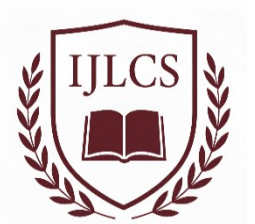


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THE GAVEL WITHOUT GRIP: THE ROME STATUTE, THE INTERNATIONAL CRIMINAL COURT, AND THE LIMITS OF GLOBAL CRIMINAL JUSTICE



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Abstract

The International Criminal Court (ICC), created under the 1998 Rome Statute, embodies the international community's most ambitious project to establish a permanent, impartial mechanism for prosecuting genocide, crimes against humanity, war crimes and the crime of aggression. While its legal mandate reflects an intricate balance between state sovereignty and universal accountability, the Court's institutional identity is equally shaped by symbolic elements. The official emblem of the International Criminal Court consists of scales of justice surrounded by olive branches, representing impartiality and peace.

Through an analysis of the Rome Statute's jurisdiction, complementarity regime, admissibility standards and procedural framework, the paper explores how the ICC is structured to operate independently. It further engages with philosophical lenses—natural law, cosmopolitanism, legal positivism and critical legal studies—to interpret the meaning and limits of the Court's symbolism. Case studies including Lubanga, Katanga, Ongwen, Al Mahdi, Kenya, Darfur, Afghanistan, Palestine and Myanmar illustrate both the Court's landmark contributions and its significant operational challenges.

The findings reveal that while the ICC has advanced international criminal jurisprudence and strengthened global expectations of accountability, its dependence on state cooperation, selective Security Council referrals, political resistance from powerful non-State Parties and legitimacy critiques particularly from the African Union continue to constrain its effectiveness. Ultimately, the “gavel without grip” remains an aspirational ideal: a powerful symbol of what global justice strives to be, yet not fully realised in practice.

Keywords – International Criminal Court (ICC); Rome Statute; Gavel Without Grip; Complementarity; State Cooperation; Universal Justice.

I. INTRODUCTION AND CONCEPTUAL BACKGROUND

One of the boldest experiments in the history of international law: The effort to institutionalise a permanent accountability mechanism in performing the most serious offenses known to humanity, is the establishment of the International Criminal Court (ICC). The Court was the result of the institutional inadequacy of previous experimentation with international criminal justice, most notably, the tribunals of Nuremberg and Tokyo that followed the conclusion of the Second World War. Even though basking in the credits of establishing the responsibility of individual criminals to

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international crimes, both tribunals were ephemeral institutions that were shaped and founded by the Allied powers and not by an international treaty. They did not have the mandate to create a long-term court system or to come up with a uniform legal system that cut across all states. This led to the decline of the momentum created by these tribunals and in decades the world would have had no war on crime judicial institution that could prosecute against genocide and war crimes and crimes against humanity.¹

It was not until the 1990s that the next significant push came, when horrors in the Balkans and Rwanda revealed the ineffectiveness of the purely political answers to a mass-based violence. The International Criminal Tribunal on the former Yugoslavia (ICTY) was founded by the United Nations Security Council (UNSC) in 1993 and the International Criminal Tribunal on Rwanda (ICTR) was founded in 1994 and despite their contribution to the creation of international criminal jurisprudence, they had structural weaknesses. They were both informal, limited geographically and relied on state cooperation to arrest and evidence. They also had the afflictions of lengthy trial timetables, logistical limitations and high financial expenses, but more to the point, since they were fashioned by UNSC resolutions, their validity was compromised by states who viewed them as GPP politics and not as an exercise in global criminal justice. The inefficiencies of these tribunals also highlighted the necessity of an institutional court that is both permanent and based on a treaty and not subject to arbitrary future and past creation and dissolution.²

The geopolitical tension was high during the negotiations leading to the Rome Statute being adopted by 120 states in the 1998 Rome conference formally creating the International Criminal Court. Another burning issue was that states in the Global South were worried that international criminal justice would become the new selective intervention, and the desire of powerful countries to have strong prosecutorial services and restrain their own military actions, at the same time several countries were claiming that they need to be granted the immunity of their heads-of-state and high-ranking officials. The last Statute struck a balance between those pressures by way of the complex jurisdictional guidelines and the concept of complementarity, which places the ICC as a court of last resort, that can only intervene when the national jurisdictions are unwilling or incapable of prosecute.³

This conflict is the main focus of the research problem of this investigation. The ICC has had a long history of criticisms by state, scholars and civil society due to what they consider to be political biasness, biased prosecution, and structural reliance on strong actors despite its noble intentions. Opponents claim the Court targets African states unfairly, it is weak at inquiring a situation with any of the major powers, and is susceptible to political coordination and back benching especially with the use of a referral or deferral. Enforcement is also another significant weakness as the ICC has no police organization and must still depend on state cooperation, which makes them susceptible to

¹ Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton UP 2000) 67–83

² UNSC Res 827 (1993) and UNSC Res 955 (1994).

³ William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 89–102.

politics and selective observance. The question now becomes: how far, indeed, does the ICC actually perform on the principle of a gavel that is not gripped or controlled politically, nor strategically by the states⁴

This study is an organisational research with three themes. As a preliminary step, the paper will look at the legal provisions of Rome Statute so as to get an insight into how the structure of the Court is created to encourage independence, impartiality and universality. Second, it examines the symbolic and functional independence of the ICC- how well the institutional structure of the Court permits the Court to be autonomous in practice. Thirdly, it analyses how influential states and the forces of geopolitical pressure affect the prosecutorial choices of the Court, and its jurisdictional capacity and enforcement ability to do so, and whether the corrective of a gavel without grip is fulfilled or subverted.

The research is of a doctrinal and theoretical approach primarily relying on the interpretation of treaties, judicial rulings, scholarly analysis on the issue, and institutional reports. The doctrinal element interprets the Rome Statute, ICC case law and other international tools. The theoretical aspect has integrated the views of international relations, critical legal studies and legal philosophy to assess the symbolic and political aspects of what the Court does. Such a two-fold approach allows to obtain both legal and conceptual understanding of the dependency between the institutional design, symbolism and geopolitical reality.

As a result of this framework, we end up with the following research questions:

- How does Rome Statute organise ICC, its jurisdiction, independence and structure of operation?
- What is the meaning of the gavel without grip that is being used in the international criminal justice context?
- Does the practical operation of the ICC portray the neutrality and autonomy of the institutional pictorials?
- What is the degree to which the ICC is being pressured by political considerations and especially powerful states to decide on prosecution and the ability to enforce its outlays?
- Can the concept of a truly apolitical, universally relevant system of international criminal justice be practiced within the existing system of world order?

These questions serve to inform the overall question on whether ICC is an extension of international criminal justice to a truly universal form or it will continue to be bound by the historical realities of state sovereignty and power politics. The picture of the gavel with no grip is therefore not just the visual signifier, but also a conceptual point of entry to judge on how similarities do not exist between the normative hopes of the Court and its functional constraints.

⁴ Linda Carter and Fausto Pocar, *International Criminal Procedure: Principles and Rules* (OUP 2013) 142–150.

II. THE ROME STATUTE: STRUCTURE, JURISDICTION AND FOUNDATIONAL PRINCIPLES

Rome Statute is a fundamental legal tool of the International Criminal Court (ICC), whose vision is a power base, its institutional framework and substantive jurisdiction. Being a treaty-based system, it is a voluntary agreement of the states to accept the jurisdiction of the Court, as opposed to institutions established by the United Nations Security Council (UNSC), which is an effort to establish a cross-border responsibility regime. The Statute as such, is the expression of an ideal of universal criminal justice and is limited by the inability to establish an international legal regime that remains ultimately tied to the consent of states.⁵

The design of the ICC revolves around the jurisdictional architecture of the Statute. It is organised into four main types of crimes that the international community singled out as the most serious crimes of interest: genocide, crimes against humanity, war crimes and crime of aggression. Crimes against humanity include crimes directed at the civilian population in its large scale or systematic form, and war crimes deal with the crimes in the international and the non-international armed conflict which expose the head of state.⁶

The Rome Statute is also tight on the time factor: The ICC cannot appeal or handle any act of conduct that occurred prior to the adoption of the Statute on 1 July 2002. The personal and territorial jurisdiction of the Statute are also well spelled out. These three forms of jurisdiction are those of promissory estoppel, the power of the Prosecutor, who may act at his will on information he obtains, provided authorised, by the Pre-Trial Chamber.⁷

The concept of complementarity is one of the most specific characteristic of the Rome Statute since, under Article 17, the Court can only interfere where national criminal jurisdictions are unwilling or indeed unable to prosecute in other words, genuine interferences. This privy does not interfere with state sovereignty, and at the same time, international crimes of a serious character are not left unpunished. The prosecution is still therefore mostly done through domestic law systems with the ICC only being used in cases where states have fulfilled their roles. Complementarity also inspires states to build up their legal systems, and this process can be observed in domestic laws which establish Rome Statute crimes as part of the domestic law.¹² The ICC never replaces domestic jurisdiction but simply anchors it in a participative -system of mutual responsibility in enforcing accountability.

The Statute states admissibility criteria in pebbles to conceptualise complementarity. In Article 17, the exception of inadmissibility is used on cases accused of being investigated or prosecuted by a state in which criminal activity is due, unless that state is unwilling or incapable of conducting the investigation or prosecution. The unwillingness test is determined by whether the process of national

⁵ M Cherif Bassiouni, *The Legislative History of the International Criminal Court* (Brill 2005) 27.

⁶ Rome Statute of the International Criminal Court 1998, art 12.

⁷ Antonio Cassese, *International Criminal Law* (OUP 2008) 329.

proceedings is aimed at protecting persons against prosecution, whether it is unduly protracted, or whether it lacks independence or objectivity. Inability test is also used testing systemic breakdown, inaccessibility of the courts or lack of capacity to conduct true investigations and the seriousness threshold restricts the Court to only the most serious cases thereby ensuring it does not become a place where a mundane or low-level offence is tried. All these principles serve to ensure that people that have been tried once by another court cannot be tried once more before the ICC over the same action; this is what the principle of *ne bis in idem* does.⁸

Strength in the Rome Statute is the establishment of a strong institutional framework that is pegged on a number of significant organs. Office of the prosecutor (OTP) is established to operate autonomously, without political guidance of any outside parties. 16 It conducts preliminary examinations, investigations and prosecutions in line with the factors of jurisdiction, admissibility and the interests of justice. The judicial system consists of the Pre-Trial, Trial and Appeals Chambers, each charged with different responsibility in enforcing due process demonstrations. 27 The Pre-Trial Chamber oversees the investigation process, issues arrest warrants and assesses the admissibility; the Trial Chamber tries the case and rules on the guilt; and the Appeals Chamber reconsiders decisions made by the trial chamber based on legal or procedural mistake. This multilink system is informed by experience gained in the previous tribunals, and it has strict judicial control on all levels.⁹

Another prominent development of the Rome Statute is that the rights of accused individuals have been greatly safeguarded, and the rightful participation of victims has been introduced in an invigorating way. At the same time, the victims are not reduced to a passive role only, as Article 68 provides them with the opportunity to act as direct participants of the process, express opinions and interests, and reclaim damages in addition to personal ones. This restorative aspect of international criminal justice is further emphasized by the ICC regime of reparations that is administered by the Trust Fund on Victims.

The state cooperation regime plays a key role in the success of the ICC and it is entrenched in the Statute. Since there is no police force within the Court, the Court depends on the goodwill of the states in the arrest, transmission of the suspects, gathering of the evidence, securing of the witnesses and imposition of the sentence. The lack of cooperation seen in such cases as the unwillingness of a number of states to arrest Omar al-Bashir despite the existence of ICC warrants is evidence of a structural weakness of the treaty-based method, which exhibits that the Court remains at the mercy of political will even where it comes to more mundane issues. In spite of its contribution to the broad participation, the model of cooperation shows that the Statute has rather the aspects of voluntary compliance instead of the authoritative parameters.¹⁰

⁸ Rome Statute, arts 5–8.

⁹ William Schabas, *An Introduction to the International Criminal Court* (5th edn, CUP 2017) 107–131.

¹⁰ Rome Statute, art 11

The Rome statute has a number of gaps, ambiguities and negotiated settlements, notwithstanding the sophistication, which show the political tension at the time it was made. An example is that the crime of aggression was not defined in the original Statute as states were in acute dissent on where it covers and connotations. The final version arrived at at Kampala was also a compromise that necessitated further ratifications and activations. Likewise, the insistence of strong states, in particular the United States, China and Russia towards effecting opt-outs and exemption as well as reliance on referral by the UNSC, shaped provisions on jurisdiction, making the determination of unwillingness or inability frequently complex, subjective, and politically charged. In addition, there remains ambiguity in the definition of the threshold of gravity and the weighing up of prosecutorial discretion and judicial control under the Rome Statute, but they demonstrate that the Rome Statute, however, radical, is more political than legalistic in its ideology.¹¹

Altogether, the Rome Statute is a very coherent and well-conducted set of principles of international criminal responsibility. Its scheme of jurisdiction, institutional framework, procedure protection and cooperation regime, constitute the result of decades of development of international criminal law. Nevertheless, the compromises and loopholes addressed by the Statute also show the limitations of the development of a judicial body in a system prevailed by the sovereignty of states. The friction between the formal power of the Court and its reliance on the states as a matter of fact still characterizes its operation and its legitimacy casting some underlying questions on whether the ICC can realise its mandate unilaterally and universally.¹²

III. SYMBOLISM OF THE “GAVEL WITHOUT GRIP”: LEGAL AND PHILOSOPHICAL DIMENSIONS

Symbols are major in the defining of identity, power, and actual legitimacy of legal institutions. One such symbol is the gavel in which the gavel has a long history of being used and being taken as a symbol of the judicial authority, order and the closure of adjudication. It was mostly Anglo-American in origin, the gavel serving as a symbol of court authority, judges banging it to gain attention, to keep order and to mark a commencement or conclusion of a justice case in a tradition where the literal use of gavels is uncommon or nonexistent. Elements of judicial symbolism were also used in the work of international courts, such as the Permanent Court of International Justice later the International Court of Justice, but conscious of a special mandate deliberately updated the visuals to suit its own sense of authority.¹³

The ICC has an iconographic constitution. The official emblem of the International Criminal Court consists of scales of justice surrounded by olive branches, representing impartiality and peace. The lack of a grip in the official pattern used by the Court is explained by the fact that it represented the impartiality of justice being rendered and a lack of influence, particularly politically, by any of the states. A gavel cannot be held or swung without a grip; justice being administered by the ICC is not supposed to be within the physical/political reach of one of the states. The logo conveys the value

¹¹ *ibid* art 12(2).

¹² Stahn (n 11) 241–249.

¹³ Judith Resnik, ‘Judicial Iconography and the Rule of Law’ (2019) 67 *American Journal of Comparative Law* 133.

of universality, independence and neutrality, which the Court upholds in the Rome Statute. The inclusion of the olive branches strengthens the message of the Court which is peace and reconciliation, a fact that is in line with the larger objective of the Court to combat international serious crimes that taint international peace. Therefore, its visual image is a reflection of its legal image a court that is supposed to be above national interests.¹⁴

In a philosophical perspective, this symbolism resonates with ideas of natural law and cosmopolitan theories of justice which consider some kinds of crimes to specifically be forbidden because they are attacks on the humanity as a whole. This ethos of universalism is seen in the gavel in the gavel without grip: justice does not depend on the interests of specific states but rather on a morality because there is no end in themselves. This future cosmopolitan theorists like David Held claim that the governance bodies in the world should take their legitimacy sources in the impersonation of universal principles and not states sovereignty.¹⁵

On the contrary, legal positivism does not base the powers of the ICC on universal morality but on the will of states. To this effect, the legitimacy of international law is based on the voluntary agreement among sovereigns, and the ICC is thus treaty-based as far as it is filled with references to the UNSC or the ratification of the Rome Statute. Positivist criticism may imply that the gavel in the air is more of a symbol rather than reality: the power of the Court depends on up how far as it is permitted by the states. However the symbolism is not irrelevant since it embodies the bargained desire among states to establish an independent court despite the realities on the ground that their dominance over jurisdiction, funding and enforcement may still limit them. The strength of the ICC between universal moral justice and consent-based authority is the source of tension.¹⁶

The third philosophical approach is critical legal studies (CLS), which is a critique of legal symbols as tools that obscure power relations. According to the CLS scholars, legal institutions present their profiles as being neutral and independent, whilst in fact operating in a model in which they call on political interests and economical reliance that are inherent within the ICC. This practice of the Court which requires cooperation by states, selective use of UNSC referrals, and its weak powers against powerful states makes its pretence of impartiality difficult. In this way, the symbol expresses a denial of political control, however, the CLS analysis bridges the structural limitations which still hold the Court in practice in a grip.¹⁷

The ideal of normativity symbolized by the emblem of the ICC is a system of inter-global criminal justice that transcends geopolitics. The Rome Statute sees a permanent, independent court with the power to prosecute the most heinous offenses regardless of the identity, nationality or any other political affiliation of the criminals. The key issue, however, is to make this optimal come true in practice. Symbolism and functionality The gap between the symbolism and functionality of

¹⁴ Hersch Lauterpacht, *The Development of International Justice* (Stevens 1958) 67–70.

¹⁵ ICC, *Official Emblem Guidelines* (ICC Publications 2004).

¹⁶ Ibid.

¹⁷ Antonio Cassese, *International Criminal Law* (OUP 2008) 20–23.

international institutions that is between what international institutions are and what they are capable of doing is a repeated theme in global governance.¹⁸

The ICC has been under constant, prolonged criticism that it has not lived to its symbolic promise. The loudest criticism is that of the African Union (AU) which has repeatedly accused the Court of targeting African leaders in disproportion and has embraced selective justice as well as structural bias and geopolitical imbalances in the Court activities. When ICC officials mention that many African cases have been self-referred by the governments pursuing accountability, the African Union (AU) believes that the pattern indicates the deeper structural bias and geopolitical imbalances in the work of this Court. This contradiction points to the complexity of the perceived neutrality of an international system where economic and political inequities are a part of the state of affairs.¹⁹

One more significant obstacle comes out of the hostility of United States to the ICC. Despite taking a significant part in the negotiations in Rome, the US finally refused to ratify the Statute because of fears that US soldiers and nationals could be prosecuted by the ICC due to political reasons.¹¹ A limitation The ASPA has been generally understood as a political rejection of the authority of the ICC. This aggressiveness seriously weakens the formal pretension of the ICC to being global and independent: when one of the key global superpowers does not only decline to join the Court, but actively curtails them, much of the hope of a grip-less justice becomes hard to put into practice.²⁰

UNSC referral structure also creates more misgivings regarding selective justice. The Security Council, with the veto of the P5 (United States, United Kingdom, France, Russia and China) in control, is allowed to refer situations to the ICC or postpone investigations. Due to this, situations can be directed to the Court based on the interests of the powerful geopolitical entities. A famous example may be the Syrian conflict: the situation was Saddam with massive evidence of mass atrocities, but referrals were foamed at the mouth by Russian and Chinese veto. A situation in Darfur and Libya was not resisted: such states have low political authority. This discriminatory interaction brings out the limitation of the imbalance of power in the world and its negative impact on the ability of the ICC to fulfil its symbolic pledge of cutting across the board with regards to impartial justice.²¹ Finally, the interaction that exists between the symbol of the gavel without grip and the real workings of the ICC shows a conflict between representation and reality. On the one hand, the symbol reflects the normative aspirations of the Court: the institution that does not engage in the politics of justice but only administers it basing on universal values and its isolation in the politics of power. Conversely, the strengths of the ICC such as state non-cooperation, selectivity when it comes to referral, susceptibility to the issues of geopolitical pressures, show that justice may not be completely emancipated, in the systems of sovereignty and international relations. The symbol depicts a court that dreams of being independent; the practice shows a court that is trying to survive in the current moods of international politics.

¹⁸ David Held, *Cosmopolitanism: Ideals and Realities* (Polity Press 2010) 88–93.

¹⁹ Mark Tushnet, 'Critical Legal Studies' (1991) 100 Yale LJ 1515.

²⁰ American Service-Members' Protection Act 2002 (US).

²¹ UNSC Draft Resolution S/2014/348 (22 May 2014), vetoed by Russia and China.

This conflict does not downplay the importance of the symbolism. Instead, it points out the aspirational character of international criminal justice: symbols are beacons of ideal configuration that work to craft an identity of the institution and the expectations of the people. It is the gavel without a grip thus not only a symbol of what the ICC is and what it is trying to be but also a reminder of the work that remains to be done to get there. The symbol can be used as the prism to evaluate the gap between the normative assertions and the actual performance, which will add to the academic knowledge of the legitimacy and constraints of the Court. Quite to the contrary, the iconography of the ICC is part of a bigger discourse of justice, power and position symbols play in legal consciousness formation on the international level.²²

IV. PRACTICAL FUNCTIONING OF THE ICC: SUCCESSES, LIMITATIONS AND CONTROVERSIES

It is shown by the practical operations of the International Criminal Court (ICC) that there is a conflict between its high-unghted normative agenda on one hand and operational political and logistical realities on the other. The Court has since the time of its establishment in 2002 established a comprehensive jurisprudence and contributed to the international criminal law significantly. But it has been facing long term impediments, including non-cooperation of states and accusation of discrimination in dispensing justice. The achievements and failures of the ICC need, therefore, to be assessed in the context of the complicated institutional, legal and geopolitical situation, in which it is based.²³

A major success of the Court was the Prosecutor v Thomas Lubanga Dyilo, the first conviction in the history of the ICC, which confirmed that the Court was able to conduct a complete investigation, arrest a suspect consensually by the state and conduct a fair trial and pass a reasoned verdict. It was also an early addition to international law by bolstering the jurisprudence surrounding child soldiers and also by clarifying evidence issues in international criminal investigations, yet the Lubanga case also displayed early operational soft spots such as disclosure issues, intermediary concerns and prosecutorial strategy.²⁴

After Lubanga, the ICC executed a number of convictions, including Prosecutor v Germain Katanga which addressed the question of both abetting and perpetrating a murder and a crime against humanity in the Democratic Republic of Congo. The ICC was able to make its first conviction of the war crime of destroying cultural heritage intentionally in Timbuktu in Prosecutor v Ahmad Al Faqi Al Mahdi, contributing to the growing appreciation of cultural rights as a crime under international humanitarian law.²⁵

²² UN Charter, art 13(b); Rome Statute, art 16.

²³ Prosecutor v Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 (14 March 2012).

²⁴ Ibid.

²⁵ Mark Drumbl, 'Child Soldiers and the Lubanga Trial' (2012) 10 JICJ 985.

In spite of these remarkable achievements, the history of the Court also reveals significant failures, especially in the situations when the collaboration of the states with the interests in politics is needed. The most symbolic one is that despite ICC warrants accusing Omar Hassan al-Bashir, former President of Sudan, of genocide, crimes against humanity and war crimes in Darfur, the latter, being a non-State Party, was bound to cooperate since the situation in Darfur was of concern to the UN Security Council (UNSC). However, over the years, the Court allowed Bashir to travel, even to States Parties, like South Africa, Chad and Kenya. The same did not happen to the Court, but instead sparked concerns of selective enforcement: the Court has no police force of its own, instead it has to rely on state cooperation.²⁶

The Kenya case, specifically the unwarranted dismissal of charges against President Uhuru Kenyatta and Deputy President William Ruto due to a lack of evidence related to the post-election violence of 2007/2008, is another high-profile failure due to the systematic witness interference, intimidation, and unco-operative attitude of the state which the ICC attributed to large part.¹¹ The Kenya cases turned into a symbol of a more significant problem: the inability of the ICC to obtain credible evidence in the political unfriendly settings.²⁷

Other issues which have been viewed as contentious in relation to the ICC in terms of its inability to deal with crimes committed by world powerhouses has also been a thorn in its flesh. This challenge was exemplified in the Afghanistan probe, which was an issue of crimes committed by the Taliban, Afghanistan civil authorities and US civilian personnel. In 2020, the Appeals Chamber approved a full-scale investigation, overturning a decision of the previous Pre-Trial Chamber, pointing to the weakness of the Court when it targeted powerful non-State Parties, but remedying the weakness of the Court.¹²¹³ In 2020, the US political pressure, which included sanctions against the officials of the ICC by the Trump administration, slowed down the progress and made it clear that a powerful Court is vulnerable to influential action under these circumstances.²⁸

In the same vein, the ICC became the topic of acute political rivalry because of the Palestine case. In 2021, the Pre-Trial Chamber affirmed that the Court was jurisdictional over crimes committed in the annexed Palestinian territories, a move that brought intensive opposition on both sides of the geopolitical partnership and geopolitical borders issue by the Israelis and the United States.¹⁵ Similar case scenarios in Myanmar/ Rohingya investigation, where ICC can only exercise its authority over crimes with a cross-boundary dimension, complicate the investigation of human atrocities that occur mostly within Myanmar, a State Party.

In addition to the separate cases, there are also some systemic issues impacting the operations of the ICC. Selectivity of UNSC referrals is one of the key problems. This kind of discriminatory referral is seen through the release of situations like Libya and Darfur, which are somewhat weak states, and those that have been vetoed as more politically sensitive, like Syria.¹⁸ The result of this selectivity

²⁶ Prosecutor v Germain Katanga (Judgment) ICC-01/04-01/07 (7 March 2014).

²⁷ ICC, 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir' (2009, 2010).

²⁸ Dapo Akande, 'South Africa's Failure to Arrest Al Bashir' (2015) EJIL Talk

in referral creates the impression that the ICC is a partisan instrument instead of impartial global justice system. This image leads to the greater issues of legitimacy, especially among states in the Global South.

ICC is also facing serious resource limitations. Investigations are expensive and the annual budget prepared by the Court funded by contributions by primarily the States Parties may not be sufficient to accommodate several widespread complex investigations at a time thus leading to delays or restricting investigative methods. The Office of the Prosecutor (OTP) has to deal with conflicting priorities at all times but occasionally has been accused of over-trusting to intermediaries or failure to build a case effectively.

Another difficulty is connected with witness protection that has become a significant weakness. Witness protection has been undermined in a number of instances, such as Kenya, and the DRC, including by bribing witnesses or threatening them; the ICC does not offer as much protection as local courts, and witness relocation can be logistically and politically challenging. This issue is particularly acute in conflict zones which may also be considered as a problem of continuing conflict zones and in these particular cases, the reliance of ICC mainly depends on unstable local partners.²⁹ At the political level, the ICC has experienced a significant level of opposition especially with the African Union (AU) accusing the Court of overly investigating African leaders despite the fact that some of the early ICC cases involved African states, but most have been self-referred and Prosecutor has broadened its investigations to include Ukraine, Afghanistan, Georgia and Palestine. Regardless, it has diplomatic impacts on the members of the AU, with threats to withdraw, such as South Africa, Burundi and Gambia. 233 These dynamics underscore the balance which the ICC needs to maintain between presumption of authority and state loyalty.

Another weakness is that the ICC is also in a treaty structure which has the effect of restricting its power inherently. Since the Court bears no territorial jurisdiction, it cannot take action in a scenario where the other party is not a State Party referred or accepting of jurisdiction by the UNSC, which undermines the Court as an impartial actor to crimes at the global level. Furthermore, states have an option to withdraw the Statute, with case in point being the Philippines after an inquiry was launched on the so-called war on drugs by the Philippines President Duterte. 25 Withdrawal also serves to highlight the weakness of a system that only relies upon voluntary participation.

In spite of these shortcomings, the ICC has played significant normative and preventive roles. According to scholars, the Court plays a role in influencing state behaviour by raising the political cost of committing or condoning atrocities. 26 The ICC also impact on domestic legal reform and seek to endorse state mechanisms of holding itself accountable as a way of preventing ICC action. Though the empirical data of deterrence is varied, the symbolic and legal presence of the Court itself has been of tremendous influence on the anti-impunity movement in the world.

²⁹ Prosecutor v Afghanistan (Appeals Chamber Judgment) ICC-02/17 (5 March 2020).

On the whole, the practical performance of the ICC shows that there is a complicated game of aspiration and limitation. Its case jurisprudence has shown it to make positive contributions to the international criminal jurisprudence, yet its operations have been hampered due to its state non-cooperation, political pressure, selective jurisdiction and limitations on resources. This is its failures and its successes in a nutshell, and it represents the general tension between what the ICC sees as a justice system that is without grip and the reality of the world that is dominated by sovereignty and power politics.

V. THE ICC IN A CHANGING INTERNATIONAL ORDER: POWER DYNAMICS, REFORM DEBATES AND FUTURE POSSIBILITIES

The International Criminal Court (ICC) was founded at a time when there was relative optimism over the global governance at a time when multilateral institutions seemed to be ready to determine a rules-based international regime. Nevertheless, in the twenty-first century, the world has undergone radical change in terms of geopolitics. The emergence of multipolarity, the re-emergence of the nationalist politics, and enhanced great-power competition have all contributed to changing the environment under which the ICC functions. This changing environment has brought about not only new opportunities to the Court but also serious questions to operate without any political interference and on its own and exercise the mandate it has.³⁰

A shift towards a so-called multipolar world of increasing influence of powers other than the United States, such as China, Russia, India, Brazil and regional blocs in Africa and the Middle East has been the largest trend to influence the ICC in its early years, and still continues to this day, particularly in the backing of the Court by the West, and especially by Europe. However, the shift of power across the globe has rendered the international criminal responsibility a more and more elusive concept. This non-universality significantly undermines the symbolic ambition of a court without grip since major geopolitical actors, China, Russia and the United States, are permanent members of the UN Security Council (UNSC), and none of them want to miss the opportunity to exert its criminal reign of terror in the current security situations.³¹

Meanwhile, a major counter-trend has taken shape out of the growing reliance on universal jurisdiction on the part of domestic courts. Criminal prosecutions of international crimes have already been tried by other nations like Germany, France, Sweden and the Netherlands using local law based on the principle of universal jurisdiction. The landmark case of the Koblenz trial in Germany which found a former Syrian intelligence officer guilty of committing torture in Syria is one example of how accountability may be addressed even in the face of the ICC being jurisdictionally limited or even politically blocked. Universal jurisdiction therefore gives a complement to the ICC by providing more avenues to justice but also creates some doubts concerning inequity and possible diplomatic tensions.³²

³⁰ Amitav Acharya, *The End of American World Order* (Polity 2018) 34–39.

³¹ Rome Statute of the International Criminal Court 1998, art 12.

³² Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 123–129

Another popular model of flexible accountability is the use of hybrid tribunals. These hybrid Courts like the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Kosovo Specialist Chambers can provide more procedural flexibility and local credibility than the ICC in some cases. The emergence can be attributed to the fact that the international community is seeking mechanisms that can work even in cases where the political barriers make ICC intervention difficult. Nonetheless, hybrid tribunals are largely reliant on ad hoc political accommodations and hence fail to substitute the desire of the ICC to have a permanent and universalised institution.³³

On the ICC itself, there are still discussions as to the amendments to the Rome Statute. One matter of reform suggests the inclusion of ecocide as a fifth core crime by the Rome Statute to ensure the process is limited by the existing procedure safeguards that would incorporate more state consent.⁸ There is also another major reform proposal, which states that ecocide should be recognised as a fifth core crime, which is proposed to be improved by the procedure protection of the crime. As the civil society and selected states are gaining strength, politics remains inconclusive, especially in the view of the resistance of large polluting countries.³⁴

Besides reforming the substantive law, the ICC has been increasing and perfecting its approach towards sexual and gender-based crimes (SGBV). The legal status of battered marriage and sexual slavery and gender-based persecution has been reinforced by the jurisprudence of the Court in cases including Ongwen and Ntaganda 9 but there are still areas they identify as gaps in the standards of evidence, cultural responsiveness and resources allocated to the SGBV investigations. Better accountability has been suggested by increased training, spearheaded units and procedures centered on survivors.

The future operations of the ICC are greatly determined by the technological advancements. Traditional investigative possibilities have been challenged by the growing availability of digital evidence, particularly satellite images, videos on cell phones, social media content and open-source intelligence (OSINT), which are now created in large volumes by organisations like the Commission for International Justice and Accountability (CIJA) and Bellingcat to be used in accountability procedures and processes.¹¹ The utilisation of digital evidence, however, raises issues of a complex nature related to authentication, chain of custody, metadata preservation and manipulation by deepfakes or fake content. Nevertheless, these issues do not diminish the potentials of the digital investigations to minimize the importance of the state cooperation and increase the ability of the Court to record the crimes in real-time.³⁵

In the light of these changing dynamics, the question determines whether the ICC and its ability to realise the aspiration represented in the the symbol of the gavel without grip will ever be fully achieved. In effect, the Court is still greatly influenced by world politics of power. Its reliance on the cooperation of the state especially on making arrests, evidence and funding has provided

³³ Higher Regional Court of Koblenz (Syrian Torture Case), Judgment of 13 January 2022.

³⁴ Sarah Williams, *Hybrid and Internationalised Criminal Tribunals* (Hart Publishing 2012) 55–70.

³⁵ Claus Kress, 'The Crime of Aggression and the Future of the International Criminal Court' (2011) 23 LJIL 851.

loopholes which can be used by the states. This selective exercise of international criminal justice is evident in the selective referral system at UNSC: even though Sudan and Libya have been referred to the Council, an attempt to refer Syria or North Korea has always been vetoed based on geopolitical considerations instead of legal principles (Fullack, 2015).³⁶

Moreover, the dependency of the ICC on a treaty-based model implies that states can either withdraw or threaten the withdrawal when the inquiring turns out to be unacceptable. The withdrawal of the Philippines in response to the scrutiny of the Prosecutor of the so-called war on drugs attests to this weakness.¹³ Likewise, numerous African states have occasionally reflected on the collective withdrawal due to perceived bias and double standard.³⁷

Nevertheless, the ICC still has massive normative impact. The fact that the Court continues to operate is a contribution to the development of the international criminal norms, builds upon the international demand of accountability and undermines the symbolic construction of the anti-impunity movement. To promote institutionalisation, the actions of states are also affected because the presence of the ICC causes reputational and political costs to perpetrate atrocity crimes though they may not actually face prosecution, due to the complementarity principle.

The reform initiatives to improve the effectiveness of ICC often center their attention on the structural and procedural change. The first and most frequent notion is to narrow UNSC control over ICC referrals and deferrals, especially by restricting or abolishing the P5 veto on mass atrocities. 16 Although this suggestion is politically unlikely, it has the potential to make the Court much more impartial. The other suggestion is an enhanced mechanism of cooperation among states, such as the development of cooperation incentives, clearer enforcement duties, and more powerful Court authority to penalize non-cooperative states, which nowadays does not have any substantial authority whatsoever.

Also, in the focus of discussions on reform is the improvement of the Office of the Prosecutor (OTP). Critics also highlight the importance of improved case selection, greater involvement with communities that are affected and greater investigation power. The improved visibility of these prosecutorial decisions would lead to a decrease in the effects of being seen as selective and increases in legitimacy. The use of witness protection programmes, field offices and local relationships would further improve the efficiency of operations of the Court. Lastly, better collaboration between the ICC and the regional organisations like the African Union, European Union and ASEAN might assist in addressing the gaps of legitimacy, although the tendency to personalise international criminal accountability.

Finally, the future of the ICC will be based on its capacity to go through this tension between its symbolic ambitions and the realities of global politics. The Court itself cannot do without the actualities of sovereignty or the effects of mighty states, but it may remain able to enhance its

³⁶ CIJA, *Annual Report* (2022); Bellingcat, *Investigations Archive*.

³⁷ UN Treaty Collection, 'Philippines Withdrawal from the Rome Statute' (2019).

institutional independence and increase its normative influence. Another bit of utopia is the so-called gavel without grip, or justice not tied to political considerations. The future success of the ICC towards this ideal will be determined by future determination of international commitment and adaptive institutional reform and ability to adjust to the ever-challenging international environment through evolution.

VI. CONCLUSION

The idea of an international criminal court (ICC) was built on history; it developed under the courageous hope that a permanent, independent body can be established to prosecute those individuals who commit the most atrocious international offenses regardless of political influence, nationality or geopolitical orientation. This desire is reflected in the Rome Statute by its jurisdiction framework, its complementarity arrangement, its procedural protections and its symbolic identity which is best symbolized by the gavel without grip. Such a symbol reflects the normative aspiration of the Court to deliver the justice that will be immune to the manipulation of the state and create the image of the impartiality, the sense of morality and universality of the application. However, as per the analysis above, the distance between this aspirational symbolism and the practice of the work of the ICC is still enormous.³⁸

Structurally, ICC has considerably progressed in creating independent legal building based on elaborate procedure rules and an elaborate institutional design. Through its pioneering rulings like the case of Lubanga, Katanga, Ongwen and Al Mahdi, the ICC has added value to the development of international criminal law, particularly concerning child soldiers, the responsibility of command, cultural destruction and gender crime.² The jurisprudence of the ICC has influenced the development of domestic justice systems in various jurisdictions and thus has a substantial influence on the anti-impunity movement officially.³⁹

Nevertheless, state non-cooperation has constantly been cited as a challenging concept to the performance of the ICC, and the greatest structural shortcoming of the Court. The inability to fulfill its own enforcement system by states, coupled with warrants to arrest Omar al-Bashir despite numerous ICC demands, and the breakdown of the cases in Kenya due to interference by witnesses and the unwillingness of states to collaborate, to reveal inconsistency between high hopes of impartial justice within the Court and the realities of politicians, diplomacy and resistance to the state.⁴⁰

Cases where the major powers or their political allies are involved stir up high levels of political reaction, diplomatic interference and even sanctions against such authoritative and influential entities, while cases involving less powerful states have been treated with relative ease whether in reference, prosecution or investigation creating a sense of partisanship. This has been reflected in

³⁸ ICC, *Official Emblem Guidelines* (ICC Publications 2004).

³⁹ Prosecutor v Lubanga (Judgment) ICC-01/04-01/06 (14 March 2012); Prosecutor v Ongwen (Judgment) ICC-02/04-01/15 (4 February 2021); Prosecutor v Al Mahdi (Judgment) ICC-01/12-01/15 (27 September 2016).

⁴⁰ Olympia Bekou, 'National Implementation of the ICC Statute' (2012) 10 JICJ 417.

the continued criticism on the part of the African Union of the disproportionate attention paid to Africa and also explains why the general admissibility gap has shown that the ICC is having some problems in preserving an image of apolitical, balanced justice.⁴¹

This is even complicated by the role of the UN Security Council (UNSC). UNSC referrals are an effective instrument of extending ICC jurisdiction to non-State Parties, but the veto authority held by the P5 is used to confine referrals to those cases that do not impact major geopolitical interests. These discrepancies negatively affect the credibility of the universality of the ICC and indicate the structural tie of international criminal justice to the international structures of power.⁴²

With the transition of the international order into the multipolar mode, the ICC has to deal with a more complex geopolitical environment. Proliferation of universal jurisdiction prosecution and hybrid tribunals indicates, both the increased responsibility to accountability and also the constraints of the ICC as a central institution - but also, there are changes in how to verify, chain of custody and cybersecurity.

When put together, these developments indicate that the future of the ICC will have to rest on its capacity to respond institutionally but remain normatively clear. The closer UNSC political influence reforms can overcome the gap between the ICC ideal and application: reforms to the prosecutorial strategy, improvements in the state cooperation mechanisms, increased transparency, more resources and reduced UNSC political influence can assist the Court to do so; however, with the States Parties, civil society and regional organisations at the forefront of reforms.

Finally, the gavel without grip continues to be a potent marketing image of what the ICC aims to represent, which is justice that cannot be possessed, is not to be under the influence or control of the political interests of states. This is however not the case since this study has indicated that the ICC is founded on an international system that is inherently constructed around sovereignty, political bargaining and unequal power relations. Symbol-reality tension cannot be an incidental quality. The Court can never truly go beyond these limitations, but its symbolic and normative power is not insignificant. In this, however, the symbolic bang of the gavel of the Court still rings: not as an ideal image of integrity achieved but as an ideal of what states and institutions can still using the pursuit of global justice.

⁴¹ Rome Statute of the International Criminal Court 1998, Part 9.

⁴² Dapo Akande, 'South Africa's Failure to Arrest Al-Bashir' (2015) EJIL Talk; ICC, 'Kenyatta Case Withdrawn' (Press Release, 5 December 2014).