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ASSESSING THE EFFICACY AND HURDLES CONFRONTING THE INTERNATIONAL CRIMINAL COURTS:

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ABSTRACT

This study undertakes a comprehensive analysis to evaluate the effectiveness and challenges encountered by International Criminal Courts (ICCs). In the adjudication and punishment of individuals culpable for the gravest violations of international law, ICCs play a crucial role.¹ This study critically examines the achievements and constraints of ICCs as they carry out their legislative objectives. By examining a range of jurisprudential scenarios and delving into crucial concepts such as enforcement mechanisms, jurisdiction, and the impact of political factors, substantial knowledge is gained regarding the complex domain of international law.² The research highlights ongoing discussions regarding the operational effectiveness of the International Criminal Court (ICC) and proposes prospective areas that require improvement in order to enhance its efficiency in the pursuit of international justice. In essence, this explication endeavours to contribute to the ongoing dialogue concerning the future trajectory of international criminal justice and the imperative for a more efficient and fair approach to adjudicating transnational transgressions..³

INTRODUCTION

Overview and Contextual Foundation of the International Criminal Court

Established in 1998 and put into operation in 2002, the International Criminal Court arose amidst a critical period in the history of international criminal law.⁴ By means of Security Council

¹ James A. Goldston, *Don't Give Up on the ICC*, FOREIGN POLICY (Aug. 8, 2019), <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icchague-war-crimes/> [https://perma.cc/PHS4-8XGP]

² Douglas Guilfoyle, Part I – This is not Fine: The International Criminal Court in Trouble, EJIL: TALK (Mar. 21, 2019)

³ Christian Wenaweser, ICC Review Conference: Opening Remarks, Int'l Crim Ct., available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statementsChristianWenaweser-ENG.pdf (last visited April 12, 2011).

⁴ Bartram Brown, 'International Criminal Law: Nature, Origin and A Few Key Issues' in *Research Handbook on International Criminal Law* (2011, Edward Elgar)

resolutions, the Yugoslavia and Rwanda tribunals were established in 1993 and 1994,⁵ respectively, signifying substantial advancements in the effort to address international offences. It was believed that the establishment of the ICC supplemented pre-existing ad hoc accountability mechanisms. Additional ad hoc tribunals were established after the International Criminal Court, including the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.⁶ As a consequence of the increased activism in international criminal law that accompanied the establishment of the ICC, new mechanisms devoted to preventing and punishing atrocity crimes were developed.

Established twenty years ago, the ICC was initially hailed as a triumph for international criminal law and the principle that perpetrators of atrocity crimes ought to be held personally liable. However, its reputation has since waned. The court has faced criticism on account of its restricted track record of successful convictions, persistent internal judicial disputes, and tense alliances with major international powers, most notably the United States. The United Kingdom publicly criticised the International Criminal Court (ICC) at the 17th Assembly of States Parties for allegedly failing to meet the standards set during the Rome Statute negotiations in 1998.

The United Kingdom expressed apprehensions regarding the performance of the ICC in a statement to the Assembly of States Parties: "[W]e cannot assume everything is normal while burying our heads in the sand. The numbers are disheartening. "Nearly two decades and one and a half billion euros have passed with only three convictions for serious crimes." This highlights the declining level of interest in the ICC, which in turn necessitates an analysis of the substantial obstacles it presently faces. The objective of this evaluation is to assess the gravity of the court's current challenges in light of its core objective of eliminating impunity.⁷

CHALLENGES FACES BY ICC & THEIR IMPLICATIONS

Limited Convictions:

At present, the International Criminal Court (ICC) is beset by formidable obstacles that call into question the legitimacy of the court. The challenges at hand comprise shortcomings in the

⁵ Beth Van Schaack and Ron Slye, 'A Concise History of International Criminal Law' (2007) <<http://digitalcommons.law.scu.edu/facpubs/626>> accessed 21/11/2018

⁶ History, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/office-of-the-prosecutor/history> [perma.cc/BS6R-HGQ9].

⁷ Rebecca Gordon, Why Are We Above International Law?, THE NATION (Mar. 26, 2019), <https://www.thenation.com/article/archive/rebeccagordon-international-criminal-court-john-bolton/> [perma.cc/7XDSM8SY].

prosecution's track record, internal strife among the judges of the court, and tense diplomatic ties with prominent international actors, such as Russia and the United States.

Since its inception seventeen years ago, the International Criminal Court has successfully prosecuted a mere eight defendants. It is worth mentioning that an appeal resulted in the reversal of the conviction of one defendant, Bemba, whereas another defendant, Al Mahdi, pled guilty. In addition, four convictions resulted from violations of Article 70 pertaining to judicial administration. The penalties for these more recent transgressions, which were all associated with the investigation into the Central African Republic, varied only slightly, from six months to three years in length.

One of the individuals convicted of fundamental offences was Katanga (DRC), who was given a 12-year term of imprisonment. However, eight years later, he was transferred back into the custody of the Democratic Republic of the Congo (DRC)⁸ with the "sentence served" acknowledged. Al Mahdi (Mali), who pleaded guilty and was given a nine-year sentence, and Lubanga (DRC), who was given a fourteen-year sentence, comprise the remaining convictions. Ntaganda was convicted most recently on accusations of war crimes and crimes against humanity. A significant sentence is anticipated for Ntaganda, considering the gravity of the offences for which she was convicted, even as the sentencing process is ongoing.

Prosecutorial Criticisms:

It would be prudent to abstain from criticising the court for its failure to obtain convictions for every defendant, given that all courts have an obligation to respect the rights of the defence and maintain the presumption of innocence. Achieving a conviction rate of one hundred percent is an uncommon and exceptional occurrence in any courtroom. However, the prosecutor of the court may face scrutiny due to their practise of initiating a restricted number of prosecutions and presenting cases that lack adequate legal strength. Significantly, the Trial Chamber reprimanded the Office of the Prosecutor ("OTP" or "Prosecutor") in the Gbagbo case⁹, which resulted in an

⁸ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006), <http://www.iccpi.int/iccdocs/doc/doc305330.pdf>. 224 Callixte Mbarushimana arrested in France for crimes against humanity and war crimes allegedly committed in the Kivus (Democratic Republic of the Congo), INT'L CRIM. CT., (Oct. 11, 2010), [http://www.icccpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr581](http://www.icccpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr581).

⁹ Situations and Cases, INT'L CRIM. CT., available at <http://www.icccpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/> (last visited Apr. 23, 2011).

acquittal, for submitting a case marked by disarray and legal fragility.

Throughout the Gbagbo proceedings,¹⁰ the prosecutor was confronted with obstacles from the very beginning. The prosecutor was reprimanded by the Pre-Trial Chamber during the confirmation of charges phase for attempting to build a case for crimes against humanity on the basis of unsubstantiated evidence obtained from press articles and NGO reports. As a result, the Pre-Trial Chamber granted the prosecutor an extra five months to gather additional evidence that could withstand critical examination and aid in the validation of the charges levied against Gbagbo.

During the course of Gbagbo's trial, the prosecution presented an extensive array of documents and presented a multitude of witnesses; however, they were unable to establish a connection between Gbagbo and the violence in Côte d'Ivoire. The Trial Chamber ordered the prosecutor to submit an additional brief, which was intended to clarify and better organise all the evidence presented during the trial, after several years of trial proceedings. As a result, Gbagbo was absolved by the Trial Chamber on January 15, 2019, following the denial of a motion to appear in court, which was filed at the conclusion of the prosecution's argument.

The prosecution was subject to severe criticism from the Trial Chamber. The prosecutor was censured by the judges for improper management of tangible evidence, dependence on hearsay testimony, and manipulated approaches to gathering evidence. Furthermore, the trial chamber justices conducted a thorough examination of the prosecutor's overly complex case theory. Judge Henderson observed that while the prosecutor's account appeared internally consistent and plausible at first glance, it was significantly deficient in direct evidence to support her account of the events. Conversely, she put forth a complex and multifarious evidentiary case that was predominantly supported by circumstantial evidence. The prosecutor's strategy was described by Judge Tarfusser as a "vortex of circularity,¹¹ self-reference, and repetition," which added complexity to the Chamber's undertaking. In addition, the Trial Chamber judges censured the prosecutor for insufficient filings, improper courtroom conduct, and mismanagement of courtroom time. According to former International Criminal Court judge Christine Van Den

¹⁰ Kevin Jon Heller, *Well, the Gbagbo "No Case to Answer" Appeal Should Be Interesting*, OPINIO JURIS (Jan. 22, 2019), <http://opiniojuris.org/2019/01/22/well-the-gbagbo-no-case-to-answerappeal-should-be-interesting/> [perma.cc/2UM7-C9DU]

¹¹ Hemi Mistry, *The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals*, 17 INT'L CRIM. L. REV. 17 (2017).

Wyngaert, the Gbagbo prosecution was a "fiasco," and as Douglas Guilfoyle has observed, the conditions surrounding the acquittal appear to warrant a severe reprimand.

One may contend that a court with a limited number of convictions has not fulfilled its objectives of combating impunity and deterring the commission of atrocity crimes. The argument posits that for the court to effectively serve expressivist goals, combat impunity, or act as a deterrent for atrocity crimes, it must pose a credible threat to those who should apprehend accountability. Advocates often posit that the mere possibility of International Criminal Court (ICC) accountability has the potential to deter atrocities and that the existence of such institutions can alter behavior. However, the reality includes several unsuccessful investigations and prosecutions by the prosecutor.

Notably, the Gbagbo case, discussed earlier, resulted in an acquittal, and a similar outcome occurred for his aide. The Kenyan cases involving Kenyatta and Ruto collapsed before reaching trial, and the initiation of the Afghanistan investigation was recently rejected by one of the court's pretrial chambers. As pointed out by Jim Goldston, a disconcerting pattern emerges when a court established to "put an end to impunity" for "the most serious crimes," dealing with a limited number of cases at an annual cost exceeding \$150 million, produces more acquittals and dismissals than convictions.

Secondly, the ICC's judges have exhibited discord among themselves, demonstrated inconsistency in applying substantive law, and some have become embroiled in a public salary dispute. These issues collectively contribute to a negative perception of the court as a faltering institution. Observations suggest a lack of harmony among ICC judges, with concerns raised about a breakdown in collegiality affecting the formal coherence of court decisions and its broader legitimacy. Recent instances of discord reached a higher threshold when Judge Ibanez Carranza dissented from a decision assigning a different judge to preside over an appeal. Her dissent prompted a joint declaration by the ICC President and Judge Hofmanski, and she publicly characterized the issuance of such a joint declaration as a potential abuse of administrative functions. As noted by Kevin Jon Heller, the public airing of disagreements over presiding judge appointments reflects a troubling state of affairs at the Court.¹²

¹² ICC, Thomas Lubanga Dyilo Sentenced to 14 Years of Imprisonment, ICC-CPI-20120710-PR824 (July 10, 2012), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr824> [perma.cc/VWX2-N4KU]

Internal Judicial Discord:

The presence of internal strife among ICC judges is conspicuous, which has adverse effects on the formal consistency of court rulings and undermines the institution's broader legitimacy.

Public disputes concerning judge appointments and salaries serve to exacerbate an unfavourable perception, thereby implying a dearth of unity within the judiciary.

Inconsistent Application of Substantive Law:

A lack of consensus exists among the judges of the ICC regarding the application of the law, which leads to inconsistent decisions.

Dissenting opinions and accusations levelled against judges in different cases, including the Ruto and Sang ruling, impede the formation of consistent jurisprudence and threaten the court's perceived legitimacy.

Strained Relationships with Global Powers:

The recurrent exercise of veto power by Russia and China in the Security Council hinders the referral of cases to the International Criminal Court (ICC), particularly in Syria, thereby restricting the court's influence and scope.

Historical animosities towards the United States, as exemplified by the American¹³ Servicemembers Protection Act of 2002, have subjected personnel of the International Criminal Court to non-compliance and arrest threats.

Some ICC member states have failed to cooperate in the execution of arrest warrants, despite their obligations; this exemplifies the broader difficulty in garnering international support.

Implications:

Criticisms of prosecutorial strategy and the ICC's insufficient success in obtaining convictions undermine the organization's credibility.

The observed lack of consensus among justices and the inconsistent implementation of substantive law undermine the court's perceived legitimacy.

Relationships with significant powers that are tense impede the ICC's ability to carry out its mandate on the international stage.

¹³ BENYERA, Everisto. Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States. *Politeia*, 2018, Vol. 37, No. 1, pp. 1–30.10.25159/0256-8845/2403

FUTURE OF ICA

In order to confront the obstacles encountered by the International Criminal Court (ICC), it is crucial to adopt a comprehensive strategic approach.¹⁴ To begin with, the prosecutor of the International Criminal Court should redirect their efforts towards constructing cases against lower-level perpetrators rather than presidents and prime ministers. By finding motivation in instances of triumph such as Lubanga and Ntaganda, the prosecutor may optimise their endeavours by pursuing more targeted prosecutions against individuals who are accused of particular offences; this will enhance the probability of securing convictions. By emulating the Yugoslavia tribunal's approach of prosecuting lower-level leaders prior to higher-level defendants, the International Criminal Court (ICC) can lay a solid groundwork for the prosecution of leaders from the same nation or circumstance.¹⁵

Furthermore, it is imperative for the prosecutor to meticulously deliberate on future case selection, taking into account various elements including the likelihood of establishing a precedent for subsequent high-level prosecutions, the potential for successful convictions, geographic diversity, and political ramifications. The importance of strategic case selection is already recognised in the ICC's recent Strategic Plan, which prioritises restricted cases that centre on crucial elements of victimisation or single accused individuals. The objective is to enhance accountability and establish a solid groundwork for subsequent cases involving more senior accused. This strategy favours the calibre of the work conducted over the quantity of inquiries, with the aim of establishing enduring legitimacy and credibility.¹⁶

Thirdly, the prosecutor must ensure that the evidence submitted in politically contentious cases is sufficiently strong to withstand political pressure. Drawing lessons from past failures, such as the investigation into Afghanistan, the International Criminal Court ought to formulate efficacious communication and public relations tactics in order to mitigate criticism and political repercussions.

Moreover, specific procedural elements, including the presence of Pre-Trial Chambers, might

¹⁴ Kenneth Roth, Endorse the International Criminal Court, in 3 TOWARD AN INTERNATIONAL CRIMINAL COURT? 19 (Council on Foreign Relations ed., 1999).

¹⁵ FORD, Stuart. Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention. Loyola of Los Angeles International and Comparative Law Review, 2019, Vol. 43, pp. 101–123.

¹⁶ ICC: Judges Reject Afghanistan Investigation, HUMAN RIGHTS WATCH (Apr. 12, 2019), <https://www.hrw.org/news/2019/04/12/icc-judgesreject-afghanistan-investigation> [perma.cc/5Q6J-WRDJ].

require reevaluation. Scholars contend that a reassessment of the existing procedures, which necessitate Pre-Trial Chambers to vouch for charges, could potentially optimise the process, thereby circumventing superfluous delays.

In addition, justices of the ICC should strive to establish consensus regarding substantive law. The enhancement of communication, coordination, and knowledge exchange among judges has the potential to foster greater consistency and uniformity in decisions, thereby fortifying the judicial integrity of the ICC.

In conclusion, improving collaboration among member states and international stakeholders is imperative for the triumph of the ICC. In light of the fact that investigations are highly reliant on the cooperation of host nations, the International Criminal Court must allocate resources towards bolstering support from member states and the international community at large.

Recognising the significance of the International Criminal Court (ICC) and the potential impediment to efforts to combat impunity in the event of its failure is crucial for safeguarding the institution's vital function in international criminal justice. Sustained investment and support for a more efficient International Criminal Court (ICC) are crucial for maintaining the ideal world in which legal principles come before coercion.

RECOMMENDATION FOR ICC:

1. Maintaining Judicial Independence:

To maintain the integrity of the ICC, one must maintain an unwavering dedication to the independence of the judiciary. It is imperative that all proceedings rigorously conform to judicial principles in order to guarantee impartiality, objectivity, and the absolute absence of political sway. Furthermore, it is essential to broaden the operational extent of the ICC beyond Africa. In addition to showcasing a dedication to international justice, this action will effectively debunk any suspicions of regional partiality or political influence.

2. Global Cooperation and Respect for ICC Requests:¹⁷

The efficacy of the ICC is fundamentally dependent on the cooperation of all states. Providing timely responses to requests from the International Criminal Court (ICC), even if it means a slight

¹⁷ A Hierarchy of the Goals of International Criminal Courts, supra note 26, at 188-92 (discussing the extensive literature on the goals of international criminal courts).

erosion of sovereignty, is crucial. The credibility of the ICC is contingent upon states adhering to its directives. It is crucial, particularly in regions such as Uganda and the DRC, to indict chiefs of state. This clearly establishes that political leaders, like any other individual, are liable to comply with international law, thereby dismantling the concept of immunity attached to referrals.

3. Ratification of Rome Statute by Major Powers:

The International Criminal Court must actively lobby major powers including the United States, Russia, and China to ratify the Rome Statute in order to strengthen its international stature. This stage is essential in order to amass widespread international backing. Strategically, the proposition that non-ratifying states refrain from voting on Security Council matters pertaining to ICC referrals guarantees that critical decisions are solely influenced by committed stakeholders.

4. Managing Victim Expectations and Outreach:

In order to effectively manage expectations, the ICC must proactively broaden its outreach initiatives. This requires victims and the international community to be informed of the court's jurisdictional boundaries. It is crucial to denounce bilateral treaties between the United States and other countries that pertain to offences within the jurisdiction of the International Criminal Court. This denunciation emphasises the critical nature of unhindered global collaboration in order to prevent major powers from impeding the mandate of the ICC.

5. Learnings from Ad Hoc Tribunals:

By drawing insights from ad hoc tribunals, the International Criminal Court ought to investigate the possibility of plea bargains involving subordinate officials. With the careful implementation of this strategy, trials may be expedited through the acquisition of crucial witness statements against prominent individuals. Nonetheless, precautions must be taken to avert the pervasive exploitation of the plea bargain system. Furthermore, in order to maintain financial equilibrium, the International Criminal Court ought to refrain from allocating its budget exclusively to a single nation. Instead, it should prioritise prosecutions according to the severity of criminal liability.

6. Caution on Oversight Mechanism:

It is critical to prioritise recommendations over the imprudent implementation of an oversight mechanism. Immediate challenges, such as exerting pressure on permanent Security Council members to ratify the Rome Statute, should be the primary concern. The necessity of an

enforcement mechanism should be assessed in light of operational obstacles and the extent of state involvement. Implementing oversight prematurely could potentially allocate resources away from more critical issues.

7. Active Role of the Security Council:

It is crucial to advocate for a more proactive role for the Security Council. A strong message will be conveyed by imposing travel restrictions and sanctions on nations that provide safe havens for the ICC or refuse to cooperate with it. Nevertheless, prudence is required in light of the Security Council's intrinsically political character, which could potentially undermine the judicial independence of the ICC. Maintaining a delicate equilibrium is critical in order to guarantee fruitful cooperation while preserving the integrity of the court.

CONCLUSION

The future vitality of the ICC is contingent on a wholehearted acceptance of change. By adopting a proactive and nuanced approach towards addressing procedural, prosecutorial, and judicial concerns, the enduring accountability mechanism in international criminal justice can be strengthened. Every recommendation is crucial in directing the ICC towards a future characterised by increased effectiveness and respect.¹⁸

In summary, this exhaustive evaluation sheds light on the complex terrain of International Criminal Courts (ICCs), underscoring their crucial function in bringing to justice those who have committed the most egregious violations of global law. By conducting an exhaustive examination of achievements, obstacles, and the dynamic international environment, this research offers significant perspectives on the intricate domain of international law.¹⁹

Substantive and multifarious obstacles confront the International Criminal Court (ICC), including a scarcity of successful prosecutions,²⁰ censure from prosecutors, internal discord within the judiciary, inconsistent enforcement of substantive law, and tense relations with international powers. The court's effectiveness is hindered by these challenges as a whole, which raises

¹⁸ Lilian A. Barria & Steven D. Roper, How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR, 9 INT'L J. HUM. RTS. 349, 359-362 (2005) (basing an evaluation of effectiveness on the number of individuals indicted, arrested, and tried).

¹⁹ Geoff Dancy & Florencia Montal, From Law versus Politics to Law in Politics: A Pragmatist Assessment of the ICC's Impact, 32 AM. U. INT'L L. REV. 645, 660 (2017)

²⁰ James Meernik, The International Criminal Court and the Deterrence of Human Rights Atrocities, 17 CIVIL WARS 318 (2015).

concerns regarding its credibility and influence on an international level.

In order to confront these challenges and strengthen the future of the ICC, strategic recommendations have been formulated. Every suggestion, including the promotion of major powers' ratification of the Rome Statute and the preservation of judicial independence, contributes to the development of a more efficient and fair international criminal justice system.

An approach to change that is both nuanced and proactive is crucial for the ICC's future. By implementing revised prosecutorial tactics, reevaluating procedural elements, cultivating judicial consensus, and obtaining increased cooperation from member states, the International Criminal Court (ICC) can effectively navigate its present challenges and establish itself as a more resilient institution.

This exposition not only emphasises the urgency of implementing immediate reforms but also recognises the possible obstacles to the fight against impunity in the event that the ICC were to experience setbacks.²¹ A world in which international violations are held accountable and the rule of law takes precedence over coercion is inextricably linked to the ongoing discourse concerning the prospective trajectory of the ICC. The maintenance of a more efficient International Criminal Court continues to be of the utmost importance in defending the cause of international justice.

²¹ See generally Sigall Horovitz et al., The International Criminal Court, in *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 223, 223-252 (Yuval Shany ed., 2014).