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The Tribulations of the International Criminal Court

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Abstract

This research focuses on substantial responses that international criminal law can provide to address the limits and ineffectiveness of the International Criminal Court. It sheds light on the reasons behind its failures. The Court is a victim of an intrinsic dualism: a political organ (the States Parties) and a legal organ (the Court itself) ensure its functioning. The problem is that the aims of these two organs are not necessarily the same. While the goal of the ICC is to end impunity, it is powerless as the States parties don't equip it with enough means of pressure. By exploring some controversial cases, the study highlights the threats faced by its mandate. The study concludes that the Court should clarify the legal standards it applies to its criminal proceedings, work based on clear prosecution strategies and policies, put an end to its endless impunity.

Keywords: Pre-Trial Chamber, ICC Prosecutor, UN Security Council, Judicial proceedings, Immunity, interest of justice.

Introduction

July 17, 2023, was the 25th anniversary of the adoption of the Rome Statute at a conference in Rome, Italy, which established the only permanent international criminal court of universal scope, whose mission is to play a key role in combating impunity for perpetrators of war crimes, crimes against humanity, genocide, and crime of aggression. In 1998, the UN General Assembly adopted the draft resolution by 130 votes to 7, with 21 abstentions. 160 States participated in the negotiation that created the Rome Statute, and then 124 ratified it. The Statute entered into force on 1 July 2002 after its ratification: the International Criminal Court was then officially created.

The International Criminal Court (ICC) was born out of a series of exceptional political acts. The precedents of international tribunals have been linked to profound political transformations, and the movement to establish an international tribunal to deal with crimes against humanity has received a strong boost after the Nuremberg and Tokyo tribunals that were established to punish the crimes accusing the losers of the World War II.

The result of intergovernmental negotiations and their compromise, which was considered as a diplomatic achievement, reflected the changes in international

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law. The Statute of the Court combines elements inspired by substantially divergent laws (Anglo-Saxon law and Romano-Germanic) law. Its formulations, riddled with so-called "constructive" ambiguities, need to be specified by judges of sometimes irreconcilable interpretations. It is this maturation, case by case, that takes time and leads scholars to consider the ICC even after two decades, as a still young institution.

More than 20 years later, while this Court has become an integral part of the global justice landscape, it does not yet weigh the global arena and is considered ineffective. Few international bodies have faced the scale of the challenges the ICC has faced. These include barriers related to institutional capacity and competence, budgetary constraints, and the lack of enforcement cooperation among various States Parties. In dealing with some of the most urgent cases of the day, its ability to act remains at the discretion of the UN Security Council under Chapter VII of the UN Charter, which rarely agrees on issues relating to international justice. The most powerful nations, as well as several countries involved in an ongoing conflict, remain outside the jurisdiction of the Court. Nevertheless, the ICC has found ways to address cases involving non-State parties, such as Myanmar and Russia.

The criticisms of the Court are essentially about its legitimacy and effectiveness. Indeed, the Rome Statute complies with the requirements of the Security Council in Articles 13 (b) and 16, which confers to it powers that undermine the credibility of the ICC. When a case is referred to by the Security Council, the State's consent is not required. The UN executive organ is acting under Chapter VII of the UN Charter and the latter is legally binding and enforceable on all the UN members. Admittedly, the Court has been portrayed as a giant without arms or legs, as it lacks police forces and depends on the cooperation of States.

The International Criminal Court, which was founded to develop and uphold human rights principles by establishing individual criminal liability for violations of four core crimes (genocide, crimes against humanity, war crimes, and crimes of aggression), is undergoing such the encroachment of the United Nations Security Council on its work. By using an analytical framework, this legal research is designed to analyze the relevant levels of Court failures to end individual impunity, by focusing on the investigations conducted in the cases of Darfur and Afghanistan which have demonstrated the flaws of the universal court.

The Research Problem

This research focuses on substantial responses that international criminal law can provide to address the limits of the International Criminal Court.

Therefore, the main question of this paper will be: What are the major reasons behind the failures that led to the tribulations of the International Criminal Court? The ICC was established to put an end to impunity by prosecuting perpetrators of the most heinous crimes. Although the Court has dealt with some important cases so far, it still finds it difficult to fight impunity because not all the atrocities that have been committed have been investigated by the Court. Critics of the ICC point to its ineffectiveness in carrying out its mission. So, this research will focus on the limits that affect its credibility and find out the reasons behind its tribulations.

Research Methodology

The methodology developed in this study adopts the descriptive analytical approach to the different principles of international criminal law. The *research will seek to provide an in-depth investigation* to critically assess *the reasons behind the ICC's limits, by exploring important criminal cases, such as the situations in Darfur and Afghanistan, still before the Court.* The approach that this study employs should reflect consideration of the main factors of the shortcomings of the Court. This study draws upon basic resources, including but not limited to literary publications, scholarly periodicals, and online articles.

Literature Review

In most cases, international criminal law has been applied to relatively less powerful and economically weaker States than powerful and economically stronger States (Mugabi, 2023, 6). The International Criminal Court (ICC) has proven to be ineffective and a failed institution of justice from its inception (Cheruiyot, 2014, 8). Indeed, historically, its limited jurisdiction has allowed war criminals to escape justice and avoid countless atrocities. Its criticisms often focus on accusations of selectivity. Why are some cases before the Court while others are not? Why are some people charged in one country and not others? Because of the limited resources of the Court, some of those responsible for real crimes can escape prosecution (Robinson, 2015, 323-336).

Enforcing the rule of law by a universal judicial institution may be a long road ahead (Cwajg, 2020, 1-13). The Rome Statute states that "*the ICC is an independent judicial institution*", but the truth is that the Court is as independent as the UN Security Council allows it to be (Hoile, 2014). Moreover, it can't be independent while its funding is at the political mercy of the United Nations General Assembly, which undermines and prejudices any claim to the independence of the Court (Baker, 2019). The ICC's sponsorship by the UN based on UN groupings and political pressures affects its impartiality since every vote is determined based on political interests and deals (Baker, 2019). There are clear

limits to the Court's action and the prosecutor's room for maneuver is reduced. Its relations with Member States and the Security Council are constrained by their limits and ambiguities (Al Banna, 2023), which is why the future of the ICC looks uncertain (Hubrecht, 2019, 23-35).

Results and Discussion

More than 25 years after the signing of the Rome Statute, the International Criminal Court has not yet established itself as an instrument for repairing the damage caused by the most atrocious crimes. Not only does the ICC's obvious silence and lack of action illustrate its failures in justice, but its very structure almost guarantees that its reach cannot extend to all humanity (Vega, 2020). Many reasons appear behind the shortcomings and tribulations of the ICC.

First, unlike the UN, which has 193 member States, the ICC with 123 adherents, is not universal (Hubert-Rodier, (2019). Not only have Russia, China, and the United States decided to move away from the International Criminal Court but relying on their sovereignty, they have also shown different levels of contempt or hostility towards the Court. According to the very fundamental principles of international law, a treaty is solely enforceable upon the parties to it. Therefore, assuming momentarily that the ICC is fully capable of executing justice quickly and effectively, any citizens of a non-party State could commit the most serious crimes against humanity with total impunity.

The remarkable failure of this justice comes from situations in which the State refuses to cooperate or collaborate. Indeed, the courts created by the Security Council (for former Yugoslavia and Rwanda) can sometimes rely on injunctions that remind States of their obligations based on Articles 25 and 103 of the UN Charter (David, 2005). These injunctions, of course, can engage the responsibility of the State, but have no binding character because of the absence of sanctions against the recalcitrant State. It is for this reason that it can be said that "the major international conventions are often repeated in rather non-binding terms. They are limited to making recommendations or making wishes. Commitments are frequently subject to restrictions or loopholes" (Dasque, 2008).

Second, the Court does not have the tools to enforce its own decisions (Hoile, 2010). As proof, the US can easily stand in the way of international justice when the Court decides to prosecute American soldiers and agents suspected of wrongs and crimes during the war in Afghanistan, a country that joined the ICC in 2003. In Syria, calls from local victims of the regular Syrian army and leaders of Western countries, Bashar Al Assad is almost certain to avoid a UN referral of the ICC for war crimes and crimes against humanity, because of Russia's opposition (Kersten, 2013). Similarly, the former president of Sudan, Omar Al Bashir, was

indicted in 2009 by the ICC for war crimes, crimes against humanity, and genocide during the Darfur war, which began in 2003, has always avoided international justice despite the international warrants issued against him (Vega, 2020).

Third, the acquittal of Uhuru Kenyata and Laurent Gbagbo, the former Ivorian President, and Charles Blé Goudé, the former leader of the young patriots, brought discredit to this Court. (Hubert-Rodier, 2019). The decision of the Court to acquit in June 2018 Jean-Pierre Bemba, the former commander-in-chief, of the Congo Liberation Movement, two years after his conviction for war crimes and crimes against humanity in 2002 and 2003, had already created an incredible astonishment (Hubert-Rodier, 2019).

Fourth, claims of anti-African bias and claims of neo-colonialism were difficult to be dismissed. Africa is designated as the first continent of defendants; the International Criminal Court rarely deals with international crimes of the rest of the world (Cryer, 2006). Finding impactful ICC results beyond Africa is difficult to achieve. African countries have no power in the Security Council, so even those who are not parties to the Rome Statute have no immunity from ICC prosecution.

Finally, there were strategies of prosecution under influence: the strategical calculations of the first prosecutor Luis Moreno Ocampo often proved to be counterproductive. Thus, sensing a resounding case that would benefit from the necessary support for its success, he hastily anticipated the opening of proceedings against Laurent Gbagbo, even before the launch of any official procedure, by engaging in informal exchanges with French authorities and President Outtara to keep the former Ivorian resident prisoner, time to launch an official extradition procedure to the Hague. As a result, the ensuing trial remained tainted by suspicion of collusion or even influence (Hubrecht, 2019).

Moreover, the influence of the United Nations and some powerful States has undermined the autonomy of the Court's freedom of action, which appears blatantly and highlights the flaws in the Darfur case and the investigation into crimes against humanity and war crimes in Afghanistan.

The United Nations Influence

Politicized prosecutions have not escaped the International Criminal Court, as there is no doubt that the United Nations Security Council is a political organ and tends to interfere in the work of the Court (Cheruiyot, 2014).

However, as per Article 2 of the negotiated relationship agreement between the Court and the United Nations, the latter recognizes the Court as an independent permanent judicial institution. Nonetheless, the influence of the

Security Council undermines its authority. While this organ does neither participate in the election of judges and the prosecutor, nor in the vote of the budget, or the amendments of the statute, it can refer cases to the Court, including to non-partis States, in conformity with article 13 (b) of the Rome Statute (Hoile, 2010, 1). Its power of referral was used it in 2005 for Darfur, and in 2011 for Libya. This encroachment of a political organ on the work of an independent judicial body has weakened the Court's work and limited its freedom of action as well. So, it is difficult for such an impartial entity resisting the UN political groupings and pressures (Baker, 2019).

In this regard, the former President of the International Criminal Court for former Yugoslavia argued: "*Judicial independence is critical for the rule of law. First, judges who are independent of political or other pressures, will adjudicate the disputes brought to them with an eye to the guiding legal principles and without any undue influence by external sources*" (Meron, 2005). However, for Henry Kissinger, the crimes detailed in the Rome Statute are "*vague and highly susceptible to politicized applications so the prosecutor of the Court will possess discretion without accountability*" (Hoile, 2010).

The Darfur Case and American Imperialism

American interventionism facilitated by the former prosecutor Luis Moreno Ocampo and the failure to arrest the former Sudanese head of State shows well the limits of the efficiency of the ICC. The factual elements invoked by the Office of the Prosecutor and the Chambers of the Court to establish the existence of genocide in Darfur were provided by a network of American militant organizations, which clearly shows that American legal imperialism infringes on the universal impartial criminal justice and endangers the confidentiality of the ICC (Gout, 2020).

The charges against Al Bashir in the ICC's second arrest warrant in 2010 are based on *prima facie* external evidence provided by NGOs and contained in reports on the humanitarian situation in Darfur between 2003 and 2008. These humanitarian reports are not legally admissible evidence that the genocide took place in Darfur, but merely observations of incidents of mass unspecified violence (Gout, 2020). Although one of the most important reports cited by the Pre-Trial Chamber published by an organization called *Physicians for Human Rights*, tried to classify these acts of violence as consistent with the crime of genocide, the second arrest warrant refers to this publication indirectly in its considerations and does not mention it in the body of the text. As such, the issuance of the arrest warrant was not based on firm evidence of genocide in Darfur, but rather based on *prima facie* and refutable evidence of the accused's genocidal intentions. As the

case against Al Bashir is currently pending, there is no evidence that the genocide was committed in Darfur (Gout, 2020).

The former prosecutor was very involved with this network of American activists participating in their workshops, conferences, interviews, public debates, and photo opportunities (Gout, 2020). These events were devoted to discussions on the execution of ICC arrest warrants, or ways to circumvent obstacles to the court's work. This type of cooperation has served to objectify a broad and shared definition of genocide at the expense of its rigid legal conception. This objectification would then add to the pressure on national governments to cooperate in the arrest of the former Sudanese head of State (Gout, 2020).

The fact that the ICC prosecutor's office indirectly invokes a formalized definition of genocide in the domestic law of a country not party to the Rome Statute, and which has maintained a formal distance from the Court since its establishment (Branch, 2017), raises serious questions about the nature and appropriation of the international criminal justice vision represented by the Court, and the ability of the United States to protect its criminal immunity while instrumentalizing an international institution in a way that evokes judicial colonialism.

It is somewhat paradoxical to note that the strategy pursued by the Office of the Prosecutor is entirely based on a definition of international criminal justice unilaterally defined by the United States, a State that has behaved in a very hostile way towards the ICC and retains the power to influence its prosecution through the UN Security Council. The Al Bashir case shows how the ICC sacrificed its autonomy in the interest of a third state, in the hope of obtaining practical benefits that are not yet materialized (Branch, 2017).

The Darfur Case and States' Non-Cooperation

After the referral of the situation in Darfur to the ICC by the Security Council in its resolution 1593 of 2005 for crimes against humanity and war crimes in the Darfur region, the case has provoked widespread legal controversy, since for the first time the Court has issued an arrest warrant against a head of state who is still in office (Bara, 2019). Nevertheless, to arrest him the Court depends on the cooperation of States it lacks police forces (Runavot, 2018).

Due to widespread perceptions of the political nature of referral, the normative force of the ICC's work has been weak. That is why some Arab governments, and the African Union were opposed to the Darfur case. This hostility has largely focused on the ICC's indictment of Al Bashir and likely reflects widespread concern that similar measures could be taken against the leaders of other regional States (Jamshidi, 2013). Once again, the normative

differences surrounding the Darfur issue and doubts about the underlying political objectives of the referral to the Security Council have reinforced this hostility. Hence the refusal of Jordan, Mali, Chad, the Democratic Republic of the Congo, South Africa, and the African Union to extradite the former Sudanese president to the International Criminal Court (Jamshidi, 2013) claiming that he was a Head of State in office during his visit to the country and thus enjoys immunity under international law (Bara, 2019).

So, the Pre-Trial Chamber concluded that these States had deliberately refused to arrest Al Bashir, thereby preventing the Court from exercising its functions and powers. Under the Rome Statute, a State that failed to comply with a request for cooperation with the Court could be transferred to the Assembly of States Parties or the Security Council under article 87, paragraph 7, of the Rome Statute (Bara, 2019). For instance, in 2014 the Pre-Trial Chamber II (PTC) issued a decision on the obligation of the state parties to arrest Al Bashir irrespective of his immunities as a head of State by finding that the Democratic Republic of Congo (DRC) failed to cooperate of the ICC by not arresting him during his visit to the DRC). The latter referred to a relevant decision of the African Union which oblige the DRC to retain Al Bashir's immunities, to Article 98 of the Statute.

For the Court, as the State parties that have ratified the Rome Statute have recognized the removal of immunities provided in article 27, so they can't invoke immunities as an obstacle for cooperation under article 98 which refer in paragraph (1) mentions two types of immunity: diplomatic or State immunity. As for paragraph (2) it only mentions in general agreements that require cooperation of a sending State. So, while the first paragraph indicates two types of requests: for surrender or assistance, the second indicates only one type of request: for surrender. Nonetheless, this article does not list the immunities that are to be respected by cooperating countries (Jacobs, 2019).

The UN Security Council's Resolution 1593 of 2005 has not removed the immunities of Al Bashir but has only created an obligation for Sudan to waive his immunities. The reading by the Pre-Trial Chamber of Resolution 1593 is weak and based on an implausible reading of the Resolution. The PTC mixed up the concept of waiver of immunities with the actual removal of immunities by the Security Council (Hoog & Knottnerus, 2014). Indeed, the obligation to cooperate was imposed on Sudan, and the ICC should therefore turn to Sudan to waive immunities. However, the Court has never asked Sudan to waive Al Bashir's immunity because of his different visits to foreign States. That means Al Bashir keeps enjoying them under customary international law in his capacity as a president (Hoog & Knottnerus, 2014).

Apart from the arrest of Ali Kosheib in June 2020, the other four leaders accused of Darfur crimes have still not been brought to justice and remain unpunished, which caused the reaction of the former Prosecutor Fatou Bensouda in 2014. She has declared that she would stop the proceedings against Al Bashir given the Security Council's inaction in Darfur (Cwajg, 2020). It is important to mention that ICC's mandate faced increasing threats from powerful States. Like the situation in Darfur, the situation in Afghanistan clearly illustrates the tribulations of the Universal Court.

The Afghanistan Investigation

In 2019, Fatou Bensouda decided to reopen the preliminary examination on Afghanistan committed on the territory of this country since May 2003, which the former Prosecutor Ocampo had closed (Peniguet, 2020). The question was concerning first the crimes committed by the Taliban and the Afghan government, but also the American forces, accused of having set up a system of torture of prisoners (Kuhrt & Kerr, 2021). Officially taken based on new information (Faqir, 2023), the decision to reopen the case seems above all to prove the prosecutor's determination to hold the American power to account, even if, it is not a State Party. The Court's jurisdiction stems from the fact that the alleged war crimes were committed on Afghan soil or from European States such as Poland, which ratified the Rome Statute. Moreover, the role of the CIA has been well documented by the American institutions themselves (Kuhrt & Kerr, 2021).

The Pre-Trial Chamber however rejected, on 12 April 2019, the Prosecutor's request, in the name of "interests of justice" claiming that the chances of successful prosecution were weak, that much time had passed, that the Afghan and US authorities have not cooperated (Jacobs, 2015). It is important to stress that the Rome Statute offers flexibility, and a broad understanding of the role of the Prosecutor in a delicate national context, with the inclusion of three small words that are buried within the Statute: it leads the prosecutor to assess whether his actions will be in "*interest of justice*" before initiating an investigation or proceeding. But the « *interest of justice*» remains largely undefined (Kuhrt & Kerr, 2021).

The judges had considered that these interests derive from the objectives of the Statute and aim at the effective prosecution of the most serious international crimes. The decision of the judges, groundless, was sharply criticized because it was issued shortly after the threats of the Security Advisor John Bolton, and a withdrawal of the visa of the Prosecutor. Many saw it as a capitulation of the Court in the face of pressure against it (Biassette, 2020). For some authors, "*the decision of the preliminary Chamber brought to light the limits of the Court,*

unable to confront the great powers but also unwilling to displease them". Hence, the risk of an inter-institutional agreement for the benefit of other forms of justice: universal jurisdiction, specialized courts, regional courts etc. (Vasiliev, 2019). After an appeal against the decision, the investigation was officially allowed to proceed on March 5, 2020. Afghanistan became a State party to the Rome Statute since May 2003, so the ICC prosecutor requested to resume the investigation based on article 18 (2), which was authorized on September 2021 by the Pre-Trial Chamber II.

After an appeal against the decision, the investigation was officially allowed to proceed on March 5, 2020. Afghanistan became a State party to the Rome Statute since May 2003, so the ICC prosecutor requested to resume the investigation based on article 18 (2), which was authorized on September 2021 by the Pre-Trial Chamber II.

On September 2, 2020, the US placed the ICC prosecutor and another official on the American Treasury blacklist, alongside terrorists and drug traffickers. The opening of an investigation into American abuses in Afghanistan has provoked the anger of the Trump administration (Biassette, 2020). Three months after signing a decree authorizing the principle of sanctions against ICC officials, the administration of Donald Trump, the former American head of State has designated its first targets. The names of Fatou Bensouda, ICC Prosecutor, and the Director of the Competence, Complementarity, and Jurisdictional Cooperation Division of the Hague, have been added to the blacklist of the American Treasury, or they are now associated with terrorists, drug traffickers and officials of authoritarian regimes accused of human rights abuses (Biassette, 2020).

On 11 June 2020, during a press conference, former American Secretary of State Mike Pompeo commented on the possible freezing of the assets of ICC members and their ban on access to the American financial system,

> "*We will not tolerate the illegitimate attempts of the ICC to subject the Americans to its jurisdiction*". He added "Any individual or entity that will continue to materially assist these individuals is also subject to sanctions" (Vega, 2020). But beyond the sanctions, it is the symbol and the message that alarm. Indeed, the ICC replied: "*These coercive acts, directed against an international judicial institution and its officials, are unprecedented and constitute serious attacks against*

the Court, the international penal justice system, and the rule of law in general" (Biassette, 2020).

Positive Aspects

Many of the challenges in question are not directly attributable to the Court: although rapid trials are generally favored, atrocities related to war crimes are so widespread that, naturally, such international trials take much longer (Vega, 2020). In addition to the unreliability of many countries in upholding justice, they persist in not cooperating with the Court and the case of Al Bashir is the better illustration.

The ICC has many positive qualities, such as witness protection, victim participation and the different rights and guarantees of the accused. Throughout its trials, ICC defendants are held in a human and well-staffed detention center in the city's international zone (Vega, 2020). The characteristics of the Court to date are a model of equality and humanity. Although incomplete, it could ultimately be an essential organ for maintaining world peace for all.

Conclusion

Member States should strengthen their support to the ICC because its mandate faces growing threats from some countries. Africa has so far served as an unfortunate, though ineffective, model for ICC action, but may be a lesson for the Court for future policies. Ensuring justice on one continent is undoubtedly insufficient in a world of six others. The ICC will have to expand its reach, but it can only do so with the right tools such as a reform of the UN Security Council, which is politicized by the veto of some powerful countries that express their animosity towards the Court.

Reforms of the ICC are also needed to better achieve justice. In this regard, the current Prosecutor Karim Khan is very experimented because his experience in the major trials in Africa makes him a judge appreciated in the Continent. Determined to strengthen an institution weakened by meager results, he has opened an investigation on war crimes and crimes against humanity committed during the conflict in Ukraine.

Despite gaps and missteps, the ICC has become an important part of the global order of justice. It is time for the Court to take stock and reflect critically on its performance over the past years. Victims of atrocious crimes need the ICC to become a reliable and credible force in international justice, now more than ever.

Recommendations

- The four former presidents of the ICC's Assembly of States Parties, the legislative body of States that ratified or acceded to the Rome Statute have recommended that:
- The Court should clarify the legal standards it applies to its criminal proceedings, work based on clear prosecution strategies and policies, put an end to its endless internal disputes, and resolve its administrative problems head-on.
- They believe that an independent assessment of the functioning of the Court by a small group of international experts is necessary. The rejection of an investigation of war crimes and crimes against humanity in Afghanistan by the Court's judges on 12 April 2019, citing a lack of confidence that the Court could carry out the work, is an excellent example.
- We think that the complementarity principle, whereby the ICC acts only when national courts are unwilling or unable, is at the root of this problem. Respect for international law and fair universal justice seems out of reach, as some countries believe that they are inherently above these laws, and some believe that they can take justice into their own hands.
- Regarding the States' cooperation to hand off perpetrators of atrocious crimes, the ICC can follow the example of the Schengen Corridor which facilitates judicial control. Mutual extradition laws should be adopted by the States parties to facilitate rapid judicial proceedings.
- We also think that a potential deterrent may be a ban on indicting leaders while in office following the immunity legal basis in international law.

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