

Selective Justice of the International Criminal Court: An Analysis through the TWAILian View

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Abstract: The International Criminal Court (ICC) is widely regarded as one of the most significant achievements of the new millennium. However, the ICC's credibility is currently being questioned for a variety of reasons. One of the key issues is the selective justice of the court. Burundi and several African nations declared their decision to depart the court in 2016, while the Philippines' exit in 2018 sparked even more controversy regarding its credibility. The legal and political validity of the court's jurisdictional range is one of the most contentious issues that has aroused a lot of debate in recent years. The ICC has been attacked for being primarily political rather than established on the rule of law for its previous prosecutions that did not extend beyond the geographical area of Africa. Another controversial aspect is the Security Council referrals against non-party states that arose as a result of the Darfur crisis and the subsequent confrontation between Sudan, the African Union, and the International Criminal Court. The major goal of this article is to assess the procedural justice mechanism of the ICC using the Third World Approach to International Law (TWAIL). It argues that existing established conceptions about the ICC's justice delivery mechanism is a missing key considerations that a TWAIL approach would include. It demonstrates why the biased application of international criminal law undermines this rationale and how this might be corrected both normatively and practically. It explains how making relevant proposals might improve the ICC's trial procedures. This article ends by constructing a viable conceptual model that serves as a foundation for potential solutions to these issues that are both logical and consistent with the goals of the ICC.

1. Introduction

The International Criminal Court (ICC) was created to support the national and international legal systems and additionally, act as a court of ultimate recourse. According to the Rome Statute, every state is required to use its criminal jurisdiction over people who commit international crimes.¹ For its complementary role, one may initiate the ICC's jurisdiction only in specific circumstances: when state and international courts refuse or are unable to prosecute criminals, when the United Nations Security Council (UNSC) instructs the Court to act, or when individual states refer situations to the Court.² The Court's jurisdiction has been sought via all three means during its functional history since 2002, culminating in charges in various cases. The defendant in the majority of these cases has been African.³

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¹ Rome Statute of the International Criminal Court 1998.

² *ibid*, Art 13-15.

³ International Criminal Court 'Situations Under Investigation' (International Criminal Court) <<https://www.iccpi.int/pages/situations.aspx>> accessed 18 February 2022.

Because these numbers are disproportionate, some have argued that The International Criminal Court is just another tool for imposing Western political dominance over international law. Critics consider the Court's failure to pursue severe international crimes committed outside of Africa as marginalizing Africans while favoring Western involvement under the pretext of universal justice.⁴

The International Criminal Court (ICC) is frequently accused of having a legitimacy problem. Most legal experts and political theorists, who examine the subject, argue that the Court is flawed in terms of legitimacy, some of which are due to its structure and others which are its fault. According to the Third World Approach to International Law, the Court's most often stated legitimacy-damaging flaws are:

1. That it has been prosecuting people selectively;
2. That its jurisdiction has been unfairly limited;
3. That there has been a regional disparity in its enforcement;
4. That it has failed to bring charges against perpetrators who have a better probability of being prosecuted;⁵ and
5. It has been used as a tool of neocolonialism by Western countries.

The primary goal of this paper is to examine the justice delivery mechanism of the International Criminal Court which has recently been accused of being biased, through the lens of Third World approaches to international law and to provide a conceptual framework for mitigating such a crisis.

2. Selective Justice in International Criminal Law

One of the toughest challenges in international criminal justice to solve is prosecution selectivity. According to John Rawls, justice is typically linked to fairness, the evaluation of procedural fairness is frequently centered on the challenges, advantages, penalties, and incentives of the process, while keeping in mind how the result will be reciprocal and mutual.⁶ An unbiased procedural justice system exists when the desired outcome cannot be determined by a distinct criterion, instead, a proper or just process is followed, and as a result, the result is also proper or just.⁷

Selectivity includes two facets: legality and legitimacy.⁸ The first consideration is the prosecutor's independence, specifically whether or not they choose cases to pursue on

⁴ Lee J. M. Seymour, 'The ICC and Africa: Rhetoric, Hypocrisy Management, and Legitimacy' in Kamari M Clarke, Abel S Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press 2016) 107.

⁵ Ali Ezzatyar, 'Fending off Failure: The International Criminal Court's New Chief Prosecutor' *The Moderate Voice* (San Diego 2012) <<http://themoderatevoice.com/151042/fending-off-failure>> accessed 15 Feb 2022.

⁶ John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14 *Philosophy and Public Affairs* 3.

⁷ Birju Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) 18 *Journal of International Criminal Justice* 1.

⁸ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005) 193.

their own initiative or are guided by outside sources.⁹ The latter relates to a more fundamental issue in which the choice of cases is influenced by political influence, favoritism, or power.¹⁰ Effective and fair implementation of the law is necessary for rule of law compliance. This is in jeopardy if prosecutors choose not to charge a specific category of criminals or a specific group of offenders.¹¹

3. TWAIL's Perspective on the Selective Application of Justice of the ICC

The Third World Approach to International Law is a movement that is interdisciplinary, academic, interpersonal, and political and is committed to exposing the imperial and colonial roots of international law.¹² According to Makua Muta, a great TWAIL critic, TWAIL sees international law as primarily 'illegitimate', in that it 'legitimizes, reproduces, and perpetuates the looting and enslavement of the Third World by the West', particularly about emerging countries.¹³ TWAIL's main goal is to learn more about how third-world countries are impacted by the implementation of international law. The term "third world" is no longer limited to a geographical category or as a descriptor for developing and underdeveloped countries, it is instead regarded as a social revolution dedicated to the advancement of repressed or disadvantaged people's interests. These individuals include people from underdeveloped countries in the Global South or marginalized groups in advanced Western liberal democracies, such as women, people of color, indigenous people, and communities in poverty.¹⁴

TWAIL's position on the ICC's selective justice is conflicted. In one sense, the ICC is considered a way through which third-world communities can look for defense against the misuse of state power; while in another, it is regarded as ordinary colonial rule. The latter speaks about the spread of Western liberal values into relatively weaker nations.

The ever-recurring and unresolved question of selectivity is one constant in the volatile arena of international criminal justice. It has surfaced in numerous critiques of international criminal law's structures, practices, rhetoric, and consequences. Each international criminal tribunal, previous or current, has had to deal with accusations of lack of legitimacy and fairness, Victor's justice, selectivity, neocolonialism, and other stinging complaints. Such criticisms are particularly vexing and uncomfortable because they are attempting to demonstrate how closely the project is connected to hegemonic power: its roots, integration, and participation in global (economic, cultural, and gender-based) dominance structures. In today's jargon, rifts and

⁹ *ibid.*

¹⁰ James Crawford (ed), *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press 2003) 575.

¹¹ Cryer (n 7) 193.

¹² Michael Fakhri, 'Introduction- Questioning TWAIL's Agenda' (2012) 14(1) *Oregon Review of International Law* 1.

¹³ Makua W. Muta, 'What is TWAIL?' (2000) University at Buffalo School of Law 31.

¹⁴ Emirjon Kaçaj, 'Interrelationship Between State and Individual Criminal Responsibility in International Law' (2018) *Human Rights Brief Spring*.

escalation stemming from this relationship are commonly referred to as “crises”.¹⁵ Despite the seeming fleeting nature of the crisis terminology, the project has been plagued by lethargy since the beginning, yet it still seems to be going strong. Every institution had to strive for legitimacy because none was spared from the “original sin”.¹⁶ Some of these detractors regarding the International Criminal Court are; the Unequal application of law, the UN Security Council's role in establishing the tribunals, and its authority to report cases to the ICC may have implications for similar eventualities as well as prolonged inquiry. Selectivity: it may also be triggered by a disproportionate prosecution emphasis that reflects the worldwide distribution of power and local power inequalities, as well as external assumptions toward the operation of judicial institutions.¹⁷ Geopolitical bias might also be present in the way norms, institutions, and practices are designed, as well as in how norms are implemented through discretionary decision-making.

4. Factors that Give Rise to the Accusation that the ICC is Selective

The primary objective of the ICC is to guarantee that crimes do not go unpunished and that they are effectively prosecuted to end the impunity of their perpetrators.¹⁸ The Court's mandate also reinforces the goals and tenets of the UN Charter, particularly the ban on using force or threatening to use it against a state's political or geographical independence.¹⁹ Notwithstanding all of this praiseworthy groundwork, the ICC system's current approach to administering international criminal justice falls short of achieving the requisite impartiality and independence.²⁰ Several of the factors leading to the claim that the ICC engages in discriminatory justice include some controversial jurisdictional issues; political factors influencing the Security Council's authority to bring a matter; the biased selection of cases by the Office of the Prosecutor (OTP) etc. These are covered in greater depth under the following headings:

4.1. Controversial Jurisdictional Issues

The ICC's subject-matter jurisdiction is limited to four specific offenses (genocide, crimes against humanity, war crimes, and aggression).²¹ Third-world nations, on the other hand, believe that nuclear weapons usage, terrorist activity, drug smuggling, illicit trade in weapons, and money laundering should all be included as aspects of crime in the jurisdictional ambit of the ICC. Terrorist violence has grown throughout

¹⁵ Darryl Robinson and others, *Oxford Handbook of International Criminal Law* (First edn, Oxford University Press 2020) 630.

¹⁶ *ibid.*

¹⁷ John Reynolds and Sujith Xavier, 'Dark Corners of the World: TWAAIL and International Criminal Justice' (2016) 14 *Journal of International Criminal Justice* 963.

¹⁸ RSICC 1998, Preamble.

¹⁹ *ibid.*

²⁰ Celestine Nchekwube Ezennia, 'The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?' (2016) 16 *International Criminal Law Review* 450.

²¹ RSICC 1998, Art 5.

West Africa in recent years, severely destabilizing already fragile states. A survey has revealed that the unlawful trade in tiny weaponry has been accused of the continuance of hostilities across the African continent. The international flow of armaments has been connected to an upsurge in conflict in neighboring regions by identical armed groups, disputes frequently seem to follow the movement of guns.²² However, because the ICC lacks jurisdiction over such matters, it has nothing to do with these contentious problems.

When a suspected crime occurs on a non-state territory to the Statute, the ICC has only two options for exercising its jurisdiction,

- If such a state voluntarily refers the situation to the ICC's jurisdiction; or
- If the matter is forwarded to the prosecutor by the UN Security Council.²³

However, as witnessed most recently in the cases of Myanmar and Israel, the ICC's Pre-trial Chamber (PTC) decided to commence prosecutorial investigations against states that are not parties in the absence of state consent.

The notion of complementarity is enshrined in the Preamble's paragraph 10 as well as Article 1 of the Statute and in Articles 15, 17, 18, and 19. Article 17 of the Rome Statute provides, that the complementarity of national and international criminal authorities generates shared liability for ICC offenses.²⁴ Unless such a national jurisdiction is absent or insufficient, the ICC does not replace the national criminal justice system of state parties with jurisdiction to prosecute international crimes.²⁵ In reality, the complementarity concept has mostly failed to eliminate impunity or encourage the implementation of global legal standards. In this regard, the following examples should be mentioned:

- **Situations in Sudan and Uganda:** Even though both nations have established specialized criminal courts in their respective regions, the ICC investigations in Uganda and Sudan, weakened the concept of nations' primary culpability for international crimes that undermines the complementarity principle.
- **The scenario in Kenya:** The Prosecutor vs. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali²⁶ and the Prosecutor vs. William Samoei Ruto and Joshua Arap Sang,²⁷ these cases are the result of a prosecutorial pro bono inquiry during the post-election violence in 2007. Kenya argued that the instances were inadmissible since investigations into the occurrences had already begun. The

²² Ineke Mules, 'Stemming the Flow of Illicit Arms in Africa' *DW* (Germany, 26 July 2019) <www.dw.com/en/stemming-the-flow-of-illicit-arms-in-africa/a-49761552> accessed 3 March 2022.

²³ RSICC 1998, Art 13(b).

²⁴ M Rafiqul Islam, 'National Trial of International Crimes in Bangladesh: Its Significance in International Criminal Law' in Mofidul Hoque and Umme Wara (eds), *First Winter School Journal: Genocide and Justice in Bangladesh* (Liberation War Museum 2014) 51.

²⁵ RSICC 1998, Art 17.

²⁶ Pre Trial Chamber II, Case No ICC-01/09-02/11 (23 January 2012).

²⁷ ICC, Case No ICC-01/09-01/11 (23 January 2012).

Pre-Trial Chamber dismissed the claim because the Kenyan investigations did not include the same behavior and individuals, which is a required prerequisite for inadmissibility.

- **Trial of Saif al-Islam Gaddafi:** The ICC Pre-Trial Chamber 1 accused Saif al-Islam Gaddafi of allegedly committing war crimes in 2011 during the uprising in Libya while he was under the supervision of the Government of Libya. In determining whether the case against Saif al-Islam Gaddafi was admissible,²⁸ the Pre-Trial Chamber 1 stated that the ICC has jurisdiction over the case because the accused was ineligible to accept a fair trial. After all, the Libyan government then encountered significant difficulties in adequately enforcing its authority across the huge province. In disobedience of the ICC judgment, the Libyan government refused to send Saif al-Islam Gaddafi to the ICC and launched proceedings in Libya with other Gaddafi-era officials in detention.

Following the preceding instances, the ICC confronts conflicting national criminal jurisdictions, and non-compliance with the ICC's conception of its complementarity rule remains a difficult barrier to mutual accountability.

4.2. Political Influence on the UN Security Council (SC)

The drafters of the Rome Statute gave the UN Security Council, operating under Chapter VII of the UN Charter, the authority to submit situations involving international crimes to the Court.²⁹ The Security Council, as the ultimate political body, inevitably bases its decisions on political motives and objectives, including the decision of whether to refer cases to the ICC.³⁰ This puts victims in a precarious position since the likelihood of their cases being submitted to the Court is likely to be influenced by several different political factors. The two key factors are listed below:

- (a) The SC's involvement in the establishment and administration of international courts spans all levels of the judicial process, and the potential for political intervention.
- (b) Ironically, the USA, Russia, and China are not at all parties to the Statute, but as Council permanent members, they have the authority to veto any proposed agreement to refer a case to the ICC.

4.3. The Biased Selection of Cases by the Office of the Prosecutor (OTP)

The Office of the Prosecutor (OTP) of the International Criminal Court is thought of as the heart of the court. The Rome Statute gives the OTP the power to conduct investigations on a case on his own initiative.³¹ To evaluate the process's legitimacy it

²⁸ *Prosecutor v Saif al-Islam Gaddafi and Abdullah Al-Senussi* [2013] ICC 01/11-01-11.

²⁹ RSICC 1998, Art 13.

³⁰ Jose Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 912.

³¹ RSICC 1998, Art 15(1).

is important to assess whether the OTP applies its discretionary power in conformity with previously established norms.³² However, establishing a separate Prosecutor as a part of the Court was a source of significant controversy and passionate argument at the Rome Conference and beforehand.³³ OTP's practice has been challenged on multiple occasions for lack of procedural legitimacy such as selective exercise of jurisdiction.

There is some discretionary decision-making involved in the OTP selection process.³⁴ As a result, exercising discretion needs human subjective judgment rather than being a mechanical procedure.³⁵ The OTP has the option of opening an inquiry based on referrals from the UN Security Council or by choosing cases that the court has authority over. The prosecutor uses discretion when determining admissibility by taking into account the standards of compatibility, seriousness, and interest in justice.³⁶ However, these decisions are influenced by ambiguous considerations, such as the degree to which a state has shown sufficient interest in conducting an investigation or the degree to which a prosecution would be justifiable.³⁷ The main driving force behind the selection process is the unpredictable use of prosecutorial discretion.

5. Geopolitical Selectivity of the ICC and the Immunity of the Western States

Geopolitical selectivity is one of the most challenging issues in international criminal justice. It's no surprise, that the ICC's case selection has long been a source of contention. The ICC has been accused of using political violence against Africa. The US collaborates with its European partners to control the ICC even though it is not a party to the Rome Statute. The ICC prosecutes Africans while dismissing identical crimes perpetrated by others and Africa is distrustful of the motives of Western states that influence the ICC due to its history of racism and colonialism.

According to TWAIL, geopolitical selectivity is referred to as the selective application of International Criminal Law to the weaker or less powerful, which renders the ICL Eurocentric, marginalizes the Third World, and serves as a tool of Western dominance.³⁸ TWAIL contends that international law embodies and promotes the West's marginalization and dominance of Third World states. From its beginning in 2002 to the present, eleven out of the sixteen cases under investigation by the ICC have

³² Allison Marston Danner, 'Enhancing The Legitimacy And Accountability Of Prosecutorial Discretion At The International Criminal Court' (2003) 97 *American Journal of International Law* 510.

³³ Jose Doria and others (n 30) 349.

³⁴ Kotecha (n 7) 115.

³⁵ *ibid.*

³⁶ RSICC 1998, Art 53(1)(a)-(c).

³⁷ Kotecha (n 7) 116.

³⁸ Asad Ghaffar Kiyani, 'International Crime And The Politics Of International Criminal Theory' (DPhil Thesis, the University of British Columbia 2016).

included African states.³⁹ As a result, there is a widespread belief in Africa that the OTP uses geopolitical considerations to attack Africa while ignoring atrocities that are being committed by the US along with its companions in Syria, Iraq,⁴⁰ and Afghanistan. TWAIL critique further argued that, The OTP yields to Western diplomatic policy's demands,⁴¹ which is regarded as a continuance of power inequalities dating back to colonial times. TWAIL experts say that the ICC can repeat existing disparities in international law – particularly because of its universal jurisdiction, which is, in reality, focuses on non-Western players in its implementation.⁴²

5.1. The Apparent Africa Bias of the ICC

Africans have been subjected to a selective application of international criminal law, which has had a negative effect on the international court and the laws it upholds. The critics assert that the ICC has a prejudice against Africans about the overwhelming number of African cases that have been brought before the Court. Advocates react by saying that African governments themselves presented the vast majority of those cases to the ICC.⁴³



Map of Key ICC-Related Locations in Central Africa⁴⁴

³⁹ ICC (n 3).

⁴⁰ Sara Sanbar, 'Twenty Years on, Iraq Bears Scars of US-led Invasion' *Human Rights Watch* (New York 19 March, 2023) <<https://www.hrw.org/news/2023/03/19/twenty-years-iraq-bears-scars-us-led-invasion#>> accessed 11 July 2023.

⁴¹ Alexis Arieff and others, *International Criminal Court Cases in Africa: Status and Policy Issues* (Congressional Research Service 2011).

⁴² Asad Ghaffar Kiyani, 'A TWAIL Critique of the International Criminal Court: Contestations from the Global South' (2011) ISA Annual Convention, Montreal 17-19 <<https://www.cpsa-acsp.ca/papers-2011/Kiyani.pdf>> accessed 21 February 2022.

⁴³ Robinson and others (n 15) 154.

⁴⁴ Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2019).

The ICC indicted 28 people for crimes committed under its jurisdiction during its first decade of operation (2002–2012), and they are all from Africa.⁴⁵ This calls into question whether the ICC selectively pursues cases involving Africa. There are now 123 nations that have ratified the Rome Statute of 1998, with 33 African countries contributing 30% of the overall membership, the highest percentage of any region of the globe as a result the chance of perpetrating ICC crimes in Africa would be brings attention than in any other region. The African cases before the ICC were intractable and continuing, and African governments tried in vain to resolve them through domestic processes before taking them before the ICC. In comparison to the role of state parties from other continents, African state parties have been pioneers in referring matters to the ICC.⁴⁶

Table 1: The cases made before the Court against Africa from 2005 to 2019

Case Start	Country	Person Charged	Status
2019	CAR	Said	Pretrial
2018	Mali	Al-Hasan	Trial
2018	CAR	YekatomNgaissona	Trial
2017	Libya	Al-Werfalli	Pretrial
2015	Mali	Al-Mahdi	Repatriation
2015	Kenya	Bett	Pretrial
2015	Kenya	Gicheru	Pretrial
2013	Kenya	Barasa	Pretrial
2013	CAR	Bemba	Imprisonment
2013	Libya	Khaled	Pretrial
2012	Ivory Coast	Simone Gbagbo	Pretrial
2012	Sudan	Hussein	Pretrial
2012	DRC	Mudacumura	Pretrial
2011	Ivory Coast	Laurent Gbagbo and BleGoude	Acquittal
2011	Kenya	Kenyatta	Charges withdrawn
2011	Libya	Qaddafi	Pretrial
2011	Kenya	Ruto and Sang	Charges vacated
2010	DRC	Mbarushimana	Charges Dismissed
2009	Sudan	Abu Garda	Charges Dismissed
2009	Sudan	Al Bashir	Pretrial
2009	Sudan	Banda	Trial
2008	CAR	Bemba	Acquittal

⁴⁵ Over 60 percent of African states are ICC parties and the Court has actively been involved in seven situations: Central African Republic, Ivory Coast, Democratic Republic of the Congo, Kenya, Libya, Sudan, and Uganda.

⁴⁶ Rafiqul Islam (n 24).

Case Start	Country	Person Charged	Status
2007	Sudan	Abd-Al-Rahman	Pretrial
2007	Sudan	Harun	Pretrial
2007	DRC	Katanga	prison sentence
2007	DRC	Ngudjolo Chui	Acquittal
2006	DCR	Lubanga	Prison Sentence
2006	DCR	Ntaganda	Prison Sentence
2005	Uganda	Kony	Pretrial
2005	Uganda	Ongwen	Convicted

Sources: International Criminal Court; CNN⁴⁷

The table above shows that, while all of the African references are founded in the black letter of the law, they each reflect different obligations and rationales for invoking the ICC's legal power and jurisdiction. This is mirrored in part by the three unique subcategories into which they might be classified, namely, State referrals, Security Council cases, and Prosecutor-initiated investigations. The chart highlights a variety of crucial facets of Africa's relationship with the ICC, in addition to the purely procedural, highlighting the apparent truth that all incidents under examination originated on the continent. The first situation (Uganda) and three others (CAR, the DRC, and Mali) are referred to by their governments. Three of those four (Democratic Republic of the Congo, Uganda and Central African Republic) were referred to the active assistance of the ICC Prosecutor. Indeed, despite appearances, the first move toward referral was taken in The Hague rather than in the capitals of the referring countries. All engaged anti-government insurgents or "rebels" who were involved in major and continuous crimes and were originally silent about their involvement.⁴⁸ The Security Council forwarded two of the cases, including those involving active heads of state (Bashir of Sudan and Gaddafi of Libya), to the ICC, while the other two (Kenya and Cote d'Ivoire) were begun pro bono by the ICC prosecutor. It should also be noted that, as of the end of April 2017, only one other country – the case of Georgia – was the subject of an ICC inquiry.

The African Union (AU) has aggressively opposed various ICC initiatives, raising concerns among supporters of the Court that it might stop receiving support from its biggest regional block. The AU decided not to enforce arrest warrants for Bashir or Gaddafi because it disagreed with the ICC's attempts to bring charges against the countries' leaders. Jean Ping, the head of the AU Commission, has consistently claimed that the ICC Prosecutor treats Africa unfairly.⁴⁹

⁴⁷ Claire Klobucista and Mariel Ferragamo, 'The Role of the International Criminal Court' (*Council on Foreign Affairs* 2021) <<https://www.cfr.org/backgrounder/role-international-criminal-court>> accessed 15 February 2022.

⁴⁸ Joe Oloka Onyango, 'Unpacking the African Backlash to the International Criminal Court (ICC): The Case of Uganda and Kenya' (2020) 4(1) *Strathmore Law Journal* 41.

⁴⁹ Richard Lough, 'African Union Accuses ICC Prosecutor of Bias' *Reuters* (London, 29 January 2011).

The Court has aggressively pursued only those individuals it considers to be weak and shielded by the UN Security Council. The International Criminal Court, for example, has turned a blind eye to blatant human rights violations in Iraq, Afghanistan, and Gaza. Instead, it has decided to charge Africans. Even in the five African nations where the Court has chosen to intervene, the Court has been politically selective in the human rights violations it pursues. As a result, the Court's assertions that it has ended impunity have been refuted.

The ICC's founders believed that the ICC would prevent further atrocities by ending impunity.⁵⁰ However, some commentators suggest that the ICC's performance should be measured not just in terms of previous crimes punished, but in its investigations' impact on reducing bad behavior both now and in the future. The ICC's investigations in Africa, which have focused on regions where atrocities are still occurring or have just now stopped, have placed a specific emphasis on the goal of deterrence. According to some observers discrepancies between the ICC's global objective and its reliance on state enforcement capacities have been made clear by the court's inability to apprehend suspects in Sudan.

African sovereignty concerns have been raised by the ICC's investigations, owing in part to the continent's lengthy history of foreign meddling. The ICC, according to President Paul Kagame of Rwanda, is a form of "colonialism that seeks to undermine people from impoverished and African nations, and also other weaker nations in terms of financial development and politics".⁵¹ According to some critics, due to geopolitical factors, the prosecutor has limited his or her investigations to Africa, either to avoid conflict with powerful countries or as a tool of Western diplomatic strategy.

5.2. De Facto Immunity of Western States

The jurisdiction of the ICC is deemed universal, even though the court is based on treaties, which generally precludes universal application. Western states, on the other hand, are de facto immune from ICC prosecution.⁵² Three of the Security Council's five members (China, Russia, and the United States) are not signatories to the Rome Statute, with only the United Kingdom and France having done so.

However, even if they are parties to the Statute, the United Kingdom and France are largely unaffected by the Court's jurisdiction, because it only pertains to the state under review not being able or willing to exercise jurisdiction.⁵³ As a result, as long as the United Kingdom and France are willing and competent to conduct an inquiry, the matter remains inadmissible before the ICC. The United States frequently asserts that it opposes the Court's exercise of jurisdiction over nationals of non-party states who

⁵⁰ RSICC 1998, Preamble.

⁵¹ AFP, 'Rwandan President Says ICC Targeting African countries' *Sudan Tribune* (Sudan, 31 July 2008); Max du Plessis, *The International Criminal Court that Africa Wants* (Institute for Security Studies 2001).

⁵² Kiyani (n 42).

⁵³ RSICC 1998, art 17.

commit international crimes on the territory of state parties.⁵⁴ Certainly, as stated by Ambassador David Scheffer before the US Senate:

‘Our standing is crystal clear: If a non-party state does not ratify the treaty, its official activities shouldn’t be accessible to the court’s jurisdiction, unless the Security Council takes action in accordance with the UN Charter.’⁵⁵

Furthermore, The Statute grants Western countries de facto jurisdictional protection by authorizing any two countries to reach an agreement that prevents the ICC from carrying out an arrest or transferring a person from one country to another.⁵⁶ The US was fast to sign numerous of these agreements, occasionally coupled with a threat to stop providing military or development financing.⁵⁷ This is merely another chance for Western countries to raise their voices against the ICC’s jurisdiction, culminating in anything less than the Court’s universal jurisdiction.

5.3. Atrocities Committed in Afghanistan by US Military Force

The abuses against Afghan captives by the USA have been documented by Human Rights Watch and other organizations. Since the US-led war that deposed the Taliban administration in late 2001. Human Rights Watch uncovered credible evidence of mistreatment or brutality by US forces in 2004, including physical assaults, immersion for detainees with cold water and frigid temperatures, and forcing prisoners to remain awake and endure prolonged painful standing or kneeling.⁵⁸ Because Afghanistan is a member of the Rome Statute, the ICC has jurisdiction over war crimes, crimes against humanity, and genocide (including crimes committed by non-state parties’ citizens) perpetrated on Afghan soil after May 1, 2003. In this respect, the ICC has jurisdiction over the US military for atrocities committed in Afghanistan. Consequently, Fatou Bensouda, the prosecutor of the ICC, asked authorization from the court’s judges on November 20, 2017 to launch an inquiry into possible war crimes and crimes against humanity perpetrated in Afghanistan from May 1, 2003. The US administration contends that non-party state nationals are not subject to the ICC’s jurisdiction even conducting atrocity crimes on the territory of a state party. The United States Armed Forces and the Central Intelligence Agency are currently being investigated for war crimes against around eighty victims who reportedly underwent torture and brutal treatment, violations of human dignity, rape, and other types of sexual abuse. There is now a possibility of retaliation by the United States in this circumstance. “This is an utterly amazing act by an unelected political group posing as a legal institution,”

⁵⁴ Michael S. Greco, ‘Statement on Behalf of the United States of America’ (ABA-ICC Project 2017) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-USA.pdf> accessed 18 Feb 2022.

⁵⁵ Robinson and others (n 15) 427.

⁵⁶ RSICC 1998, art 17.

⁵⁷ Kiyani (n 38) 14.

⁵⁸ Human Rights Watch, ‘Afghanistan and the International Criminal Court’ *Human Rights Watch* (New York, 20 November 2017) <<https://www.hrw.org/news/2017/11/20/afghanistan-and-international-criminal-court>> accessed 18 February 2022.

Pompeo said, adding, "To protect our countrymen from this renegade, so-called court, we shall take all necessary measures." In April 2019, Pompeo refused Prosecutor Bensouda a visa to the United States in support of then-National Security Advisor John Bolton who was strongly opposed to the ICC.⁵⁹

5.4. Russia/Ukraine: A Morbid Apathy

The preliminary examination began in Ukraine on April 25, 2014, and was completed in December 2020. Even though Ukraine is not a Party to the Statute, the Court has jurisdiction under Article 12(3) because it agreed to the Court's authority. As a result, the Court has jurisdiction over events that occurred beginning on November 21, 2013, when enormous protests erupted in Kiev's Maidan Square against the incumbent President, Viktor Yanukovich, and his reluctance to sign an Association Agreement with the EU. The departing prosecutor, Fatou Bensouda, declared herself satisfied in December 2020 that the legislative prerequisites for initiating an inquiry into the situation in Ukraine had been reached. The OTP determined that a series of crimes, including crimes against humanity and war crimes, had been perpetrated and that the court had jurisdiction since the competent authorities have been either unwilling or unable to prosecute themselves. While the probe into Ukraine may appear to be a chance to respond to ICC accusations, the climax began to become less certain after Russia withdrew from the Statute (it was a signatory to the Rome Statute but never ratified) in 2016, right after ICC declared the war between Russia and Ukraine in Crimea to be an international one. Because of Russia's removal from the court and the resulting lack of cooperation, it will be impossible to bring either Russians to justice. The next stage in the legal procedure is to ask the Pre-Trial Chamber for permission to launch an inquiry into the situation in Ukraine. Meanwhile, the Office is taking steps to ensure the integrity of any future examination into the situation in Ukraine. However, it is quite unlikely that the ICC would be successful in bringing the perpetrators to justice.

5.5. Iraq War: The Invasion

Let us now shift our attention to the Iraq-UK issue, which is also a depressing narrative. The most recent chapter in the saga began in May 2014, when ICC Chief Prosecutor Bensouda stated that she will restart an investigation into claims of war crimes committed by British soldiers operating in Iraq from 2003 to 2008. This decision reversed the earlier decision of her predecessor, Luis Moreno Ocampo, to close the preliminary examination into the same conduct in 2006.

Six and a half years later, in December 2020, the Prosecutor reported that the second preliminary examination had likewise been completed, without moving to seek that an investigation be initiated. The judgment was based on the issue of legality, namely whether the UK had been "shielding" prospective suspects by not progressing with

⁵⁹ *ibid.*

national prosecutions. The question was whether these processes, as insufficient and faulty as they were, met the OTP's "genuineness" criteria outlined in its Policy Paper on Preliminary Examinations (PE). In the end, the ICC's Iraq-UK PE went unaddressed because it was unable to address both the UK's Iraq War legacy and the ICC's dysfunction. The year 2014 was a landmark event for the United Kingdom, and not simply because of the PE, which may have saved the country from utter shutdown early on. It was a poisoned headache that the ICC didn't need, emphasizing the limitations of PEs rather than their potentials.

5.6. Impacts of Such Afro-centric Approach: The Biased implementation of the law

The ICC's obsession with Africa has certain negative consequences. This is making the ICC's legitimacy more challenging to establish.

Question has been raised that if Kenya can be prosecuted, why can't Afghanistan and Palestine?⁶⁰ This is, in fact, one of the African Union's key complaints about the ICC's purported African bias. Sudan has likewise made a similar point on several occasions. "The Court is essentially political; thus, it is not competent to achieve any form of justice. In the 14 years since its establishment it has ruled on four — just four — cases, all of them concerning African nationals, after rejecting more than 9,000 other complaints." the Sudanese envoy said during a recent SC hearing on the situation in Sudan.⁶¹

The initiatives of the ICC in Africa fail to promote confidence in the Court as the stronghold of fairness and equality that the region envisioned. According to the AU, the charges against al-Bashir, Kenyatta, and Ruto show that the same Western countries have politicized the ICC and refuse to join it and its founding treaty. As a result, the Court's reputation as an impartial and independent court has come under scrutiny. Unless the Court addresses its legitimacy issue, it will keep losing the respect and backing of African leaders and nations, and those folks will impede the work of the Court.

The spectrum of offenses coming under the jurisdiction of the ICC is generally centered on basic civil and political rights which are non-exhaustive and preferential in favor of the West omitting rights of particular relevance to Third World peoples. This results in a false conflict narrative to the disadvantage of Third World populations.

The ICC's lack of legitimacy begs the question of whether regional law enforcement would provide an effective replacement. In addition, some questions emerge, is it possible for a continent like Europe or Africa to be said to as a "political community"

⁶⁰ Valentina Azarova and Triestino Mariniello, 'Why the ICC Needs A 'Palestine Situation' (More Than Palestine Needs the ICC): On the Court's Potential Role(s) in the Israeli-Palestinian Context' (2017) 11(1) Human Rights and International Law 115.

⁶¹ Security Council, *The Situation in the Middle East S/PV.7833* (UN 13 December 2016) <<https://documents-dds-ny.un.org/doc/UNDOC/PRO/N16/433/87/PDF/N1643387.pdf?>> accessed 16 February 2022.

whose people share common Ideals and passions that should be protected by a regional criminal code managed by regional legal institutions?⁶²

As discussed earlier, the ICC is facing certain jurisdictional issues as a result of cases developing in the Middle East and Southeast Asia, and there are additional concerns resulting from the ICC's trigger mechanism, such as the acts of the OTP. These matters also require a lot of attention to be addressed, but instead of focusing on them, the ICC is busy charging African countries one after the other. In most of these cases, the investigation began several years ago but has yet to see the light of a final decision to proceed.

6. Moving Forward: Strengthening the ICC's Justice Delivery Mechanism and Recognition

Though the challenges that the ICC is facing are unavoidable, some of them may be fixed to strengthen the organization. These are covered in the section that follows:

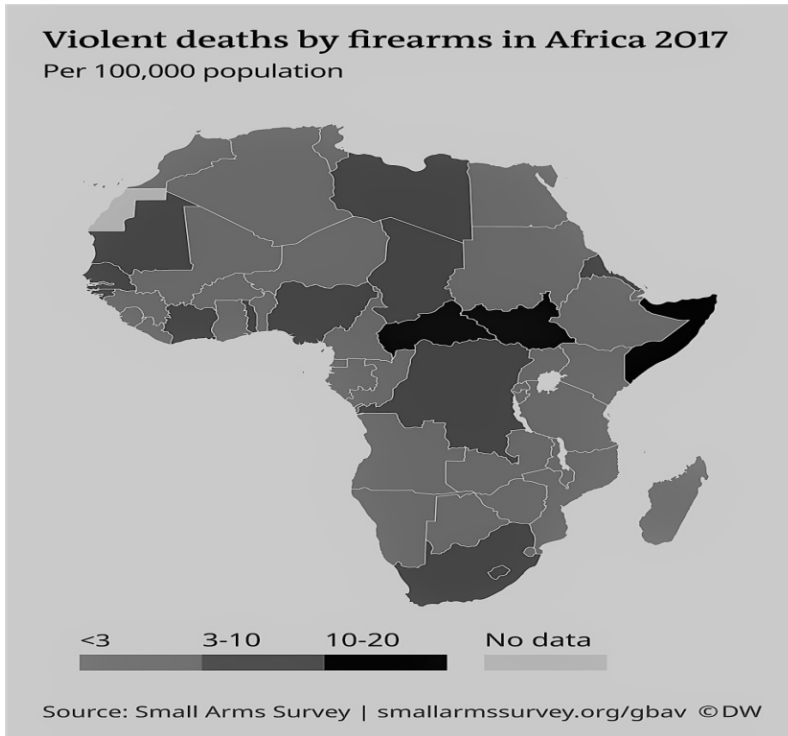
Broadening the Scope of the Subject Matter Jurisdiction: The anticipated subjective jurisdiction for modern International Criminal Law may include a broader range of crimes, some of which are neocolonial, such as mercenaries, embezzlement, money laundering, illicit arms trafficking and the illegal extraction of natural resources.⁶³ The illegal trafficking of firearms or illicit arms trade is rapidly rising in third-world countries, particularly in Africa, creating a hot issue of debate around the world. Take, for example, Mali, Niger, Cameroon, and Chad, which have seen the creation of a "patchwork of Islamic Extremist Groups". The Western Sahel region is now experiencing a surge in terrorist violence, with over 4,000 deaths reported in 2019.⁶⁴

These situations in Africa should be resolved as quickly as feasible to ensure equitable justice and uphold the universal jurisdiction of the ICC. It is high time for the ICC to widen its jurisdictional authority and include terrorism and illegal arms trafficking as crimes under its jurisdictional ambit.

⁶² Robinson and others (n 15) 201.

⁶³ Gennady M. Danilenko, 'The Statute of the International Criminal Court and Third States' (2000) 21(3) Michigan Journal of International Law 445.

⁶⁴ Méryl Demuynck, Tanya Mehra and Reinier Bergema, *ICCT Situation Report: The Use of Small Arms & Light Weapons by Terrorist Organizations as a Source of Finance in West Africa and the Horn of Africa* (International Centre for Counter-Terrorism 2020) <www.jstor.org/stable/resrep25263> accessed 3 March 2022.



Map 2: Areas, where deaths were caused by firearms in Africa in 2017.⁶⁵

Strengthening Regional Entities at the Domestic Level: State actors may try to avoid probable ICC jurisdiction by altering local legal systems and marketing them as legitimate and credible alternatives to the ICC. Conducting trials on African land would be a powerful symbolic gesture, as near as feasible to the murder scenes and the locations of the victims. The participation of regional institutions in Africa is critical for the ICC's approval. It would make sense to have a regional African criminal court, because the ICC is a court of last resort, and it might help the ICC's legitimacy.⁶⁶

Regional African Criminal Court: The African Court of Justice (ACJ) was envisioned as the AU's primary judicial instrument in the Founding act. The Protocol creating the ACJ was established in 2003, and it was ratified by eighteen African countries, putting the Protocol into force.⁶⁷ In 2004, the African Court on Human and Peoples' Rights (ACHPR) was formed, and it began operations in 2008. The ACJ and the ACHPR were proposed to be merged because the ACHPR's usefulness was being questioned. The new African Court of Justice on Human and Peoples' Rights (ACJHR) would be

⁶⁵ Ineke Mules, 'Stemming the flow of illicit arms in Africa' DW (German 26 July 2019) <www.dw.com/en/stemming-the-flow-of-illicit-arms-in-africa/a-49761552> accessed 3 March 2022.

⁶⁶ Joanna Nicholson, 'Introduction: Strengthening the Validity of International Criminal Tribunals' (2017) 17(4) *International Criminal Law Review* 587.

⁶⁷ Protocol of the African Court of Justice of the African Union 2004.

established as a result of this, and it would be responsible for offenses carried out on the continent of Africa.⁶⁸

Establishing Regional Chambers of the International Criminal Court: The ICC could establish a local or regional trial chamber, located outside of the ICC's headquarters and capable of conducting trials relating to a specific scenario or collection of geographically linked circumstances. Moreover, in its ordinary sense, the Rome Statute allows the ICC to relocate the trial to a location other than The Hague.⁶⁹

Decentralization of the Powers of the Office of the Prosecutor: Taking into account the challenges posed by the case selection policy of the Office of the Prosecutor and the ICC's overreliance on it, it is now pivotal to delegate the OTP's authority and improve its case selection policy. In Louise Parrott's view, to preserve the ICC's dignity, prosecutorial discretion must be handled with caution. It should be reviewed through a system of checks and balances. In this sense, forming some supplementary investigative bodies in addition to the OTP may be an appropriate method of checking and balancing of the power of the OTP.⁷⁰ A specific complementarity and external relations unit under the Prosecutor's Immediate Office could be a valuable instrument for facilitating access to information, promoting, monitoring, and appropriately assessing national initiatives to address crimes within the Court's jurisdiction. The installation of a system known as the 'Investigation Oversight Office (IOO)' is a novel way to balance the generally one-sided investigation.⁷¹ This could be an effective strategy to solve the problems with the Office of the Prosecutor in the following manner:

- (i) It may relieve the OTP of undue investigative power.
- (ii) If the investigation supervision is concerned about the OTP's investigations, it may propose to the PTC or TC that additional investigative steps be requested.
- (iii) The Investigation Oversight Office's competent supervision may shorten the lengthy process of the OTP's investigation.
- (iv) The ICC's over-reliance on the OTP will be reduced.

This could be an effective strategy to solve the problems with the Office of the Prosecutor. As the ICC lacks its own police forces to ensure the arrest of individuals charged with crimes or the production of evidence, the cooperation of both state parties and non-state parties is required to fulfill this enforcement duty. A unified legal framework must be adopted to improve the Court's legitimacy.

⁶⁸ Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity' (2019) 17(5) *Journal of International Criminal Justice* 1005.

⁶⁹ RSICC 1998, Art 62.

⁷⁰ Louise Parrott, 'The role of the International Criminal Court in Uganda: Ensuring that the pursuit of justice does not come at the price of peace' (2006) 1 *Australian Journal of Peace Studies* 1.

⁷¹ Elmar Richard Widder, 'A fair trial at the International Criminal Court?: human rights standards and legitimacy' (Electronic Dissertation, University of Hull 2015) <<http://hydra.hull.ac.uk/resources/hull:13606>> accessed 2 March 2022.

7. Recommendations

The following is a list of recommendations based on a thorough analysis of the information:

- i. The ICC should ensure that the jurisdiction is applied universally rather than selectively applied.
- ii. Terrorism, illegal arms trafficking, money laundering, and other crimes should be included in the ICC's jurisdictional purview.
- iii. If the ICC is to be recognized by the public, the complementarity principle stated in Article 17 of the Rome Statute must be treated seriously.
- iv. ICC should operate independently, avoiding the influence of UN bodies such as the Security Council.
- v. If the International Criminal Court wishes to demonstrate its emancipatory potential, it should begin by prosecuting modern colonial crimes. The ICC would have major possibilities to do so if it could exercise jurisdiction over circumstances like Palestine or Afghanistan.
- vi. For the sake of the Court as a whole, the Office of the Prosecutor's functions must be made as efficient as possible. The Court cannot function without a professional and effective prosecutor's office. To increase transparency in the Prosecutor's activities during the examination process, the office should produce regular reports on its activities.
- vii. The Office of the Prosecutor must maintain close contact with the affected communities to appropriately represent their interests.
- viii. In strengthening the ICC's procedural legitimacy, other oversight bodies, such as the Investigation Oversight Authority, may be useful besides the Office of Prosecutor.
- ix. The establishment of ICC regional circuit chambers could be a viable option for realigning the relationship between the African Union and the ICC.
- x. Strengthening the provincial justice delivery system and institutions. Without looking at the ICC's 'external part,' it is impossible to completely comprehend how it will operate. In this context, substantial collaboration between the ICC and state parties is required.
- xi. Taking into account institutions' "structural bias," Strategic legal advocacy should be strengthened for the legal processes to investigate, prosecute, and adjudicate international crimes in a consistent and even-handed way.
- xii. The ICC should also have a system for determining the genuine basis for state referrals, with these considerations, a state's voluntary referral of offenses to the ICC should not be seen as a blanket endorsement of international criminal justice.

- xiii. Legal scholars must develop a sociological perspective and grasp numerous characteristics of societies and their norms, as well as how they function independently and about one another.

8. Conclusion

Third-world nations welcomed the ICC as a beacon of hope for addressing the injustices caused by colonial domination. However, regrettably, it has fallen short of the public's expectations on several grounds, e.g. contradictory jurisdictional principles, complicated, politically influenced and biased tribunal proceedings, and selective application of laws. For instance, the UN Security Council's power to refer a case is largely motivated by political considerations on the part of UN member states such as the United States, Russia, and China, which have not ratified the Rome Statute. Secondly, the ICC's repeated allegations against African states since its inception have highlighted the geopolitical selective application of law rather than its unbiased application. Also, powerful nations like the US and Russia are immune from prosecution even when they commit more serious crimes than other developing countries.

It has been observed through this study that Western countries have utilized the ICC to exert dominance over third-world countries by accusing leaders such as Omar Al-Bashir and Muammar Gaddafi so that their political strength may dwindle. South Africa has defied the ICC's instructions, openly criticized the Court, and indicated its intention to withdraw from the Rome Statute because the presidents of Sudan, Libya, and Kenya were prosecuted for political reasons, contrary to international law. The US and its allies use the ICC as a political tool to remove African rulers they detest.

The global criminal justice system is becoming more centralized, which is reducing regional variation. At this juncture, state collaboration has emerged as a crucial prerequisite that, in the end, brings offenders to justice and ensures the International Criminal Court's mandate as articulated in its preamble. Besides, the credibility of the ICC will be strengthened if an unbiased attitude is shown towards powerful nations.

