

OBSTACLES TO THE APPLICATION OF INTERNATIONAL JUSTICE: RULES OF REFERRAL TO THE INTERNATIONAL CRIMINAL COURT AND POLITICAL CONSIDERATIONS OF THE SECURITY COUNCIL.

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INTRODUCTION

The establishment of the International Criminal Court (ICC) was a beacon of hope in an armed, conflict-torn world.¹ The international organization was established “to put an end to impunity for the perpetrator” of “the most serious crimes of concern to the international community as a whole” as reflected in the Rome Statute,² which has been ratified by 123 nation-states around the globe, giving the court jurisdiction to investigate and prosecute war crimes, crimes against humanity, genocide, and the crime of aggression.³ However, the ICC has been riddled with controversies since its inception, with many prominent Western nations and key players of the UN Security Council’s (United Nations Security Council) failure to ratify the convention.⁴ A thorough analysis of the last twenty years since the establishment of the ICC points to deeper concerns in the referral mechanism and how external political, economic, and social factors influence the independent body.⁵ Established on the principle of Complementarity Jurisdiction, proceedings can be initiated at the ICC through three referral mechanisms: (1) referral by the United Nations Security Council, (2) self-referral by the member states or state parties, and (3) referral by the Prosecutor (Proprio Motu Investigations).⁶ However, the ICC suffers from fundamental structural defects in its referral mechanism and this has rendered it an obstacle to peace in most

¹ GEORGHIOS M. PIKIS, *THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT I* (2010).

² Rome Statute of the International Criminal Court pmbl, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

³ *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 2, 2020, 12:00 AM), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states> [https://perma.cc/PUL5-XPJD].

⁴ Frankie Wong, *Criticisms and Shortcomings of the ICC*, ACCESS ACCOUNTABILITY (Sept. 26, 2019), <https://accessaccountability.org/index.php/2019/09/26/criticisms-and-shortcomings-of-the-icc/> [https://perma.cc/E8S4-K88P].

⁵ Moses Retselisitsoe Phooko, *How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court*, 1 NOTRE DAME J. OF INT’L COMP. & HUM. RTS. L. 182, 196 (2011).

⁶ Gabriel M. Lentner, *The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism*, 20 INT’L CRIM. L. REV. 251 (2020).

of the conflicts in which it has inserted itself.⁷ This study aims to analyze these referral mechanisms and how political pressure and procedural ambiguity hinder achieving the International Criminal Court's mandate.

The first part of the study is dedicated to analyzing the preliminary investigation process, examining the three referral mechanisms that initiate a proceeding before the ICC. In doing so, each referral mechanism is looked into to determine the lacuna in the law and its implementation that prevents justice. A particular focus will be placed on transparency and selectivity of cases by the Prosecutor and the ICC's obsession with the Sub-Saharan African nations. The study will also look into how external factors and politics of member-states influence the decisions of the independent body, negating the little progress it has achieved since its inception in 2002.

The second part of the study scrutinizes the complicated relationship between the United Nations Security Council and the International Criminal Court, and a theoretical background in the study, with a deep dive into the history of the relationship. The study also looks into how the politics within the UNSC invariably influence the inner workings of the ICC, and how difficult is for the Court to operate without being politicized—attracting criticism from less powerful nations which see the work of the ICC as a tool of Western powers (especially the five permanent members of the UNSC) to change or strengthen the leadership of a country.⁸

Finally, the study will recommend how the fallacies in the triggering mechanism can be rectified to attain justice, through reformation of its structural and procedural flaws which would lead to the restoration of the ICC's credibility and legitimacy. The study will also call for the ICC to minimize political intervention from external factors over the Court that undermine its independence and the sole reason for its existence—fighting impunity and delivering justice.

⁷ Stephen Rademaker, *The ICC's Fundamental Design Flaws Have Only Become More Evident*, INT'L CRIM. JUST. TODAY (May 24, 2021), <https://www.international-criminal-justice-today.org/arguendo/the-iccs-fundamental-design-flaws-have-only-become-more-evident/> [<https://perma.cc/55VB-YUTP>].

⁸ See Louise Arbour, *The Rise and Fall of International Human Rights*, Address at the Sir Joseph Hotung International Human Rights Lecture (Apr. 27, 2011) (transcript available at <https://archive.globalpolicy.org>) [<https://perma.cc/KN7T-XX5B>]; see Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941 (2010).

I. THE REFERRAL PROCEDURES OF THE INTERNATIONAL CRIMINAL COURT

A. SELF-REFERRAL BY STATE PARTIES TO THE ROME STATUTE

Among the three triggering mechanisms under the Rome Statute for the exercise of the International Criminal Court jurisdiction, state-referrals have been the primary practice to date. Five out of eight situations brought before the ICC have been self-referred by states, with Uganda being the first to invoke the Court's jurisdiction on December 16, 2003.⁹ Article 14 of the Rome Statute authorizes state parties to refer any situation (in which one or more crimes within the ICC's jurisdiction appear to have been committed) to the Prosecutor for investigation and prosecution.¹⁰ Instead of states lodging complaints against other states to the Court, which was the provision's initial aim, self-referrals emerged. Thus, the term "self-referral", "auto-referral" or "voluntary referral" is used when state parties refer a situation to the ICC against themselves.¹¹ However, this new practice raises important questions as to its origins, legality, and effects on the Court's validity.

As self-referrals became familiar, a debate among scholars related to their legality was generated.¹² One of the basic arguments challenging the legal basis of the practice was that such referrals are neither expressly provided in the Rome Statute nor can be found during the drafting history.¹³ Professor Schabas refers to self-referrals as a "creative interpretation" of Article 14 of the Rome Statute and an "opportunistic construction."¹⁴ Likewise, Mahnoush Arsanjani and W. Michael Reisman express, in an influential article, their concerns over the compliance of

⁹ Ahmed Samir Hassanein, *Self-Referral of Situations to the International Criminal Court: Complementarity in Practice – Complementarity in Crisis*, 17 INT'L CRIM. L. REV. 107, 107–09 (2017).

¹⁰ Rome Statute, *supra* note 2, art. 14.

¹¹ Michael Ddeme Mukwana, *Self-Referrals to the International Criminal Court: Legal Analysis, Case Studies and Critical Evaluation* (Mar. 2017) (LL.D thesis, University of the Western Cape) (on file with the library of the University of the Western Cape).

¹² *See, e.g., id.*; Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L. 385 (2005); Hassanein, *supra* note 9.

¹³ William A. Schabas, 'Complementarity in Practice': *Some Uncomplimentary Thoughts*, 19 CRIM. L.F. 5, 13–14 (2008).

¹⁴ *Id.* at 12–14.

voluntary referrals to the requirements of admissibility and the “selective externalization of difficult cases” by states to the ICC.¹⁵

Procedure requires a state to refer a specific situation, in writing, to the Court. In requesting a prosecutor to investigate the case, the state triggers the Court’s jurisdiction.¹⁶ The requesting state has to specify the relevant circumstances of the situation and present all the supporting documents that it has in its possession.¹⁷ In this way the state has to identify the situation and set a framework in terms of temporal, territorial and maybe personal aspects.¹⁸ Only after the prosecutor has applied a preliminary examination of the facts can she decide to commence investigating the case.¹⁹ Also, the state needs to have a direct jurisdictional link to the alleged crimes: the crimes need to be committed in the territory of the referring state, by a national of that state, or with the state-party as the custodial state.²⁰

In order to understand and criticize the practice of state-referrals, first we have to explore the principles of complementarity and admissibility. Although the term of complementarity *per se* can’t be found in the Rome Statute, Article 1 provides that “the Court shall be complementary to national criminal jurisdictions.”²¹ The principle of complementarity, which is based on respect for the state sovereignty in the exercise of criminal jurisdiction, entails the supplementary role of the ICC. In short, the ICC does not aim to replace national jurisdiction but simply is a second option in a state’s arsenal against impunity. Admissibility, as a criterion to determine whether the principle of complementarity can apply to a specific case, is subsequent.²² Article 17(1) of the Rome Statute sets inability or unwillingness on the part of the state where the crimes are committed as the two reasons that can invoke the ICC’s jurisdiction.²³

¹⁵ Arsanjani & Reisman, *supra* note 12, at 390.

¹⁶ See Rome Statute, *supra* note 2, arts. 13(a), 14(1).

¹⁷ *Id.* art 14.

¹⁸ Situation in the Democratic Republic of the Congo, ICC-01/04-101-tEN-Corr, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS- 4, VPRS-5, VPRS-6, ¶ 65 (Jan. 17, 2006), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01689.pdf [<https://perma.cc/7566-GZ95>].

¹⁹ Rome Statute, *supra* note 2, art. 15.

²⁰ Hassanein, *supra* note 9, at 119.

²¹ Rome Statute, *supra* note 2, art. 1.

²² Mukwana, *supra* note 11, at 69.

²³ Rome Statute, *supra* note 2, art. 17(1).

B. SELF-REFERRAL AS A TOOL FOR STATES' OWN POLITICAL GAIN

Starting from the actual text of the Rome Statute, the ambiguity of Article 14, which provides for self-referrals, not only raises several questions but also leaves space for opportunistic interpretations. The text allows state referrals without setting any requirements or any framework, while it barely provides qualifiers in Article 17.²⁴ For example, the requirements of admissibility, namely the unwillingness or inability of a state to prosecute the alleged crimes nationally, and the principle of complementarity have never been fulfilled in practice. States may have political, geostrategic, and domestic considerations in mind when referring a case to the ICC but never to fight impunity. To date, the cases brought before the ICC are characterized by a complete absence of national proceedings, and this has led to arguments that admissibility is trumped due to inaction, not unwillingness and inability.²⁵ The ICC itself, rather than supporting states to deal with their cases nationally and carry out their duties, encourages them to exercise the practice of self-referrals.²⁶

In most cases, self-referrals have been a political weapon for state parties to advance their own agenda.²⁷ The potential for manipulation when a state initiates a voluntary referral to the ICC derives from the government's motive to bring an opposition group before the court. In reality, states use the ICC for political and military reasons, namely to pursue their enemies, rather than to provide justice.²⁸ The unfortunate reality is that the Rome Statute leaves plenty of space for the states to do so. As Article 14(2) provides, the state when referring a situation to the court shall specify the relevant circumstances and present supporting documents.²⁹ This gives states the freedom to specify the circumstances of a situation, like the actual events, the actors involved and the crimes committed, according to their political intentions. However, this also allows states to draw a veil over their involvement in the alleged crimes

²⁴ See *id.* art. 17.

²⁵ Darryl Robinson, *The Controversy Over Territorial State Referrals and Reflections on ICL Discourse*, 9 J. INT'L CRIM. JUST. 355, 371–72 (2011).

²⁶ Patrick Wegner, *Self-Referrals and Lack of Transparency at the ICC – The Case of Northern Uganda*, JUST. IN CONFLICT (Oct. 4, 2011), <https://justiceinconflict.org/2011/10/04/self-referrals-and-lack-of-transparency-at-the-icc-%E2%80%93-the-case-of-northern-uganda/> [<https://perma.cc/NWP2-9FCG>].

²⁷ See, e.g., Leila Sadat, *The International Criminal Court*, in CAMBRIDGE COMPENDIUM INTERNATIONAL CRIMINAL LAW 137, 139 (William A. Schabas ed., 2016).

²⁸ See *id.*

²⁹ Rome Statute, *supra* note 2, art. 14(2).

or, on the contrary, their inaction to such atrocities. That is why after a state-referral the Prosecutor still holds the power to decide to investigate case.³⁰

Another hazard that may arise from self-referrals is that it is almost impossible for the court to achieve the full cooperation of the referring state.³¹ Upon the receipt of a state referral, the Prosecutor, if it considers it crucial, may seek supplementary information from the state or other reliable sources.³² However, a state's position can easily change from supporting the ICC's procedures to preventing the progress of the investigations if that progress does not support the referring state's interests. Government authorities will cooperate fully when it comes to targeting an opposing side, such as rebels, as was their aim in the first place, but they are unlikely to contribute to the investigation of charges against pro-government forces.³³ However, this is a general matter of international criminal law since it recognizes territorial states as both lawful authorities that have an active role in the investigations and as possible targets of the investigation.³⁴

1. *The Case for Self-Referral Among African States*

Uganda was the first to refer a situation to the ICC in December 2003.³⁵ During an internal armed conflict between the government and the Lord's Resistance Army (LRA) rebels in northern Uganda, which continued for the past almost twenty years, a number of severe human rights violations had been committed and approximately 1.5 million people were displaced.³⁶ So, Uganda's self-referral to the ICC came not only as a sign of trust to the Court but also as a sign of hope in restoring peace in the area. However, Uganda's aim in referring the situation to the ICC was to target LRA and its activities rather than bring both sides before the Court and fight against impunity or provide justice.³⁷ In reality, the

³⁰ See *id.* arts. 15(6), 53.

³¹ Catherine Gegout, *The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace*, 34 *THIRD WORLD Q.* 800, 805 (2013).

³² Rules of Procedure and Evidence, 2013 ICC, No. 104(2) at 40.

³³ Schabas, *supra* note 13, at 16.

³⁴ Robinson, *supra* note 25, at 368.

³⁵ Uganda, COAL. FOR THE INT'L CRIM. CT., <https://www.coalitionfortheicc.org/country/uganda> [<https://perma.cc/QXV7-JE63>].

³⁶ Denise Dunovant, *Northern Uganda: Protection in Displacement, Protection on Return*, 53 *FORCED MIGRATION REV.* 28 (2016).

³⁷ See Schabas, *supra* note 13, at 9–10.

Ugandan government was unable to solve its long-standing internal problems and used the practice of self-referral to manipulate the ICC according to its political aims.³⁸ The government not only succeeded in its military and political goals, but also the selectivity of the referral allowed the Ugandan army to avoid any prosecution for the atrocities that it committed.³⁹

In the case of the Democratic Republic of Congo (DRC), the country had been suffering from a violent civil war since 1999, during which time gross human rights abuses, like rapes and mass killings, took place leading to more than 3.4 million people to becoming displaced in the DRC.⁴⁰ Soon after the Rome Statute entered into force, the Prosecutor announced his desire to target those bearing the responsibility for the crimes committed in the DRC, as the situation in Ituri was the most urgent for investigation.⁴¹ A year later, the DRC government referred the entire territory of the DRC to the ICC for the investigation of the crimes committed after 2002.⁴² In reality, President Kabila of the Democratic Republic of Congo was using self-referral to the ICC to sideline his political rivals.⁴³ Since Kabila was new to the political arena, he felt safe in doing so, as he was not excessively involved in the situation in Ituri and was unlikely to face charges. His initiative to refer the DRC to the ICC was part of his political agenda, targeting his political opponents with the least reputational cost for himself.⁴⁴

2. *The Manipulation of the ICC for Third State's Political Aims Under Article 98 Agreements*

Under Article 98 of the Rome Statute, the ICC cannot initiate proceedings when the referring state is restricted by obligations to a third state deriving from a bilateral agreement between the two states.⁴⁵ The

³⁸ See Arsanjani & Reisman, *supra* note 12, at 395.

³⁹ Wegner, *supra* note 26.

⁴⁰ U.N. Off. for the Coordination of Humanitarian Affs., *Democratic Republic of the Congo 2004: Consolidated Appeals Process*, at 15, 66, U.N. DOC. OCHA/CAP/2003/47 (Oct. 2003).

⁴¹ Press Release, Int'l Crim. Ct., Communications Received by the Office of the Prosecutor of the ICC (July 16, 2003).

⁴² U.N. GAOR, 59th Sess., 6th mtg. at 4, UN DOC. A/C.6/59/SR.6 (Nov. 1, 2004).

⁴³ See Maria Elena Vignoli, *The ICC's Work in Congo Isn't Done*, HUMAN RTS. WATCH (Aug. 11, 2020), <https://www.hrw.org/news/2020/08/11/iccs-work-congo-isnt-done> [https://perma.cc/D7RR-L6QZ].

⁴⁴ Arsanjani & Resiman, *supra* note 12, at 393–94.

⁴⁵ Rome Statute, *supra* note 2, art. 98(1).

result is that, from one side, states can protect themselves from state referrals and, on the other, the ICC becomes subject to the political influences of states, thus diminishing its effectiveness.⁴⁶ In this way, the more powerful states withdraw from the court's jurisdiction over important cases that involve severe human rights violations, leaving smaller states unprotected and in silence. However, the ICC, as an international institution, has to abide by the rule of cooperation, meaning that it can neither force states to cooperate nor surrender suspects.

The United States took advantage of the opportunity given by Article 98 to prevail over the Rome Statute. In 2002, the state initiated an effort to secure US officials and military personnel from prosecution by the ICC. The Bush Administration, in enacting the American Service-Members' Protection Act (ASPA), not only prohibited any involvement of the US in the ICC proceedings but also started to impose restrictions on third states, in case they were cooperating with the court.⁴⁷ In the same vein, the US started to negotiate agreements with other states to ensure that the signing state would not surrender possible American suspects to the ICC.⁴⁸

The bilateral agreement between Afghanistan and the United States is a clear example of the limitations that Article 98 imposes on the Court's jurisdiction, and, even worse, on justice itself. Although Afghanistan has been a party to the Rome Statute since 2003, giving the ICC the jurisdiction to investigate crimes committed in the territory of Afghanistan and by Afghani nationals, the Court has never investigated any of the atrocities committed by the US forces in the area.⁴⁹ The agreement between the two states preempts any jurisdiction that the Court may have over the crimes committed in Afghanistan by the United States. Even though steps have been taken by the ICC to address some of the human rights violations in the area, the Prosecutor's office until now has only referred to anti-government forces without making any reference to US accountability.⁵⁰ Once again, the ICC is vulnerable to political

⁴⁶ See Nadia Shamsi, *The ICC: A Political Tool? How the Rome Statute is Susceptible to the Pressures of More Power States*, 24 WILLAMETTE J. INT'L L. & DIS. RES. 85, 90 (2016).

⁴⁷ Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 688–89 (2003).

⁴⁸ See Diane Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002).

⁴⁹ Shamsi, *supra* note 46, at 89–90.

⁵⁰ David Bosco, *Is the ICC Investigating Crimes by US Forces in Afghanistan?*, FOREIGN POL'Y (May 15, 2014, 6:07 PM), <https://foreignpolicy.com/2014/05/15/is-the-icc-investigating-crimes-by-u-s-forces-in-afghanistan/> [https://perma.cc/QMW8-L5GR].

influences and pressures by world powers challenging its position as an independent institution.

C. REFERRAL BY THE PROSECUTOR

The Office of the Prosecutor is an independent body of the International Criminal Court responsible for investigating genocide, crimes against humanity, war crimes, and aggression under the Court's jurisdiction.⁵¹ Led by the Prosecutor and Deputies, the role of the Office of the Prosecutor is crucial to the working of the ICC. The ability of the ICC Prosecutor to initiate proceedings *proprio motu* was one of the most heavily debated issues during the formation of the Rome Statute and the ICC.⁵² Today, this power bestowed on the Prosecutor is reflected in the following Articles of the Rome Statute:

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15...

Article 15

Prosecutor

The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.⁵³

However, this power and implementation is not without struggle and has been heavily criticized for factors from discrepancies in selecting an "independent prosecutor" as well as roadblocks in actualizing independency due to built-in procedural mechanisms at the ICC. This section of the significant study will look into the lacuna of the *proprio motu* referral of the Prosecutor of the ICC.

⁵¹ *Office of the Prosecutor*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/otp> [<https://perma.cc/B5LY-RFER>].

⁵² Morten Bergsmo, *The Jurisdictional Regime of the International Criminal Court, Part II, Articles 11-19*, 6 Eur. J. CRIME L. CRIME JUST. 345, 35(1998).

⁵³ Rome Statute, *supra* note 2, art. 15(1).

1. *Independence of the Office of the Prosecutor*

The principle of independence requires that the Office of the Prosecutor avoids seeking or acting on instructions from other sources.⁵⁴ While the prosecutor and his deputies are independent and do not seek or receive instructions from external agencies, such as any government or international organization,⁵⁵ on paper, the actual independence of the OTP is often under scrutiny.⁵⁶ Allegations of politics within the Committee on the Election of the Prosecutor (CEP) by undermining qualified candidates and ignoring the “high moral character requirement” under Article 42(3) of the Rome Statute have been raised time and again in the short timeframe since the establishment of the ICC.⁵⁷ These criticisms truly undermine the independence of the Office of the Prosecutor as well as the investigations initiated by him *suo motto*.

a. *Influence and Political Play of State Parties in Appointing the Prosecutor*

Unlike other independent counsels, the Prosecutor, as well the ICC, is heavily dependent on the member states for funds and resources.⁵⁸ The Prosecutor’s “independence” can often be in jeopardy as he answers directly to the ICC judiciary and directly to member states.⁵⁹

There has been much criticism regarding the election of the Office of the Prosecutor as concerns over circumventing the vetting procedure arose in the 2021 elections.⁶⁰ This failure on the part of the Assemblies of State Parties points to undue influence on the selection of the Prosecutor

⁵⁴ HUMAN RTS. WATCH, *THE SELECTION OF SITUATIONS AND CASES FOR TRIAL BEFORE THE INTERNATIONAL CRIMINAL COURT* (2006).

⁵⁵ Rome Statute, *supra* note 2, art. 42(1).

⁵⁶ *See, e.g.*, OPEN SOC’Y JUST. INITIATIVE, 2020–2021 INTERNATIONAL CRIMINAL COURT PROSECUTOR ELECTION PROCESS, INSIGHTS AND RECOMMENDATIONS FOR FUTURE ELECTIONS (2021).

⁵⁷ *The ICC Prosecutor Election Process: A Post-Mortem*, AM. SOC’Y INT’L L. (Mar. 29, 2021), <https://www.asil.org/event/icc-prosecutor-election-process-post-mortem> [<https://perma.cc/Q6DC-87SX>].

⁵⁸ Rome Statute, *supra* note 2, art. 115.

⁵⁹ Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55. *stan. l. rev.* 1633, 1647 (2003).

⁶⁰ *See, e.g.*, Angela Mudukuti, *Continued Concerns About the ICC Prosecutor Election: No Election Without Vetting*, INT’L JUST. MONITOR, (Feb. 3, 2021), <https://www.ijmonitor.org/2021/02/continued-concerns-about-the-icc-prosecutor-election-no-election-without-vetting/> [<https://perma.cc/PX9D-G7WN>].

striking at the very foundation of the Office, i.e. independence.⁶¹ This also further aggravates the shocking findings in the ICC Independent Expert Review regarding hostile work environment at the International Criminal Court (ICC) and accounts of bullying.⁶² Pursuant to Article 42(3) of the Rome Statute, the high moral character requirement of the Prosecutor was the center focus of the 2021 elections.⁶³ Proceeding without a proper vetting mechanism has been cited as a violation of due process.⁶⁴ This is extremely perilous as any proprio motu investigations by the Prosecutor will be targeted for the failure to vet and discrepancies during the elections period. When member states vote, it is impossible to put aside personal agendas and political motives. NON-ICC members, especially key Western players such as the United States and Russia (against both investigations are underway) would utilize these allegations in dismantling not only proprio motu investigations but also the credibility of the evidence and other procedures in the court. While these criticisms are aimed at the officeholder, rather than the office itself, it is important. Loss of confidence in personnel creates barriers to justice, especially if the Prosecutor is influenced by the member states. How these influences can hamper justice will be discussed further.

b. Office of the Prosecutor's Refusal to Initiate Proceedings in the Case of Chinese Uyghurs

The Office of the Prosecutor's wobbly standards while initiating investigations have often been attributed to undue influence by member states.⁶⁵ Often citing jurisdictional excuses in initiating these proceedings, the OTP has often circumvented these exceptions, especially whilst

⁶¹ See *ASP Presidency Fails to Protect the Integrity of the Election of the Next ICC Prosecutor*, open soc'y just. initiative (Feb. 10, 2021), <https://www.justiceinitiative.org/newsroom/asp-presidency-fails-to-protect-the-integrity-of-the-election-of-the-next-icc-prosecutor> [https://perma.cc/7FJM-TSNB].

⁶² Assembly of States Parties, *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report*, 47–48, ICC-ASP/19/16 (Sept. 30, 2020).

⁶³ Angela Mudukuti, *Vetting for High Moral Character and ICC Prosecutorial Elections*, opinio juris. (Jan. 19, 2022), <https://opiniojuris.org/2022/01/19/vetting-for-high-moral-character-and-icc-prosecutorial-elections/> [https://perma.cc/RGQ6-Q89M].

⁶⁴ Angela Mudukuti, *The ICC Prosecutor Elections and the Failure to Vet Candidates* (Feb. 21, 2021), <https://angalamudukuti.com/the-icc-prosecutor-elections-and-the-failure-to-vet-candidates/> [https://perma.cc/VJ84-6CTR].

⁶⁵ David Bosco, *Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations*, 111 AM. J. INT'L L. 395, 408 (2017).

dealing with non-member states and smaller players of the UNSC.⁶⁶ However, this quest for justice is often ignored while choosing cases and allegations in veto powers in the UNSC.⁶⁷ In 2019, the Prosecutor of the ICC initiated an investigation into Crimes Against Rohingya Muslims with Bangladesh Territorial Element.⁶⁸ While the referral must be applauded, the Prosecutor's blindness to communications suggesting the Genocide of the Chinese Uyghurs are dismissed based on the failure of territorial element that can be easily determined.⁶⁹ In July 2020, lawyers for the East Turkistan Government in Exile (ETGE) and the East Turkistan National Awakening Movement (ETNAM) filed a communication before the OTP to initiate a proprio motu proceeding against China.⁷⁰ While the OTP claims they lack the jurisdiction to investigate a non-member state, there is some evidence that points to unlawful arrests and deportation from Cambodia and Tajikistan that may be used to investigate Beijing.⁷¹ When UNSC Referral or Self-Referral is an impossibility in this situation, the OTP decided to balance politics over justice.

Though China has not ratified the Rome Statute, China has developed close relations with the ICC and the Office of the Prosecutor.⁷² China has often taken peculiar interest in the operation of the ICC,⁷³ and, as a permanent member of the UNSC, China did not seek to use its veto

⁶⁶ See, e.g., Dustin Foley, *ICC Prosecutor Acknowledges Jurisdiction Over Possible War Crimes in Ukraine*, JURIST (Feb. 25, 2022), <https://www.jurist.org/news/2022/02/icc-prosecutor-acknowledges-jurisdiction-over-possible-war-crimes-in-ukraine/> [<https://perma.cc/2SQJ-FUTW>].

⁶⁷ See, e.g., Eweline U. Ochab, *International Criminal Court Will Not Take Further the Case of the Uyghurs*, FORBES (Dec. 15, 2020), <https://www.forbes.com/sites/ewelinaochab/2020/12/15/international-criminal-court-will-not-take-further-the-case-of-the-uyghurs/?sh=1bf271ea2fe3> [<https://perma.cc/A9BX-TVAD>].

⁶⁸ Press Release, International Criminal Court, *ICC Judges Authorise Opening of an Investigation into the Situation in Bangladesh/Myanmar* (Nov. 14, 2019), <https://www.icc-cpi.int/news/icc-judges-authorise-opening-investigation-situation-bangladesh/myanmar> [<https://perma.cc/HJJ4-ELVX>].

⁶⁹ Irit Weiser, *Prosecutor-initiated Investigation Authorized into Crimes Against Rohingya with Bangladesh Territorial Element*, 3 PKI GLOB. JUST. J. 81 (2019).

⁷⁰ *East Turkistan Government-in-Exile Urges ICC to Launch Investigation into China's Human Rights Abuses*, ANI NEWS (Feb. 3, 2022), <https://www.aninews.in/news/world/asia/east-turkistan-government-in-exile-urges-icc-to-launch-investigation-into-chinas-human-right-abuses20220203134740/> [<https://perma.cc/FF7H-TM2A>].

⁷¹ See Javier C. Hernández, *I.C.C. Won't Investigate China's Detention of Muslims*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/15/world/asia/icc-china-uighur-muslim.html> [<https://perma.cc/2Y7C-EEDS>].

⁷² Dan Zhu, *China, The International Criminal Court, And Global Governance*, AUSTL. OUTLOOK (10 Jan. 2020), <https://www.internationalaffairs.org.au/australianoutlook/china-the-international-criminal-court-and-global-governance/> [<https://perma.cc/X9J9-2QJ5>].

⁷³ China's Statement to the Sixth Committee of the United Nations General Assembly Sixth Committee, UN DOC. ASA17/023/2007 (Oct. 1999).

power to block the Council referrals of situations in Darfur or Libya to the ICC.⁷⁴ Irrespective of his independence, the Prosecutor indeed remains wary of upsetting the key powers that can determine UNSC referrals to the ICC. In order to protect UNSC referrals, proprio motu referrals often suffer.

Factors starting from the appointment of the Prosecutor and his independence in initiating investigations is subject to the politics of member states and United Nations Security Council are hindrances to the Prosecutor's proprio motu referral.

2. *Limitation of Power to Initiate Investigation*

Setting aside the politics of proprio motu referrals, the procedural hindrances to initiating an investigation by the Prosecutor is controversial. According to Article 53(1) Rome Statute, the Prosecutor is bound by certain standards to prosecute cases.⁷⁵ It is argued that these criteria are based on arbitrary interpretation of law and create stricter standards for initiating investigations compared to other referral mechanisms thereby obstructing justice.⁷⁶

a. Authorization of the Trial Chamber When Acting 'Proprio Motu'

Under the Rome Statute, the Prosecutor is entrusted with a broad measure of discretion to initiate an investigation.⁷⁷ As per Article 15 of the Rome Statute with regard to authorization of proprio motu investigations, The Pre-Trial Chamber must evaluate the application put in by the Prosecutor.⁷⁸ Even though the caveat is in place to prevent the Prosecutor from abusing his/her power,⁷⁹ in doing so, the court more often than not has gone beyond its statutory powers to define the scope of an

⁷⁴ Zhu, *supra* note 72.

⁷⁵ Rome Statute, *supra* note 2, art. 53(1).

⁷⁶ Andrés Morales, *The Scope of Proprio Motu Investigations at the International Criminal Court and Why We Should Care*, JUS COGENS: INT'L L. PODCAST & BLOG (May 11, 2021), <https://juscogens.law.blog/2021/05/11/the-scope-of-proprio-motu-investigations-at-the-international-criminal-court-and-why-we-should-care/> [https://perma.cc/2GDU-93P8].

⁷⁷ INTERNATIONAL CRIMINAL COURT, ANNEX TO THE PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR (Sept. 1, 2003).

⁷⁸ Rome Statute, *supra* note 2, art. 15.

⁷⁹ Lloyd T. Chigowe, *The ICC and the Situation in Afghanistan: A Critical Examination of the Role of the Pre-Trial Chambers in the Initiation of Investigations Proprio Motu*, 35 LEIDEN J. OF INT'L L. 699, 708 (2022).

investigation through judicial decisions such as in the situations in Georgia and the Republic of Burundi.⁸⁰ However, the jurisprudence of the Chamber holds the standard higher than that of the state and UNSC referral processes. This was discussed in the dissenting opinion in a Cote d'Ivoire decision of the ICC.⁸¹ Judge Fernández de Gurmendi's separate dissent argues that "the role of the Pre-Trial Chamber in article 15 decisions is limited to the underlying purpose of preventing 'unwarranted, frivolous, or politically motivated investigations.'" ⁸² The Pre-Trial Chamber's unwarranted interferences take away the essence of the authority of the Prosecutor to initiate proprio motu investigations.

b. Crossing the Threshold of 'Reasonable Basis to Proceed'

Article 15(4) of the Rome Statute places a "reasonable basis to proceed" criteria on the Prosecutor to submit the application to the Pre-Trial Chamber to trigger an investigation.⁸³ Similarly, the application should demonstrate the case or potential cases arising from the proprio motu investigations are of sufficient gravity to justify ICC action. Proprio motu investigations, like those discussed above, have had a higher standard of reasonableness to prove in comparison to other referral mechanisms. When the Prosecutor receives a referral from UNSC or a state party, Article 53 of the Rome Statute provides that the Prosecutor shall initiate an investigation unless he determines that there is no reasonable basis.⁸⁴ The Trial Chamber only reviews the decision not to proceed. This standard is reversed in the case of a proprio motu investigation.⁸⁵ Though statutorily bound, this places the referrals from a state party and the UNSC above that of the Prosecutor and undermines the independence of the ICC.

⁸⁰ See Situation in Georgia, ICC-01/15-12/27-01-2016, Decision on the Prosecutor's Request for Authorization of an Investigation, (Jan. 27, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_00608.PDF [<https://perma.cc/TB8U-SY28>]; see also Situation in The Republic Of Burundi, ICC-01/17-X-9-US-Exp, 25, Public Redacted Version of Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi (Oct. 25, 2017) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_06720.PDF [<https://perma.cc/7CCM-SB4D>].

⁸¹ Prosecutor v. Côte d'Ivoire, ICC-02/11, Dissenting Opinion of Judge Gurmendi (Oct. 5, 2011).

⁸² *Id.* ¶ 17.

⁸³ Rome Statute, *supra* note 2, art. 15.

⁸⁴ Rome Statute, *supra* note 2, art. 53.

⁸⁵ See Manisuli Ssenyonjo, *The Implementation of the Proprio Motu Authority of the Prosecutor in Africa*, in THE INT'L CRIM. CT. AND AFR. (2017).

In the ICC judgment concerning the situation in Afghanistan, the court also stated that proprio motu investigations are not only limited by the Prosecutor's application request but also by the caveat that crimes must be "sufficiently linked" to those referred to in the request.⁸⁶ A crime is sufficiently linked when the additional crimes are a part of the same attack (in case of crimes against humanity) or committed within the same armed conflict (in case of war crimes) as the crimes contained in the Prosecutor's request.⁸⁷ This places proprio motu investigation's "reasonable basis to proceed" standard at a higher threshold than other ICC referral mechanisms, directly undermining the independence of the Office of the Prosecutor and indirectly undermining justice.

3. *Lack of Legitimacy and Transparency in Prosecutorial Discretion*

The Rome Statute has vested the power to investigate and prosecute politically sensitive crimes in a single individual, the Prosecutor.⁸⁸ A criticism flowing from this independence is that initiating a proprio motu investigation rests on the discretion of the Office of the Prosecutor, without the prior sanction or trigger by any concerned party.⁸⁹ A critical aspect of this independence, is ambiguity with regard to prosecutorial discretion in selecting the cases to investigate. The Rome Statute offers no real guidance on the criteria that the Prosecutor is to apply in making determinations about which situations to pursue and which ones to ignore.⁹⁰ When there are safeguards set in place to assess the gravity and reasonableness of the selected communication, there is no obligation under statutory law to look into all cases.⁹¹ When such broad discretionary power is vested on the Prosecutor to not investigate, fears of abuse of power arising from the politicization of the Office of the Prosecutor are sure to creep in. This section looks into the lack of transparency and legitimacy in selected situations for proprio motu investigations.

⁸⁶ Prosecutor v. Afghanistan, ICC-02/17, Majority Opinion of Judge Aitala, ¶ 2 (Oct. 31, 2022), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00828.PDF [<https://perma.cc/DNU6-BRGS>].

⁸⁷ *See id.*

⁸⁸ Bosco, *supra* note 50, at 396.

⁸⁹ *See* Kaveri Vaid, *Discretion Operationalized Through Law: Proprio Motu Decision-Making at the International Criminal Court*, 25 FLA. J. INT'L L. 359 (2013).

⁹⁰ Schabas, *supra* note 13, at 540.

⁹¹ *Id.* at 541.

a. Selective Interest in Investigating Communication: Remnants of Victor's Justice

The politicization apparent in the election of the Prosecutor has a profound impact that trickles down to selective interest in investigating communication received by the Office of the Prosecutor.⁹² Criticisms of selectivity by the Prosecutor have often been ignored.⁹³ While the Prosecutor has to prove the gravity and reasonableness of a situation he chooses to investigate, there is no requirement to indicate why his selection warrants more importance than other pressing communications around the globe.⁹⁴

Although never officially released, a draft document entitled "Criteria for Selection of Situations and Cases" was circulated that implied that the selection of situations by the Prosecutor would be based upon "gravity."⁹⁵ Factors relevant to assessing gravity include: a) the scale of the crimes; b) the nature of the crimes; c) the manner of commission of the crimes; and d) the impact of the crimes.⁹⁶ However, in reality, selection of cases often reflect a political stand more than a judicial one. Proprio motu investigations have an inherent political dimension, often favoring victors.⁹⁷ Though the Office of the Prosecutor claims independence from external political influences, the Complementarity and Cooperation Unit (the coterie of advisers) within the OTP assist the Prosecutor with this political guidance.⁹⁸ Most investigations can only be fruitful if backed by political consensus, as it was in the case of many tribunals prior to the establishment of the ICC.⁹⁹

While allegations of Victor's Justice have roots in the Axis prosecution after the World Wars by the Allies, it has also crept up to the

⁹² See Bosco, *supra* note 50.

⁹³ See, e.g., Birju Kotecha, *The International Criminal Court's Selectivity and Procedural Justice*, 18 J. INT'L CRIM. JUST. 107 (2020).

⁹⁴ Bosco, *supra* note 50, at 401–02.

⁹⁵ International Criminal Court Office of the Prosecutor, *Criteria for Selection of Situations and Cases*, 5 (June 2006) (unpublished draft document) (on file with author).

⁹⁶ *Id.*

⁹⁷ See Schabas, *supra* note 13, at 549.

⁹⁸ See PAUL SEILS, *HANDBOOK ON COMPLEMENTARITY: AN INTRODUCTION TO THE ROLE OF THE NATIONAL COURTS AND THE ICC IN PROSECUTING INTERNATIONAL CRIMES* (2016).

⁹⁹ See AARON FICHELBERG, *CRIMINAL TRIBUNALS* (2017).

International Criminal Court.¹⁰⁰ A thorough look into Africa can point to the same.

b. Prosecutorial Selections and Decline in Public Confidence:
African Case Study

The Office of the Prosecutor's focus on Africa often reflects the contemporary version of Victor's Justice. From the Bush Administration in Afghanistan to the British Forces in Iraq,¹⁰¹ the ICC has failed to bring charges or even investigate anyone but Sub-Saharan African militia leaders, with the exception of Western allies.¹⁰² This is the norm when there is substantial evidence pointing to many nations in the West engaging in activities that can qualify as war crimes. Prosecutor Moreno-Ocampo stated that gravity is "one of the most important criteria for selection of [the OTP's] situations and cases."¹⁰³ However, some issues seem to warrant more gravity than others based on political, economic, and social factors. The failure of the Office of the Prosecutor to look into the gravity of the situation over the dilemma of the affected communities strikes at the very foundation of international criminal law and the establishment of the ICC—serving justice.

II. THE POLITICS OF THE UN SECURITY COUNCIL

A. BACKGROUND ON THE RELATIONSHIP BETWEEN THE UNSC AND THE ICC

The relationship between the UNSC and the ICC has been the subject of both high praise and intense criticism from the international criminal justice community.¹⁰⁴ This is due in large part to the divergence

¹⁰⁰ Marco Vöhringer, *Critiques of International Criminal Law Revisited in the Light of the Rome Statute*, VOELKERRECHTSBLOG (Jan. 10, 2022) <https://voelkerrechtsblog.org/critiques-of-international-criminal-law-revisited-in-the-light-of-the-rome-statute/> [<https://perma.cc/3L4W-LMLE>].

¹⁰¹ Thomas Christiano, *The Problem of Selective Prosecution and the Legitimacy of the International Criminal Court*, J. SOC. PHIL. 1, 1 (2021).

¹⁰² *Id.*

¹⁰³ Luis Moreno-Ocampo, Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives, 21 AM. U. INT'L L. REV. 497, 498 (2006).

¹⁰⁴ See Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?*, 16 IND. INT'L & COMP. L. REV. 1 (2005).

between the theoretical benefits of this relationship and its actual function in practice since the Court's inception.

The basis of the relationship is outlined in the Rome Statute in Article 13(b), which grants the UNSC referral authority, and in Article 16, which grants the UNSC the ability to defer cases that come before the Court.¹⁰⁵ Though the Negotiated Relationship Agreement between the UN and the ICC recognizes the ICC as "an independent judicial institution,"¹⁰⁶ the UN Charter and the function of the UNSC in the UN System undeniably influenced the inclusion of these provisions in the ICC's founding document.

The role of the Security Council is to maintain international peace and security, and Chapter VII of the Charter grants it powers to fulfill this role when faced with threats to the peace, breaches of the peace, and acts of aggression.¹⁰⁷ According to Articles 41 and 42 respectively, these powers include the use of non-forceful measures, such as economic and diplomatic actions, and when these measures are deemed inadequate, the use of force.¹⁰⁸ In 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, largely considered a precursor to the ICC, "determined that the creation of the tribunal by the UNSC was pursuant to its powers under Article 41 [the use of non-forceful measures] of Chapter VII."¹⁰⁹ Furthermore, while some delegations at the Rome Conference expressed concern that the inclusion of a provision giving the Security Council referral authority would undermine the independence of the ICC, the majority argued that complete independence could make it possible for the Court to "hamper the Council in the discharge of its Chapter VII responsibilities."¹¹⁰ As a result, Article 13(b), which defines the jurisdiction of the Court, states that this jurisdiction exists when a

¹⁰⁵ Amanda Kramer & Rachel Killean, *Security Council Referrals to the ICC: A Politicised System*, 7 IR. Y.B. INT'L L. 117, 119 (2012).

¹⁰⁶ Bethel Aregawi, *The Politicisation of the International Criminal Court by United Nations Security Council Referrals*, ACCORD (July 21, 2017), <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/> [<https://perma.cc/NU7H-YYKY>].

¹⁰⁷ U.N. Charter art. 15, ¶ 1; U.N. Charter art. 39.

¹⁰⁸ U.N. Charter art. 41; U.N. Charter art. 42.

¹⁰⁹ Nada Ali, *Through a Glass Darkly: The ICC, the UNSC and the Quest for Justice in International Law*, 19 INT'L CRIM. L. REV. 669, 675 (2019).

¹¹⁰ Louise Arbour, *The Relationship Between the ICC and the UN Security Council*, 20 GLOB. GOVERNANCE 195, 196 (2014).

situation is referred to the ICC by the Security Council acting under Chapter VII of the UN Charter.¹¹¹

Delegations at the Rome conference were less supportive of a provision giving the Security Council the power to defer cases before the Court, despite the fact that both Article 13(b) and Article 16 provide similar opportunity for the politicization of the ICC.¹¹² According to Louise Arbour, Director of the International Crisis Group, the initial draft written by the International Law Commission required the ICC to obtain authorization from the Security Council before the ICC could initiate any proceedings related to a situation that the Council was involved in, effectively giving the P5 members of the UNSC veto power over ICC proceedings.¹¹³ In response, delegations agreed to “a compromise requiring the Council to actively seek a deferral rather than have the Court seek Council permission.”¹¹⁴ The inclusion of a twelve-month expiration following a UNSC deferral represented an attempt to further limit the Council’s authority,¹¹⁵ but because any deferral can be renewed after the twelve-month period, this limitation makes little to no difference.

Among international human rights activists, these provisions, particularly the Security Council’s referral authority, have been hailed as an important step in advancing the reach of international criminal justice.¹¹⁶ This is because the UNSC has the power to refer any country’s situation deemed a threat to international peace and security, which includes cases related to non-state parties and countries that are not signatories to the Rome Statute. As a result, Article 13(b) makes it possible to reach perpetrators that would otherwise remain outside the jurisdiction of the Court in order to hold them accountable for their crimes.¹¹⁷

Others, however, argue that UNSC referral and deferral authority actually undermines the fundamental principles of universality and voluntary compliance that the Rome Statute is based on.¹¹⁸ Because three of the five permanent members of the Security Council, the United States, Russia, and China, have not ratified the Rome Statute, they remain outside

¹¹¹ *Id.* at 197.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 195.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 198.

of the Court's reach.¹¹⁹ Yet, they have the power to refer other non-signatories, who would otherwise also fall outside of the ICC's jurisdiction, to the Court.¹²⁰ At the same time, the veto power of all five permanent members means that any one of them can block a referral at any time, which allows them to shield themselves and those with political ties to them from investigation by the ICC.¹²¹ Consequently, these factors have contributed to the idea that the referral and deferral authority of the UNSC render the ICC a policy tool for advancing the political interests of the permanent members of the Security Council.

B. SELECTIVITY OF UNSC REFERRALS

While the establishment of a mechanism for the direct referral of cases to the jurisdiction of the ICC by the UNSC fell within the rationale of advancing international law, its concretization did not lead to a significant improvement of the international justice system. Rather, it had little practical repercussions: only in two instances did the Security Council exercise its power to refer situations to the International Criminal Court, and both have been widely contested.¹²²

The first case, referred to the ICC per UNSC Resolution 1593 of March 31, 2005, granted the court jurisdiction over Sudan concerning the internal armed conflict in the Darfur region and the alleged human rights violations, war crimes, and crimes against humanity committed by actors involved in the fighting.¹²³ The referral, based on the report published by the International Commission of Inquiry on Darfur, established by the UNSC in 2004,¹²⁴ led to the opening of the investigation by the Prosecutor in June 2005. The Court then indicted and issued arrest warrants for two high-ranking Sudanese officials in 2007, and for Sudan's President Omar

¹¹⁹ See *In Hindsight: The Security Council and the International Criminal Court*, SEC. COUNCIL REP. (July 31, 2018), https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php [<https://perma.cc/EZT9-GG4V>].

¹²⁰ S.C. Res. 1207, ¶ 1 (Nov. 17, 1998).

¹²¹ See *High-Level Meeting of Experts and Parliamentarians on the Relationship Between UN Security Council and the International Criminal Court*, PARLIAMENTARIANS FOR GLOBAL ACTION, (March 16, 2012), <https://www.pgaction.org/news/chatham-icc-sc.html> [<https://perma.cc/EFX7-RFX4>].

¹²² S.C. Res. 1593, ¶ 1 (March 31, 2005); S.C. Res. 1970, at 1 (Feb. 26, 2011).

¹²³ S.C. Res. 1593, ¶ 1 (March 31, 2005).

¹²⁴ Rep. on the Int'l Comm'n of Inquiry on Darfur (2005), transmitted by Letter dated 31 January 2005 from the Commission. Established pursuant to Resolution 1654 (2004) Addressed to the President of the Security Council, at 2, U.N. Doc. S/2005/60 (Feb. 1, 2005).

al-Bashir in 2008.¹²⁵ Sudan's government, however, rejected the ICC's jurisdiction over the events in Darfur.¹²⁶ National ministers argued that Sudan is not a signatory to the Rome Statute and that only Sudanese national courts possess the jurisdictional authority to conduct investigation in the region;¹²⁷ as such, they framed the referral to the ICC as a breach of national sovereignty.

Similarly, the Security Council unanimously approved UNSC Resolution 1970 on February 26, 2011, inviting the ICC to open an investigation in Libya, citing the UN Human Rights Council Resolution regarding the human rights violations committed in the country.¹²⁸ Analogous arguments to those made by Sudanese authorities were put forward by Libya's judiciary, holding that the persecution of Al-Senussi and Saif Al-Islam Gaddafi should be handled domestically.¹²⁹

Indeed, both referrals were backed by reliable findings that documented sufficient grounds for an international investigation and justified the ICC's intervention into the specific contexts. However, human rights breaches and atrocities of similar magnitude have reportedly been taking place in a multitude of other settings that fall outside of the ICC's jurisdiction and would thus require a UNSC resolution to be scrutinized by the international law system.¹³⁰ The failure of the Security Council to initiate referrals for situations such as the persecution of Rohingya Muslims in Myanmar, or the use of chemical weapons in Syria,¹³¹ among others, puts in question the functioning and rationale of the entire referral system.

Decisions of the UNSC are doubtlessly made to uphold international law, but they are political in nature. In fact, contrary to investigations initiated by the ICC's Prosecutor, UNSC-mandated situations do not require the same previous assessment by a judiciary

¹²⁵ Ayad Derbal, *The ICC's Involvement in the Situation in Darfur: Not a Threat to Peace* (Winter 2008) (unpublished manuscript) (on file with the University of Notre Dame Center for Civil and Human Rights).

¹²⁶ *Id.*

¹²⁷ *Sudan Rejects ICC Jurisdiction, Says One Suspect Held*, SUDAN TRIB. (Feb. 27, 2007), <https://sudantribune.com/article20849/> [<https://perma.cc/P7AD-U8RC>].

¹²⁸ S.C. Res. 1970, at 1 (Feb. 26, 2011).

¹²⁹ Aregawi, *supra* note 106.

¹³⁰ *Id.*

¹³¹ *Strengthening Accountability and Justice for Serious Violations of International Law*, SEC. COUNCIL REP. (May 31, 2022), <https://www.securitycouncilreport.org/monthly-forecast/2022-06/strengthening-accountability-and-justice-for-serious-violations-of-international-law.php> [<https://perma.cc/566E-J28T>].

panel, leaving great amounts of legal discretionary power in the hands of political figures.¹³²

Moreover, great amounts of freedom were left to the Security Council as to the internal procedure and criteria to adopt for the assessment of a possible referral, and these procedures have generally not been followed as a unitary body.¹³³ Such concession appears in line with the overall relations between the ICC and the SC, whose Permanent Members – particularly those who are not members of the Rome Statute – wish to maintain as much independence from the Court as possible. Nevertheless, the lack of an established blueprint specific to the referral process has played a key role in the inability (or unwillingness) of the Security Council to concretely submit situations to the attention of the Prosecutor. Article 13(b) of the Rome Statute establishes, in fact, that referrals shall take place following the approval of a UNSC resolution, as authorized by the UN Charter.¹³⁴ It naturally follows that referrals thus require the approval of at least nine of the fifteen Council members, which unavoidably includes the P5. These permanent members, therefore, retain their power to veto any referral, factually preventing the International Criminal Court from gaining jurisdiction over situations with severe allegations of crimes of aggression whenever this does not align with one of their political agendas.

Recent years have seen growing discourse on the existence of veto powers as a whole; both in academia and on the political scene. In fact, the sentiment has been expanding that such capacity embodies unequal power dynamics and that it subordinates the fate of the entire international system to the political will of traditional big powers.¹³⁵ While any concrete alteration to the UN Charter on such subject matter remains almost entirely unrealistic, vetoing trends have shifted following the end of the Cold War, with an overall decline of the use of veto powers.¹³⁶ The United Kingdom and France, for instance, have not vetoed any resolution since 1989.¹³⁷

¹³² Simon Jennings, *Playing Politics With the ICC: The Security Council's Referral of Libya to the Hague Court Highlights the Limitations of International Justice*, INST. FOR WAR AND PEACE REPORTING (March 8, 2011), <https://reliefweb.int/report/libya/playing-politics-icc-security-councils-referral-libya-hague-court-highlights> [<https://perma.cc/N49H-KRGL>].

¹³³ *See id.*

¹³⁴ Rome Statute, *supra* note 2, art. 13(b).

¹³⁵ Ian Martin, *In Hindsight: What's Wrong With the Security Council?*, SEC. COUNCIL REP. (March 29, 2018), https://www.securitycouncilreport.org/monthly-forecast/2018-04/in_hindsight_whats_wrong_with_the_security_council.php [<https://perma.cc/6NP5-RJJ2>].

¹³⁶ *The Veto*, SEC. COUNCIL REP. (Dec. 16, 2020), <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php> [<https://perma.cc/NC9F-UC9X>].

¹³⁷ *Id.*

Furthermore, since the early 2000s, France in particular has taken a strong anti-veto stance, advocating for self-restraint from the use of veto in the case of resolutions regarding “genocide, crimes against humanity and war crimes on a large scale.”¹³⁸ The wide support found for this proposition among members of the General Assembly and from the UNHCR has, however, not translated into practical influence on the UNSC’s Permanent Members.

In reality, the use of veto has developed to mirror the political equations internal to the Security Council, as well as the global power dynamics and alliances. Growing ideological and strategic opposition from Russia and China against traditional Western powers has thus led to more frequent calls for veto by the two countries, increasingly sheltering one another’s interests as what could be framed as an “anti-Western” bloc.¹³⁹ Such a trend has been especially visible since the outbreak of the Syrian Civil War in 2011 – Russia, often with the support of Beijing, has vetoed all seventeen related UNSC Resolutions.¹⁴⁰ Such vetoes prevented a broad array of initiatives ranging from humanitarian endeavors and sanctions, to referrals of the situation to the ICC despite the documented usage of chemical weapons by different parties involved in the conflict.¹⁴¹ Indeed, given the ties between the Assad regime and the Kremlin, as well as the latter’s role as an armament supplier to the Syrian government, such moves tie a matter of international law with a highly politically charged discourse. Similarly, Chinese interests and influence have upheld impunity for the perpetrators of gross humanitarian law breaches in Myanmar where, according to the UNHCR, over 1.2 million Rohingya Muslims are facing persecution and alleged genocide from the government.¹⁴²

Simultaneously, it would be erroneous to only represent the usage of veto powers as an impediment to international justice as a non-Western phenomenon. Even though mainstream media discourse and official

¹³⁸ Gareth Evans, *Should the UN Security Council Veto be Limited?*, WORLD ECON. F. (Feb. 5, 2015), <https://www.weforum.org/agenda/2015/02/should-the-un-security-council-veto-be-limited/> [<https://perma.cc/R5VK-45F7>].

¹³⁹ SEC. COUNCIL REP., *supra* note 136.

¹⁴⁰ Richard Mills, Deputy U.S. Representative to the United Nations, Remarks at a UN General Assembly Meeting Following Russia’s Veto of a UN Security Council Resolution on the Syria Cross-Border Humanitarian Mechanism (July 21, 2022).

¹⁴¹ *UN: Russia and China’s Abusive Use of Veto “Shameful,”* AMNESTY INT’L (Feb. 28, 2017), <https://www.amnesty.org/en/latest/news/2017/02/un-russia-and-chinas-abusive-use-of-veto-shameful/> [<https://perma.cc/HC8M-B6B2>].

¹⁴² *Myanmar Emergency Update*, UNHCR REGIONAL BUREAU FOR ASIA AND PACIFIC, (Oct. 6, 2022), <https://reporting.unhcr.org/document/3316> [<https://perma.cc/J5HW-ZV25>].

public statements frame the United States as an advocate for international law, US affiliation with the state of Israel has led to a lack of UNSC referrals despite the creditable reports of war crimes during clashes in the Palestinian Occupied Territory.¹⁴³ Indeed, such opposition often need not be stated as a formal casting of veto as, given their lack of political viability, the drafting of resolutions regarding controversial situations might be precluded in the first place by the desire to not initiate diplomatic strains.

C. LACK OF UNSC SUPPORT AFTER REFERRAL

The second major way in which the politics of the UNSC impact the function of the International Criminal Court occurs after the jurisdiction of the Court has already been triggered, by UNSC referral or otherwise, in the form of UNSC support, or lack thereof, for ICC proceedings.

One principle at the heart of the Rome Statute is state consent. When a state becomes a party to the Rome Statute, it agrees to accept ICC jurisdiction over crimes that are committed on that state's territory or are committed by a national of that state on any territory.¹⁴⁴ Only after a state has consented to ICC jurisdiction by ratifying the Rome Statute does it have an obligation to cooperate with the Court. However, given that the ICC has no enforcement mechanism, the Court has no way of ensuring that states follow through on this obligation. In essence, this means that the ICC relies on little more than voluntary compliance to execute its mandate.¹⁴⁵ If a signatory state fails to cooperate with the ICC, the Court can "refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council,"¹⁴⁶ but the Rome Statute outlines little else by way of repercussions for noncompliance.¹⁴⁷ Furthermore, "the obligation of

¹⁴³ See Creede Newton, *A History of the US Blocking UN Resolutions Against Israel*, ALJAZEERA (May 19, 2021), <https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel> [<https://perma.cc/E7ED-H256>].

¹⁴⁴ Rome Statute, *supra* note 2, art. 1.

¹⁴⁵ *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works#:~:text=The%20Court%27s%20founding%20treaty%2C%20called,jurisdiction%20over%20four%20main%20crimes> [<https://perma.cc/GS7S-NWH4>].

¹⁴⁶ Gwen P. Barnes, Comment, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT'L L. J. 1584, 1595 (2011).

¹⁴⁷ *Id.*

[states not party to the Rome Statute] depends on ad hoc agreements or on obligations created by the Security Council. Only the Security Council, when acting under Chapter VII of the Charter, has the power to impose binding obligations on all member states of the UN, regardless of their status with respect to the Rome Statute.”¹⁴⁸

When the ICC was established, The UNSC’s power to impose binding obligations on all member states of the UN was cause for particular celebration within the international justice community. In addition to providing the opportunity to extend the jurisdiction of the ICC beyond signatories to the Rome Statute as previously mentioned, the Charter offered an avenue for the Security Council to help ensure compliance with ICC requests in such situations as well. While a non-signatory is under no obligation to cooperate in the absence of ad hoc agreements and the Court has very little means by which to compel cooperation, the UNSC has the power to oblige non-signatories to comply with ICC investigations and arrest warrants following a UNSC referral.¹⁴⁹ In other words, the Security Council referral has the potential to function as a mandatory enforcement mechanism in order to maintain or restore international peace and security.¹⁵⁰

However, this paper has also previously highlighted the divergence between the theoretical benefits of this relationship and its application in practice, and this element is no exception to the phenomenon.¹⁵¹ The UNSC has incurred significant criticism in relation to the handling of the two situations that the Security Council has referred to the ICC since its establishment. Following referral and subsequent initiation of ICC proceedings, the UNSC offered insufficient support to ensure that the Court could execute its mandate, despite the power conferred to it by the UN Charter.¹⁵²

In both cases, this is evident in the language of the Chapter VII resolutions referring the situation in Sudan in 2005 and in Libya in 2011 to the Court. In each resolution, “the Security Council, whilst obliging states in which the crimes were committed. . . to cooperate fully with the

¹⁴⁸ Hemi Mistry & Deborah Ruiz Verduzco, *Summary Report of High-Level Meeting of Experts and Parliamentarians on the Relationship Between UN Security Council and the International Criminal Court*, PARLIAMENTARIANS FOR GLOBAL ACTION, (Mar. 16, 2012) <https://www.pgaction.org/pdf/Chatham-ICC-SC.pdf> [<https://perma.cc/SSN8-8HNL>].

¹⁴⁹ See S.C. Res. 1207 (Nov. 17, 1998).

¹⁵⁰ Mistry & Verduzco, *supra* note 148 at 8.

¹⁵¹ *Supra* Part II.

¹⁵² Arbour, *supra* note 110, at 5–7.

Court, has expressly recognized that other [non signatories] have no obligation under the Statute, and instead only urges them to cooperate.”¹⁵³ In its second referral concerning the situation in Libya, the Security Council demonstrated a stronger commitment to supporting the ICC by enacting an arms embargo, freezing assets, and imposing travel bans, but it still did not include explicit language obliging parties to cooperate.¹⁵⁴ Thus, while the UNSC’s referral authority can empower the Court by requiring UN member states to comply with ICC requests via a Chapter VII resolution, the Security Council’s failure to explicitly do so “has significantly diluted the potential effectiveness of the referral as a mandatory enforcement mechanism adopted in order to maintain or restore international peace and security.”¹⁵⁵

Another issue that remains particularly controversial, with respect to the language of the two UNSC referrals, was the addition of a stipulation that the UN bear no cost incurred by a UNSC referral. Instead, the United States, not wishing to contribute funding to a Court whose jurisdiction it does not recognize, leveraged its veto power in order to ensure that full financial responsibility was placed on parties to the Rome Statute in the resolution concerning the situation in Darfur.¹⁵⁶ Following the continuation of this practice in its referral of the situation in Libya, critics argue that this is likely to remain a standard procedure of UNSC referrals.¹⁵⁷ This is in contrast to the ad hoc tribunals, the ICTY and the ICTR, whose costs were borne by the United Nations. Accordingly, despite the fact that the Security Council derived its authority to execute both the ad hoc tribunals and the ICC referrals from its obligation to all members of the United Nations to maintain international peace and security, its shirking of the costs of one measure but not the other can only be explained by the political nature of the UNSC.¹⁵⁸ By forcing the ICC to bear full financial responsibility, despite Article 115 of the Rome Statute specifically envisioning UN funding,¹⁵⁹ the Security Council effectively places its own political interests above the effective realization of the Court’s mandate.

Beyond criticisms of the initial resolutions referring situations to the ICC, many argue the Security Council has also consistently failed to

¹⁵³ Mistry & Verduzco, *supra* note 148, at 8.

¹⁵⁴ Kramer & Killean, *supra* note 105, at 129.

¹⁵⁵ Mistry & Verduzco, *supra* note 148, at 8.

¹⁵⁶ S.C. Res. 1593, ¶ 2 (Mar. 31, 2005); S.C. Res. 1970, ¶ 5 (Feb. 26, 2011).

¹⁵⁷ Kramer & Killean, *supra* note 105, at 130.

¹⁵⁸ Mistry & Verduzco, *supra* note 148, at 8.

¹⁵⁹ Rome Statute, *supra* note 2, art. 115.

provide follow up support to the ICC after it has referred a situation.¹⁶⁰ The 2012 High-Level Meeting of Experts and Parliamentarians on the Relationship Between UN Security Council and the International Criminal Court organized by the Royal Institute of International Affairs confirmed that “the failure of the Council to take any further measures or pursue in anyway the Court’s progress, aside from. . . periodic reports. . . does not convincingly demonstrate an exemplary commitment to the Court and its pursuit of international accountability.”¹⁶¹

Furthermore, as previously mentioned, in the event of noncompliance in relation to situations referred by the UNSC, the ICC can do little more than notify the Security Council. The original intention of this stipulation in the Rome Statute was to allow the UNSC to take action under its Chapter VII powers to oblige cooperation, which the Security Council should have a vested interest in given that to make the referral in the first place, a situation was deemed a threat to international peace and security. However, when states refused to comply with ICC arrest warrants in relation to the situation in Darfur, the Court notified the UNSC, but no action was taken to address the noncompliance.¹⁶² Indeed, the ICC has called out the Security Council for failing to provide “necessary technical, political, peacekeeping, and other appropriate resources to assist in investigations, arrests, and other elements of cooperation.”¹⁶³ Consequently, many argue that the lack of sufficient support in their referrals and following the initiation of ICC proceedings demonstrates, at the very least, a disregard for the UNSC’s primary responsibility and, at worst, the subjugation of that responsibility in favor of political considerations.

D. CONSEQUENCES

The politicization of the Court has implications for the effective execution of the ICC’s mandate as well as for the acceptance and advancement of the broader goals of international criminal justice in general. A growing perception of this politicization and resulting bias in its actions presents several practical problems for the Court, namely in the form of increasing opposition to the International Criminal Court and its

¹⁶⁰ Arbour, *supra* note 110, at 199–200; Aregawi, *supra* note 106, at 31–32.

¹⁶¹ Mistry & Verduzco, *supra* note 148, at 9.

¹⁶² *Id.*

¹⁶³ Aregawi, *supra* note 106, at 31.

activities.¹⁶⁴ African states in particular have expressed grievances with the fact that the only two situations to be referred by the UNSC have involved states on the continent of Africa, despite the existence of countless other situations around the world that are equally in need of investigation and prosecution by the ICC. Leaders of these countries point to the fact that, in Libya, the ICC appeared to target African leaders and, at the same time, ignored Western actors accused of involvement in the atrocities.¹⁶⁵ Amid accusations that ICC investigations are merely tools for the P5 to harass African leaders, the African Union has called on its members to disregard ICC requests such as arrest warrants.¹⁶⁶ With no enforcement mechanism to employ to ensure compliance and no post-referral support from the Security Council in the event of noncompliance, opposition like this can severely impede Court proceedings. This damages the ICC's credibility as an institution, which undermines the legitimacy of the broader international criminal justice project.¹⁶⁷

III. RECOMMENDATION AND CONCLUSION

The elucidated modalities for the initiation of ICC investigation and the analysis of the internal political dynamics of the UN Security Council represent concurring evidence: the current system for the upholding of international law is inherently flawed. The structural constraints embedded in the ICC's framework act as concrete obstacles to accountability for international humanitarian law breaches, impeding the necessary carrying out of legal actions against perpetrators.

Such fallacies must not be overlooked and, particularly in the face of recent breaches of international law associated with the war in Ukraine, call for systematic change in ICC's procedures at all stages. In fact, while the Court has jurisdiction in Ukraine per the 2014 Article 12(3) declaration,¹⁶⁸ such authority does not extend to the crime of aggression. The latter could only be investigated following a UNSC referral, which is

¹⁶⁴ Arbour, *supra* note 110, at 200–01; Aregawi, *supra* note 106, at 32.

¹⁶⁵ Westen K. Shilaho, *The International Criminal Court and the African Union: Is the ICC a Bulwark Against Impunity or an Imperial Trojan Horse?*, 18 AFR. J. ON CONFLICT RESOL. 119, 129–30 (2018).

¹⁶⁶ Rukmini Callimachi, *African Union calls on member states to disregard ICC arrest warrant against Libya's Gadhafi*, ASSOCIATED PRESS, July 2, 2011.

¹⁶⁷ Arbour, *supra* note 110, at 201; Aregawi, *supra* note 106, at 30–31.

¹⁶⁸ *Ukraine Accepts ICC Jurisdiction over Alleged Crimes Committed since 20 February 2014*, INT'L CRIM. CT. (Sept. 8, 2015), <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014> [<https://perma.cc/V68K-586E>].

inconceivable given Russia's role as both agent of the crime and required indictor,¹⁶⁹ thus effectively paralyzing the Court. Any effort to improve the effectiveness of the ICC and strengthen its pursuit of international justice must take into account the political considerations that influence its referral mechanisms as they currently exist.

The process of referrals by the UNSC appears particularly detrimental: it places significant legal power in the hands of a thoroughly political body, it allows for the subordination of international law to the political agendas of the five Permanent Members of the Council. Indeed, it is expectable for the decisions of the P5 to be made in function of their economic, strategic, and political interests; such natural articulation, however, leads to the preclusion of appropriate legal procedures whenever these might result in rulings adverse to said interests.

On top of such systemic limitations to the Court's jurisdictional authority, its mandate is highly threatened by their effects on the ICC's credibility as an impartial and effective enforcer of international norms. Moreover, they undermine the rationale of the Security Council's Responsibility to Protect, and support claims of embedded biasedness in the entire international law system. Consequently, any effort to improve the effectiveness of the ICC and strengthen its pursuit of international justice must take into account the political considerations that influence its referral mechanisms as they currently exist.

To that end, it appears necessary to unravel the overly politicized and arbitrary relations between the International Criminal Court and the UN Security Council. A viable alternative would be the establishment of a new, independent body tasked with the assessment of allegations of breaches of humanitarian and international law and the subsequent referral of situations to the ICC. In order to escape currently observable issues including the lack of representativity and the recurrent deadlock in the Security Council, the creation of such an institution should build upon the rationale of the 1950 "Uniting for Peace" resolution,¹⁷⁰ and frame the novel organization under the umbrella of the UN General Assembly. This type of action would insulate the ICC from the inherently political equations that govern the UN Security Council and obstacles presented by the other referral procedures of the Court, which appears essential to its credibility

¹⁶⁹ See Darcy Shane, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST SEC. (March 16, 2022), <https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/> [<https://perma.cc/AM5T-XFN6>].

¹⁷⁰ G.A. Res. 377 (V), (Nov. 3, 1950).

as an international institution, and to the legitimacy of the goals of international criminal justice more broadly.

