, Retrieved from <https://www.thedailystar.net/law-our-rights/news/icc-jurisdiction-and-non-party-states-1697461> on 16th June 2022 at 2: 34 pm IST.

<sup>18</sup> Utkarsh Dubey, “Jurisdiction of the International Criminal Court Over Non-party States: Legitimate or Ultra Vires?”, JURIST – Student Commentary, May 19, 2021, Retrieved from <https://www.jurist.org/commentary/2021/05/utkarsh-dubey-icc-jurisdiction-over-nonparty-states/> on 16<sup>th</sup> June 2022 at 3:03 pm IST.

<sup>19</sup> Steven Kay QC, Joshua Kern, “Jurisdiction over Nationals of Non State Parties at the ICC”, Retrieved from <https://www.uklfi.com/jurisdiction-over-nationals-of-non-state-parties-at-the-icc> on 16th June 2022 at 3:07 pm IST.

international tribunal has exercised jurisdiction over a national of a non-consenting State absent a Security Council resolution enabling the exercise of such jurisdiction”. “Affected States’ consent or a Security Council decision is a prerequisite to the exercise of jurisdiction by an international entity under customary international law”. Additionally, clear objections by *China, Israel and the United States* do make the task seem pretty impossible. A continuing breach of the said customary rule would render any subsequent prosecution and trial unlawful.<sup>20</sup>

### **Conclusion and Suggestions**

Major challenge to the working of the system is the politicization of the court at the hands of the “United Nations Security Council”. The Security Council’s power of referring cases without state ratification tends to make the referral decisions political in nature. No grounds exist for determining the referral of a situation which in turn sets in inconsistency and unpredictability to the whole process. The powerful permanent members are successful in pressurizing court into pursuing certain investigations while avoiding others because of their personal and national interests. Lack of follow up support by the UNSC also contributes to failed investigations and prosecutions by the ICC. The referral power seems unfair for another reason, that being non participation in the Rome Statute system by “three out of the five

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<sup>20</sup> *Ibid.*

permanent members of the UNSC”. The ICC’s reliance on UNSC taints the “legitimacy and credibility of the court as an impartial international judicial institution”. It is the need of the hour that Security Council should support the court by enforcing arrest warrants through travel bans and asset freezes. It should avoid endorsing amnesties for world criminals and should refrain from using its highly controversial veto power in decisions relating to the ICC.

The not so increasing number of member states of the Rome Statute along with threats of withdrawal have been the most terrible challenge the court has faced and continues to face. Mass exodus threats coming from the African continent along with low representation of the continents of Asia, North Africa and Middle East is a direct obstacle to the universal acceptance of the Court. Most populous nations like “India, China, the United States” being out of the Rome Statute system serves as a complete blow to the quest for universality.

For the overall functioning of the ICC, it is of utmost importance that non party states cooperate voluntarily. This is because no solution is found for extracting cooperation from them under the Rome Statute. ICC being the result of a treaty cannot obligate cooperation from non member states. Neither the rules under customary international law provide for any gateway from this obstacle. The current prosecutor’s biggest goal is to achieve some sort of a dialogue with the non party states under

investigation in order to end impunity for the perpetrators of crime either by allowing ICC to carry on with the investigations or to have efficient domestic/ national proceedings at their respective ends.