# The International Criminal Court: Analyzing Its Efficacy in Combating International Crimes in the 21st Century

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## ABSTRACT

*Abstract— The International Criminal Court (ICC), established under the Rome Statute in 2002, has played a central role in the global fight against impunity for the gravest international crimes. This research analyzes the efficacy of the ICC in addressing international crimes in the 21st century, focusing on its successes, limitations, and ongoing challenges. By reviewing key cases and investigations, the study explores the ICC's impact on international criminal law, its role in deterring international crimes, and its influence on the domestication of criminal law in member states. The research also addresses critical obstacles to the Court's effectiveness, including the lack of state cooperation, political resistance from powerful non-signatory countries, and its limited number of convictions. Through a comprehensive evaluation, this paper aims to provide recommendations for enhancing the ICC's capacity to deliver justice and promote accountability in an increasingly complex global landscape..*

***Keywords**: International Criminal Court (ICC); Rome Statute; International Crimes; Global Justice.*

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## INTRODUCTION

The establishment of the International Criminal Court (ICC) in 2002 marked a significant milestone in the quest for justice and accountability in international law (Malesevic, 2012). Created under the Rome Statute, the ICC was envisioned as a permanent institution dedicated to the prosecution of the most serious crimes, including genocide, war crimes, crimes against humanity, and the crime of aggression. Over two decades later, the Court's role in combating international crimes has been both lauded for its achievements and criticized for its shortcomings.

This research examines the efficacy of the ICC in the 21st century, focusing on its successes, limitations, and the challenges it faces in the pursuit of global justice (Clark, 2011; Nyarks, 2006; Nyarks, 2012). Despite the ICC's noble mandate, its journey has been fraught with political, legal, and practical obstacles, as evidenced by its uneven record of convictions, concerns over impartiality, and limited jurisdiction due to the non-participation of key global powers. This paper seeks to provide a balanced analysis of the Court’s impact on international criminal justice, exploring both the positive outcomes and areas where the ICC has struggled to fulfill its promise.

Through an evaluation of cases under investigation and trials conducted, this study also highlights the ICC's role in shaping international criminal law and its influence on domestic legal frameworks. At the same time, it addresses the Court’s constraints, including state cooperation, political resistance, and the slow pace of trials. As the international community faces an increasing number of conflicts and atrocities, this analysis offers insights into how the ICC can evolve and strengthen its position as a pivotal actor in global efforts to combat impunity.

## UGANDA (INVESTIGATION OPENED IN JULY 2004):

Just as in the case of Congo, even the situation of Uganda was a self-referral made in January 2004 for the war crimes and crimes against humanity committed by members of the “Lord's Resistance Army”(LRA) in its conflict with the government there. As regards the LRA, the OTP in a press release stated” (Akhavan, 2005, p. 43). A key issue will be locating and arresting the LRA leadership. This will require the active cooperation of states and international institutions in supporting the efforts of the Ugandan authorities. Many of the members of the LRA are themselves victims, having been abducted and brutalised by the LRA leadership. The reintegration of these individuals into Ugandan society is key to the future stability of Northern Uganda. This will require the concerted support of the international community – Uganda and the Court cannot do this alone” (Ginamia, 2021, p. 43). A key aspect of this situation was that many members of the LRA had been abducted during childhood and were victims of the crime of conscription of child-soldiers but upon growing up also became perpetrators by recruiting child soldiers themselves. This brings us to the curious case of Ongwen who was himself abducted when he was 10 years old by the LRA and went on to rise in the ranks of the LRA and was ultimately convicted by the ICC for, inter alia, recruiting child soldiers.

Even though the first arrest warrants were issued as early as 2005, no progress could be made until 2015 when one of the accused persons, namely, Ongwen willingly surrendered himself and was sentenced by the trial court to 25 years in 2021. Ongwen stands convicted for 61 crimes committed during the period from 2002 to 2005 (Glavaš, 2022). Out the 5 arrest warrants that were issued, Ongwen stands convicted, two accused passed away and the remaining two continue to remain at large. Their proceedings will commence only once they have been apprehended and brought before the ICC for a trial.

**DARFUR (INVESTIGATION OPENED IN JUNE 2005):**

The situation in Darfur region of African country Sudan became the first situation to be referred to the ICC by the UNSC. Sudan is not a state-party to the statute but because the Rome Statute permits the UNSC to refer situations directly to the ICC, it became possible for the ICC to investigate these crimes (Shamsi¸ 2016). Although a UNSC resolution creates a binding obligation upon all UN member-states to co-operate by virtue of Article 25 of the UN Charter but because the then head of state, namely, Omar Al-Bashir, had also issued a warrant of arrest, no co-operation was forthcoming from the state of Sudan. He was the first sitting head of state to be "wanted by the ICC" and the first person charged for genocide by the ICC. More than a million people had been displaced internally or became refugees owing to the conflict in Darfur, Sudan. There were allegations of genocide, war crimes and crimes against humanity, inter alia, against members of the Sudanese government and the Janjaweed militia.

So far only one case is ongoing against Ali Mohd Ali Abd-Al-Rahman who has allegedly committed 31 counts of war crimes and crimes against humanity. His case began in 2002 (Sadat¸ 2013; Nyarks, 2022). Four other persons including former president Al Bashir continue to remain at large. Al Bashir's reign ended and continues to remain in Sudan's custody, his trial can commence only once he is handed over to the ICC.

**KENYA (INVESTIGATION OPENED IN MARCH 2010):**

Until now, the situations had been referred to the ICC either by a state-party or the UNSC. The Kenya situation was the prosecutor's maiden suo motu investigation. Noting the prosecutor's arguments, the PTC stated "…‟elements of brutality, for example burning victims alive, attacking places sheltering IDPs, beheadings, and using pangas and machetes to hack people to death," and that perpetrators, among other acts, allegedly "terrorized communities by installing checkpoints where they would select their victims based on ethnicity, and hack them to death, commonly committed gang rape, genital mutilation and forced circumcision, and often forced family members to watch" (Shalluf¸ 2019, p. 22). The PTC granted the go-ahead for the investigation keeping in view the gravity and scale of the entire situation. More than a 1000 deaths, 900 acts of sexual offences and thousands of displacements internally.

This situation led to two cases against six accused persons in total. Unfortunately, the charges could not be confirmed against any of the accused persons and all suspects walked free as regards the core crimes within the court's jurisdiction (Udoh & Umotong, 2013). However, two subsequent cases relating to offences against the administration of justice are underway against 3 accused persons for influencing or attempting to influence witnesses. Two of these suspects (out of the three) continue to remain at large.

**LIBYA (INVESTIGATION OPENED IN MARCH 2011):**

The situation in Libya, a non-state party, has been referred by the UNSC in relation to the violence used against the civilian population of Libya by the top leadership of the Gaddafi leadership (Saba & Akbarzadeh, 2018; Udoh & Umotong, 2023). The UNSC while referring the situation condemned "the violence and use of force against civilians, deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government" (Saba & Akbarzadeh, 2018, p. 32). The situation pertains to crimes against humanity as well as war-crimes committed in the non-international context as fighting was ongoing between the government forces and the non-state organized groups.

The situation led to three different cases pertaining to five suspects, of whom one accused, Gaddafi himself, has passed away, case against one accused was found to be inadmissible (Udoh, 2013; Udoh, 2014). The other three accused continue to remain at large. Their case will remain at the pre-trial stage until they can be arrested and brought to justice.

**CÔTE D'IVOIRE, ALSO KNOWN AS, IVORY COAST (INVESTIGATION OPENED IN OCTOBER 2011):**

The Ivory Coast situation was the first such situation where the country had accepted the court's jurisdiction on ad-hoc basis under article 12 (3) of the Rome Statute. Two years later, in 2013, Ivory Coast officially ratified the Rome Statute as well to become a member state of the Rome Statute (Solomon¸ 2015). In this situation, the court was looking into the commission of crimes against humanity in relation to violence that had ensued after poll-results were disputed between two opponents, namely, Mr. Gbagbo and Mr. Ouattara. While granting the request, the PTC noted that the OTP was interested in looking into crimes committed by both factions which resulted in civilian deaths as well as approximately one million displacements. Two cases were brought forward in the situation.

Unfortunately, this situation did not auger well for the prosecution as both the cases fell flat quite early. In one case against Simone Gbagbo, the charges were vacated. In the second case against Mr. Gbagbo and Mr. Charles Blé Goudé, both were set free by the

court in the "no case to answer" motion and their acquittals stand confirmed by the appeals chamber (Block, 2023).

**MALI (INVESTIGATION OPENED IN JANUARY 2013):**

The investigation into this African country began owing to a self-referral by Mali. The investigation has focused on war crimes occurring in particular cities since 2012. The OTP has stated in its report in this regard "In 2012, the Situation in Mali was marked by two main events: first, the emergence of a rebellion in the North on or around 17 January, which resulted in Northern Mali being seized by armed groups; and second a coup d'état by a military junta on 22 March, which led to the ousting of President TOURE shortly before Presidential elections could take place, originally scheduled for 29 April 2012" (Roberto¸ et al., 2013, p. 53).

Religious shrines were also damaged as a result of the violence. Two cases have arisen from this situation involving one person in each. In the first case, Al Mahdi was found guilty of destroying "religious and historic buildings" in the town of Timbuktu and was subsequently sentenced to 9 years. The second case involves Al Hassan whose trial is ongoing and involves war crimes and crimes against humanity.

**CENTRAL AFRICAN REPUBLIC II (INVESTIGATION OPENED IN SEPTEMBER 2014):**

CAR II is different from CAR I in the sense of temporal jurisdiction. While under CAR I, the ICC had jurisdiction for crimes committed from July 1st 2002 to 2003, under CAR II, the court has jurisdiction for crimes committed from 1st August 2012. Both these situations were self-referrals emanating from the CAR itself. In CAR II, the ICC has focused on war crimes and crimes against humanity. The OTP stated the following in relation to the situation in a press statement "The information available provides a reasonable basis to believe that both the Séléka and the anti-balaka groups have committed crimes against humanity and war crimes including murder, rape, forced displacement, persecution, pillaging, attacks against humanitarian missions and the use of children under fifteen in combat. The list of atrocities is endless" (Jacobs & Arajarvi, 2008, p.23).

Out of the three cases emerging from the situation, trials are ongoing in two cases. One case is at the pre-trial stage awaiting confirmation of charges. One suspect continues to remain at large. Since the ICC does not allow trials in absentia, his trial can begin only with his arrest and subsequent appearance at The Hague.

**GEORGIA (INVESTIGATION OPENED IN JANUARY 2016):**

Georgia was the first situation before the ICC which was focused on a nonAfrican country. It helped break from the narrative of African bias that had been building on for years. The investigation was opened by the prosecutor suo-motu. The investigation relates to the war crimes and crimes against humanity committed during the subsistence of the international armed conflict lasting between 1st of July 2008 to 10th of

October 2008 (Wanigasuriya, 2021). Since there were ongoing investigations on the domestic front for some time and because the ICC follows the principle of complementarity, that is, the principle of noninterference when the domestic system is itself investigating/prosecuting the crimes, the crimes were sought to be investigated/prosecuted by the ICC prosecutor much later in 2016.

In this regard, the prosecutor stated "Under the complementarity principle in the Rome Statute, the ICC cannot proceed if national authorities are already undertaking (or have undertaken) genuine domestic proceedings into the same cases" (Heller, 2006, p.12). Until recently, the competent national authorities of both Georgia and Russia were engaged in conducting investigations against those who appeared to be most responsible for some of the identified crimes. These investigative measures, despite some attendant challenges and delays, appeared to be progressing. However, in March of last year, relevant national proceedings in Georgia were indefinitely suspended. The Office continues to monitor relevant proceedings in Russia, which, according to the Office's information, are still ongoing." No cases have begun at this stage. Three arrest warrants were issued and all 3 suspects continue to remain at large. The situation in Georgia again proves the inability of the court to function in case the suspects are not apprehended.

**BURUNDI (INVESTIGATION OPENED IN OCTOBER 2017):**

The investigation in this situation relating to another African country was opened suo motu by the ICC prosecutor. The situation looks at the commission of crimes against humanity committed against Burundi nationals in the country and outside Burundi for the period extending from 26th April 2015 to 26th October 2017 (Ndayiragije & Giezendanner, 2022). Burundi was a member-state of the Rome Statute but it withdrew its assent upon the beginning of this investigation. Burundi was the 1st nation-state to withdraw from the ICC statute. It has set the wrong precedent because if each country withdraws upon the initiation of ICC proceedings then there is going to be zero adherence of international criminal law and each country against whom an investigation is launched will adopt a hostile attitude towards the ICC. Burundi"s withdrawal became effective from 27th October 2017 which means that the ICC can investigate incidents upto 26th October 2017 in relation to Burundi. However, since the ICC depends upon the co-operation of nation states for proper investigations/prosecutions, it is doubtful if the ICC will be able to get success in this situation. Authorizing the investigation, the Chamber found "a reasonable basis to believe that State agents and groups implementing State policies, together with members of the "Imbonerakure"launched a widespread and systematic attack against the Burundian civilian population" (Ssenyonjo¸ 2018, p. 17).

Crimes against humanity such as murder, imprisonment, torture, rape, enforced disappearance and persecution are alleged to have been committed in this situation. In the preliminary investigation launched in 2016, it was found that "more than 430 persons had reportedly been killed, at least 3,400 people arrested and over 230,000

Burundians forced to seek refuge in neighboring countries (Pathak¸ 216). The preliminary examination focuses on acts of killing, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances that have been allegedly committed since April 2015 in Burundi." No cases have arisen so far from this situation.

**MYANMAR/BANGLADESH (INVESTIGATION OPENED IN NOVEMBER 2019):**

The PTC authorized the OTP to proceed with further investigations in the situation. It will be interesting to see how this investigation pans out as it has jurisdictional issues. It must be born in mind that Myanmar is not a state-party to the Rome Statute but the view that has persisted is that since neighboring Bangladesh is a member-state to the Rome Statute and because many of the cross-border deportations took place in Bangladesh as the receiving state, therefore, by way of extension, part of the crimes having been committed on the territory of a state-party, the ICC shall have the power to investigate and prosecute crimes against humanity committed against the Rohingya Muslims in Myanmar.

The focus of this investigation remains upon "any alleged crimes within the Court's jurisdiction – including but not limited to crimes against humanity, such as deportation and persecution, allegedly committed against the Rohingya population - committed at least in part on the territory of Bangladesh, a State Party to the Rome Statute, or on the territory of any other State Party, insofar as such crimes are sufficiently linked to the situation as described in the Pre-Trial Chamber III"s 14 November 2019 decision. The situation as described in this decision encompasses the 2016 and 2017 waves of violence which allegedly took place in Rakhine State, on the territory of Myanmar." So far no cases have emanated from this situation (Šturma¸ 2022, p. 43).

**AFGHANISTAN (INVESTIGATION OPENED IN MARCH 2020):**

Overruling the PTC which had held in 2019 that an investigation into the situation in Afghanistan would not be in the interests of justice, the ICC Appeals Chamber in 2020 permitted the OTP to open its investigation in its decision dated 5th March 2020. The prosecutor has been permitted to investigate the war crimes and crimes against humanity committed in Afghanistan in relation to the armed conflict since May 1st 2003, that is, the date upon which the ICC statute entered into force for Afghanistan, and other offences committed on the territories of other state-parties since July 1st 2002 bearing nexus to the armed conflict in Afghanistan (Madina, et al., 2022).

The preliminary examination of the situation in Afghanistan was made public in 2007. The OTP has received numerous communications under article 15 of the Rome Statute related to this situation. The preliminary examination focusses on crimes listed in the Rome Statute allegedly committed in the context of the armed conflict between proGovernment forces and anti-Government forces, including the crimes against humanity of murder, and imprisonment or other severe deprivation of physical liberty; and the war crimes of murder; cruel treatment; outrages upon personal dignity; the

passing of sentences and carrying out of executions without proper judicial authority; intentional attacks against civilians, civilian objects and humanitarian assistance missions; and treacherously killing or wounding an enemy combatant (Madina, et al., 2022). The preliminary examination also focuses on the existence and genuineness of national proceedings in relation to these crimes. This is again going to be a very difficult situation to investigate since Taliban now holds control over Afghanistan which was itself one of the chief perpetrators of the alleged crimes having taken place during the conflict. It is unlikely that the ICC will see any co-operation from the Taliban government.

Moreover, it wouldn't be a surprise if the Afghan Taliban government withdraws from the Rome Statute. However, as will be clarified in the sections relating to withdrawals later in this chapter, such withdrawal will have no implication upon Afghanistan's pre-existing responsibilities under the Rome Statute as long as the withdrawal does not become effective including its responsibility to co-operate with the ICC in the ongoing investigation. However, while on paper, this may sound like a strong provision, in reality, it is unlikely to act as the binding force upon the Afghan government to co-operate with the ICC.

In 2021, the ICC"s new prosecutor Karim Khan succeeding Fatou Bensouda has decided to drop the investigation relating to international crimes committed by U.S. soldiers and CIA on Afghan soil during the subsistence of the armed conflict as alleged by his predecessor Bensouda. Karim Khan defended his decision by stating that he had arrived at this decision after considering the gravity of crimes committed by the Taliban and the ISIS which will now remain at the center of the investigation (Case, 2023).

The prosecutor's decision seems justified to some extent in the sense that former president Trump's administration had adopted a very hostile attitude towards the ICC ever since the former prosecutor Bensouda had decided to prosecute U.S. nationals and due to this hostility it was unlikely that the ICC would have let the investigations and prosecutions in relation to any other case under the Afghan situation to come to fruition. Therefore, sometimes, one ought to trade lesser evil for prosecuting greater evil.

It is highly unlikely that this investigation will mature into anything prosecutable before the chambers due to the expected non-cooperation of the now in power Taliban government. After all, perpetrators of international crimes seldom adopt a co-operative approach especially when they are in power if any lessons have been learnt from Omar Al-Bashir's position in the Darfur situation.

**PALESTINE (INVESTIGATION OPENED IN MARCH 2021):**

As per the PTC, the investigations and prosecutions can extend to "Gaza and the West Bank, including East Jerusalem." Palestine had lodged its desire to have the ICC exercise its jurisdiction over alleged international crimes having occurred on its territory as far back as June 13th of 2014 on the basis of an ad hoc referral under article 12 (3) of the Rome Statute made on the 1st of January 2015. It also ratified the Rome

Statute on the 2nd of January 2015 and the statute entered into force in relation to Palestine on the 1st of April 2015 (Bayefsky¸ 2021).

On 20 December 2019, the Prosecutor announced that following a thorough, independent and objective assessment of the reliable information available to her Office, the preliminary examination into this Situation had concluded with the determination that all the statutory criteria under the Rome Statute for the opening of an investigation had been met. However, given the complex legal and factual issues attaching to this situation, she announced that she would be making a request to Pre-Trial Chamber I for a ruling to clarify the territorial scope of the Court's jurisdiction in this Situation. In the Prosecutor's request, dated 22 January 2020, the Office set out its legal position, and encouraged the Chamber to hear views and arguments from all stakeholders before deciding the specific jurisdictional question before it" (Panepinto, 2021, p. 86). No cases have begun in relation to the situation in Palestine yet. It is quite a complex situation and it will be interesting to see the international community"s response as the investigation/prosecution progresses further.

**VENEZUELA (INVESTIGATION OPENED IN NOVEMBER 2021):**

The Venezuelan situation was brought to the knowledge of the ICC"s prosecutor upon the request of multiple countries. The referring states, using the provisions of article 14 of the Rome Statute requested the prosecutor to investigate the alleged crimes against humanity having taken place on Venezuelan territory since the February of 2014. Venezuela is a state-party to the statute since 2000 and the Rome Statute entered into force for it on the 1st of July 2002 (Matos¸ 2021). In 2020, the OTP came to the conclusion that several crimes against humanity and detention as crimes against humanity in particular had been committed in Venezuela at least since April of 2017.

In November 2021, the prosecutor announced the decision to proceed further with the investigation on the basis of the preliminary examination which had just been closed (Matos¸ 2021). The OTP has also concluded an agreement with the member-state of Venezuela to co-operate with the court in helping fulfilling the mandate of the OTP in relation to the situation in Venezuela and also "to continue to foster means and mechanisms to support and promote genuine national proceeding in Venezuela."

**UKRAINE (INVESTIGATION OPENED IN MARCH 2022):**

Ukraine is not a ratifier of the Rome Statute. However, it has referred the situation to the ICC in an open-ended manner since 2013-2014 on the basis of article 12 (3) of the Rome Statute relating to ad-hoc references. The OTP has also received referrals from 43 state-parties to investigate the crimes occurring in Ukraine. The OTP decided to open the investigation in March 2022 and now has a "dedicated portal through which any person that may hold information relevant to the Ukraine situation can contact ICC investigators" (Young & Peterson, 2014, p. 42). The situation in Ukraine relates to the crimes committed by Russia. It will again be interesting to see how Russia reacts to the investigation/prosecution as the ICC OTP moves ahead given that it is a non-state

party and holds a strong position in the international arena as inter-state dynamics stand today.

These are the 17 situations that have been under the review of the ICC ever since the Rome Statute entered into force. Some of these situations have been progressing rather slowly and given that two decades have passed since the operations of the ICC began, it is time for the ICC to prove its mettle.

**POSITIVE OUTCOMES OF THE ROME STATUTE:**

The ICC has helped transform the landscape of international criminal law. It has been successful in some instances and it has equally failed in other respects. Let us first consider its areas of success:

**Deterrence due to the ICC:**

We have to understand the goals of an institution in order to contemplate its successes and failures. The first question that arises is: what are the goals of the ICC. After review of extensive literature, Stuart Ford arrived at the conclusion that the following are the nine goals in relation to international criminal courts and tribunals:

"1) assigning responsibility for wrongs and punishing the guilty; 2) providing closure or redress for victims; 3) establishing a reliable historical record; 4) fostering post-conflict reconciliation; *5)* expressing condemnation of abhorrent acts; 6) ending impunity; 7) preventing violations of international criminal law; 8) maintaining or restoring international peace and security; and 9) developing international criminal law" (Fletcher, L. E., & Weinstein, 2002, p. 12).

Out of these nine goals, the most important goal is the prevention of violations of international criminal law. This means that if the ICC has been successful in deterring and preventing international crimes even to a small extent, it"s creation is worthwhile given the fact that 170 million people have lost their lives in the 250+ armed conflicts (international and non-international in nature) having taken place from the time of worldwar II to the close of the 20th century, that is, in a period of five decades.

The proposition of measuring ICC"s success in relation to its deterrent and prevention value has a slight roadblock. In law, how do you judge whether an adjudicatory body has had a global impact on the practical level? The answer lies in empirical research. In the last few years, several researchers have conducted empirical research to evaluate the effect of international criminal law on conflicts and whether such institutions can prevent violations of international criminal law. The works of these researchers include:

- "The Deterrent Effects of the International Criminal Court: Evidence from Libya" by Courtney Hillebrecht where the author has explored the impact of the ICC in Libya since its intervention.
- "The International Criminal Court and the Deterrence of Human Rights Atrocities" by James Meernik where the author looked at the impact of the ICC on state behavior generally.

• “Can the International Criminal Court Deter Atrocity?” by Hyeran Jo and Beth Simmons where the authors studied the impact of the ICC civilian deaths across different countries and a timeline of 20 years.
• “The Impact of Criminal Prosecutions during Intrastate Conflict” by Geoff Dancy and Eric Weibelhaus-Brahm where the authors carried out research on the impact of criminal prosecutions including those undertaken by the ICC on conflict termination during civil wars.
• “In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?” by Benjamin Appel where the author has carried out a study to determine whether ratifiers of the Rome Statute commit more or less human rights infractions in comparison to non-ratifiers.

The findings of these empirical papers have been compiled in a research-paper published as recently as 2020. You will be astonished to see the positive impact the ICC has had on international crime prevention. It has been determined that the ICC has been able to prevent violence, reduce civilian casualties and lead to fewer infractions of human rights. Some of the more prominent findings from these studies include:

1. The more action that was taken by the ICC in relation to Libya, the lower the civilian fatalities dropped.
2. While the ICC‟s involvement did not completely abate the violence, it did statistically speaking reduce it.
3. States acceding to the Rome Statute and enacting domestic legislations have an impact on the human rights”protection in the state as a lower level of human rights”infractions have been noticed in such states.
4. The ICC can have a deterrent effect.
5. State-parties to the Rome Statute with greater commitment to the ideals of the ICC have lower incidences of “political violence” domestically in comparison to stateparties having a lesser commitment to the ICC.
6. States with ongoing civil wars is likely to see lesser number to civilian deaths where the state has ratified the Rome Statute and enacted a domestic legislation in furtherance to its commitments under the Rome Statute in comparison to a nationstate which has not ratified the statute.
7. Ratification of the Rome Statute nearly reduces the acts of state-sponsored killings by half.
8. Ratification of the Rome Statute has no impact on the behavior of the rebel groups operating from the state.
9. Opening an ICC investigation in the concerned state has a deterrent effect on rebel groups as a reduction in “rebel-sponsored civilian killings” has been observed in situations where investigations have been initiated.
10. A state which ratifies the Rome Statute while a conflict is on-going is more likely to end the conflict by way of peaceful negotiations than other states.
11. Conflicts where the ICC intervenes are shorter than their counterparts where the ICC does not intervene. You will be astonished to know that where the ICC intervenes,

a conflict generally lasts for 2.05 years whereas, on the other hand, where the ICC does not intervene, the conflict lasts for 3.41 years.

12. State-parties to the Rome Statute were less likely to engage in new conflicts in comparison to their counterparts, that is, non-state parties.

13. The ICC does not prolong conflicts. Rather, on the contrary, it helps in reducing violence and the timeframe for which conflicts continue.

14. The states which ratify the Rome Statute have a significant impact on the reduction of human rights violations in comparison to their non-ratifying counterparts. This naturally reduces violence.

If achieving the goal of "highest expected value" does not sound like success then what does?

## DOMESTICATION OF INTERNATIONAL CRIMINAL LAW:

What is the ultimate purpose of international criminal law? It is to bring an end to the perpetration of all international crimes. How can this purpose be achieved? The wider the net of international criminal adjudicatory mechanisms across countries, the easier it is to fulfill this purpose. This brings us to the next utilitarian value of the Rome Statute. As more and more countries have adopted the Rome Statute, they have felt incentivized to domesticate international criminal law *vide* the *complementarity* principle of the Rome Statute, that is, the ICC intervenes only when the nation-states themselves are unwilling to punish the perpetrators of international criminal law.

The ICC has already succeeded in the sense that it has enabled more nations to adopt laws criminalizing conduct amounting to international crimes. Even for nonratifying states such as India, U.S.A. etc., it may be beneficial to adopt statutes domestically criminalizing international crimes. The main purpose of international criminal law is the criminalization and punishment of core international crimes. Therefore, if the said crimes can be punished domestically then there is no need really for a supra-national criminal authority which is likely to threaten the sovereignty concerns of the countries such as India, the U.S., China and Russia.

If countries undertake upon themselves the onus to punish international crimes then what really is the need for an international criminal court? Therefore, domesticating international criminal law is a win-win for all countries alike, whether ratifiers of the Rome Statute or not. Even the Delhi High Court in a recent case of CBI versus Sajjan Kumar and other highlighted the importance of criminalizing genocide and crimes against humanity in the Indian context urgently. Domestic implementation of the ICC Statute has had a direct impact on the importance and manner to fight impunity" and it has also been proven that the domestication of international criminal law leads to a reduction in violence.

### Victim participation and redressal:

No other international criminal tribunal prior to the Rome Statute gave the respect and participatory rights deserved by the victims who are the primary stakeholders of

the international criminal justice system. The ICTY, ICTR as well as the IMT and IMTFE were focused entirely upon the perpetrators of international crimes, so much so that the plight of the victims was given a complete go by.

Although faced with some initial glitches, the ICC has been successful in creating a trust fund for victims, ensuring reparations and focusing on the needs and participation of the victims.

The term "victims" stand defined under the ICC Rules of Procedure and Evidence in the following terms: "For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes (Zappalà, 2010).

Articles 68 and 75 of the Rome Statute list the rights and protection afforded to, inter alia, the victims: Article 68 of the Rome Statute states:

"1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information" (Heller, 2011, p.43).

Article 75 of the Rome Statute relating to the reparations of victims states:

"1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law."

These are the main successes of the ICC.

## FAILINGS OF THE ROME STATUTE:

Like any institution around the world, everything about the ICC can't be positive. It has to have its own share of failings. As a matter of fact, it has more failures than successes. Let us analyze some areas where the ICC has scope for improvement.

### Not enough ratifiers:

A quick survey of the state-parties chronological order of joining would show that more than half of the ratifying states had joined the court by the 1st of July 2002 when the ICC started functioning. It can said that the majority joined by 2011 (Nyamache, 2017). Ever

since then there has merely been a trickle of new joiners. Only 5 states have joined the Rome Statute in the last decade. Malaysia had joined the ICC in 2019 but it withdrew its consent right before the ratification would have entered into force for it owing to "political confusion" domestically (Thynne & Barnaby, 2020).

Countries in the likes of India and the U.S.A. continue to hold onto their narrow confines of sovereignty and remaining apprehensive of the ICC agenda. U.S. has been critical of the ICC since day one. It is an irony that the U.S., one of the biggest detractors of the ICC today, was amongst the four allies due to whom the field of international criminal law blossomed with the establishment of the IMT for Nazi war criminals (Okide, 2021; Okide, 2022). They could have instead gone for quick justice by executing the criminals but instead decided to go-ahead with the legal approach to set a precedent for the international community. Today the U.S. cannot digest the same principle regarding *justice over sovereignty* when it comes to having a permanent institution to deal with perpetrators of international crimes. From George Bush Junior to the Trump administration, the U.S. has continued to remain hostile to the ICC especially former NSA John Bolton who announced that the visas of ICC personnel would be revoked. Even under the Biden administration, it is unlikely that the U.S.-ICC issues will thaw.

It is important to bear in mind that as long as the international community continues to resist the ICC as the supranational criminal adjudicatory body, it appears unlikely that the ICC will be in a position to play a decisive role in ensuring compliance of international criminal law.

**Withdrawal of consent to be governed by the Rome Statute:**

Any international court or tribunal would suffer a serious setback in the face of constant threats of withdrawal from the statute. The ICC is no different. Article 123 of the statute permits withdrawals subject to the following terms and conditions:

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective (Edet, et al, 2024).

The issue of withdrawals in relation to the ICC began with three African nations requesting for withdrawal from the Rome Statute. Two of these, South Africa and Gambia, retracted from their withdrawals and continue to be members of the ICC. Burundi, on the other hand, became the world's first country to withdraw support from the ICC and is no longer governed by it except to the extent of its pre-existing

responsibilities as highlighted under article 123 of the statute reproduced hereinbefore. The reason for Burundi's exit is the launch of investigations by the ICC into the crimes having occurred on its soil. In 2017, suo-motu investigation was launched by the prosecutor in regard to the crimes against humanity committed against civilians within and outside Burundi between the timeframe extending from 2015 to 2017 (Materu & Materu, 2015).

Philippines followed suit withdrawing it support from the ICC upon the launch of a prelim investigation into President Duterte's war on drugs and the ensuing crimes against humanity resulting therefrom. Even Philippines will continue to remain bound by its duty to co-operate for its pre-existing responsibilities prior to the date its withdrawal became effective, that is, up to 17th March 2019 (Robles¸ 2023). Therefore, the ICC is legally empowered to continue its investigation and prosecution into the alleged crimes against humanity as the launch of the investigation by the ICC predates its withdrawal becoming effective (Owa, et al., 2024). However, on the practical front, without the co-operation of Philippines into the alleged crimes, it will be difficult for the ICC to move ahead with its investigation and take the prosecution to its logical conclusion.

**Sparse and tardy convictions:**

The ICC started functioning in 2002. The first conviction came in Thomas Lubanga's case in 2012 after a decade of operations. By 2021, the ICC was able to convict only a total of five persons for core crimes under the subject-matter jurisdiction of the ICC. Dominic Ongwen being the fifth such convict for having committed war crimes and crimes against humanity in Uganda after the entering into force of the Rome Statute. He has been sentenced to 25 years imprisonment in 2021. The five other convictions secured so far by the ICC relate to "offences against the administration of justice" in the Bemba case (Okeke & Soronnadi, 2021). Such few convictions in two decades is not a satisfactory record. This is near about the same timeframe as the ICTY and the ICTR which have convened their proceedings in a much more efficient manner. More than a dozen individuals indicted by the court continue to remain at large.

Since the ICC does not permit trials *in absentia*, their trials cannot begin until they have been apprehended. While the whereabouts of some of the indicted persons is not known, others are being shielded by the state of residence of the indicted. As long as there is no co-operation from the states, there is little the ICC can do. Without enforcement powers, the ICC has to rely completely on state co-operation to proceed with its investigations and proceedings.

**Failed prosecutions:**

The maxim of criminal law "Let Hundred Guilty Be Acquitted but One Innocent Should Not Be Convicted" rings true each time the prosecution fails in securing a conviction. Whenever the evidence does not add up, the only reasonable solution is to set the person free no matter how strong the suspicion that he in fact committed the

crime. However, a failed prosecution always leads to some embarrassment for the prosecution especially when its work has been tardy. There have been three major embarrassing situations for the OTP so far:

(a) The reversal of conviction and release of Jean-Pierre Bemba by the appeals chamber in 2018, 10 years after he had been arrested (Kemp, 2018). This really brings into perspective the issue of long inordinate trials because if a person is ultimately acquitted, it is unfair for him to have spent such a long period in custody;

(b) The falling apart of the Kenyan case pertaining to President Kenyatta and Vice-President Ruto before the trial commenced; and

(c) The acquittals of Laurent Gbagbo and Charles Blé Goudé in response to a "no case to answer motion" at the end of the prosecution's presentation of the case. The trial chamber was particularly critical of the prosecutor's poor time & case management and reliance upon hearsay evidence. The duo had been charged with crimes against humanity in relation to the violent political conflict following the 2010 *Côte d'Ivoire* presidential elections. The trial chamber noted that since the prosecutor had failed to establish the core elements of the alleged crimes, there was no need for the defence to submit any further evidence.

**African focus:**

Unnecessary focus on the African countries has led to this unfortunate allegation. Since the first two situations before the ICC namely Congo and Uganda were self-referrals by these countries, it cannot be said that there was a deliberate attempt or a conspiracy to target African countries (Okide, 2019; Okide, 2020). The ICC depends upon state co-operation to carry out investigations and prosecutions so naturally if a state is self-referring a situation, there is greater likelihood of co-operation. The third situation, that is, Darfur (Sudan) was referred by the UNSC owing to serious allegations of genocide and other crimes which was also becoming an issue for neighboring country Chad as it received a huge influx of refugees. Again, there is no specific targeting on an African country deliberately by the OTP of the ICC.

The fourth situation again was a self-referral by an African country, namely, Central African Region. I believe the anti-Africa narrative was a natural consequence of the fact that the first nine situations before the ICC pertained to African countries including Sudan and Libya which were referred by the UNSC.

This initial charge of African-bias has been partially neutralized with several situations now being investigated outside Africa. Seven of the Seventeen situations under investigation before the ICC relate to countries outside the African continent including Afghanistan, Ukraine and Palestine. It will be interesting to see how the ICC navigates through some of these politically-charged and sensitive situations.

## CONCLUSION

Based on the aforementioned discussion, it is safe to conclude that the Rome Statute has been impactful in bringing continuity to the field of international criminal law and

in ensuring wider compliance and respect for international criminal law. Although it has not gained enough success in its day-to-day functioning but there is much to celebrate considering that there was no permanent international criminal court right upto 1998. The jurisprudence of the ICC can be considered very shallow and sparse compared to the ICTY/ICTR which operated for, more or less, the same amount of time as the ICC has been in operation.

There is huge scope for improvement for the ICC based on the foregoing discussion such as better quality jurisprudence and timely trials but the increased deterrent value, domestication of international criminal law and participatory rights of victims makes up
for the court's weaknesses. Addressing a few of the research questions through this chapter, we can conclude the following outcomes:

1. Even though it is not possible to remove inhibitions based on issues of sovereignty of non-signatory countries such as India, China, Russia and the U.S.A. in order for them to ratify the Rome Statute, nevertheless, the end object can still be met if a campaign is simultaneously run for domestication of international criminal law as regards the non-ratifying countries. The ICC can create a conducive-environment and help non-ratifying states to domesticate international criminal law by tailoring the laws on the basis of state-specific conditions. This will obviate the need for ratifying the statute.
2. The challenges stunting the ICC have been discussed throughout this chapter. With the co-operation of the international community, it is possible to rise above the issues stunting the international community.
3. ICC can be strengthened by more number of ratifications (which seems unlikely as the ratifications have stagnated), by the domestication of international criminal law by ratifiers and non-ratifiers alike, by ensuring better-quality jurisprudence, quicker trials and strengthening prosecutions.
4. Irrespective of the issues gnawing at the ICC in relation to its day-to-day functioning, the ICC has nevertheless, helped in deterring the commission of international crimes to some extent in juxtaposition from a scenario where there is no permanent ICC. Just being successful in this domain is enough as it has a direct bearing on reduced number of inter and intra-state conflicts, lower human rights infractions and reduced violence, thereby, strengthening international peace and security.

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