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Selective Prosecution and Geopolitical Bias in International Criminal Law: A Doctrinal Analysis of the ICC's Legitimacy Crises

T ADI LAKSHMI*  AND M RAJINI** 

ABSTRACT

The emergence of international criminal law (ICL) marked a decisive departure from the Westphalian principle of sovereign impunity by locating accountability in individuals rather than States. Rooted in the Nuremberg and Tokyo Tribunals and institutionalised through the Rome Statute of 1998, the International Criminal Court (ICC) was established to prosecute genocide, war crimes, crimes against humanity and aggression. Its promise of universal accountability has, however, been weakened by geopolitical selectivity. This article critically examines how the prosecutorial decisions, jurisdictional limitations and dependence on United Nations Security Council referrals of the ICC have disproportionately affected African States, while powerful nations and their allies have frequently avoided comparable scrutiny. Employing a qualitative doctrinal and case-based methodology informed by critical legal theory and Third World Approaches to International Law (TWAIL), the study analyses structural inequalities within the institutional framework of the Court. It demonstrates how prosecutorial discretion, the uneven application of complementarity, Security Council veto powers and limited transparency in case selection can facilitate strategic impunity for dominant geopolitical actors. The article further examines the proceedings of the Court concerning Kenya and its limited action regarding alleged Western violations in Iraq and Afghanistan, illustrating the asymmetrical administration of international criminal justice. The study argues that such inconsistent enforcement has strengthened perceptions of neo-colonialism and has made international criminal law appear to be a mechanism selectively imposed upon the Global South. This politicisation threatens the credibility, legitimacy, universality and moral authority of the Court. The Court must therefore adopt transparent prosecutorial standards and apply legal principles consistently to all States, irrespective of political power, regional influence or international alliances.

* Author is a Student at Aurora Deemed to be University, Bhongir, Telangana, India. ORCID: <https://orcid.org/0009-0002-6307-8705>

** Author is a Student at Aurora Deemed to be University, Bhongir, Telangana, India. ORCID: <https://orcid.org/0009-0006-2868-8742>

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I. INTRODUCTION

The advent of international criminal law (ICL) marked a paradigmatic rupture in the Westphalian doctrine of sovereign impunity, redirecting the gaze of international justice from collective State liability to individual criminal accountability. Born from the ashes of the Second World War and crystallised through the Nuremberg and Tokyo Tribunals, ICL aspires to adjudicate the gravest breaches of international norms, namely genocide, crimes against humanity, war crimes and the crime of aggression. Its crowning institutional expression, the International Criminal Court (ICC), was created by the Rome Statute adopted on 17 July 1998, which entered into force on 1 July 2002; the Court was envisioned as a guardian of global accountability and a deterrent against impunity.^{1,2,3,4,5}

However, a vital fissure compromises the structural integrity and normative aspirations of ICL: geopolitical selectivity in prosecution. Although conceived as a universal instrument of justice, the prosecutorial patterns of the ICC reveal a marked asymmetry. Its docket has been disproportionately populated by African defendants, while alleged transgressions committed by powerful nations, often members of the United Nations Security Council (UNSC), have remained largely uninvestigated or unprosecuted. This dissonance has catalysed critiques of institutional bias, neo-colonial tendencies and the subordination of law to realpolitik.⁶

This article explores how geopolitical selectivity undermines the legitimacy, effectiveness and universal reach of ICL. It argues that political interference, particularly through the referral mechanism of the Security Council and the veto power of its permanent members, compromises

¹ Charter of the International Military Tribunal art. 6, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

² Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, T.I.A.S. No. 1589.

³ ANTONIO CASSESE, CASSESE'S INTERNATIONAL CRIMINAL LAW 3–12 (Paola Gaeta et al. eds., 3d ed. 2013).

⁴ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1–16 (5th ed. 2017).

⁵ Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90.

⁶ *Situations under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/situations-under-investigations> (last visited Sept. 15, 2026).

the impartiality of the ICC and risks turning it from a symbol of justice into an instrument of selective prosecution.^{7,8,9}

II. LITERATURE REVIEW

A. Evolution of international criminal law

International criminal law evolved as a response to impunity for egregious crimes committed during armed conflict. The Nuremberg Charter of 1945 and the Tokyo Charter of 1946 set forth the principle of individual criminal responsibility under international law. These ad hoc tribunals laid the foundation for the post-Cold War resurgence of international criminal tribunals such as the ICTY and the ICTR, which in turn paved the way for the creation of the ICC.^{10,11,12}

Scholars such as Antonio Cassese and William Schabas have emphasised the normative advances made by these tribunals, more particularly in advancing accountability, the rights of victims and the development of customary norms. Criticism nevertheless emerged about the partiality, selectivity and politicisation of such tribunals, specifically where the international community wielded them inconsistently.^{13,14,15}

B. Rome Statute and the principle of complementarity

The Rome Statute of 1998 established the ICC as a permanent court with jurisdiction over the core crimes. It institutionalised the principle of complementarity, stipulating that the Court may exercise jurisdiction only where national courts are unwilling or unable genuinely to investigate or prosecute. While the principle was intended to respect State sovereignty and judicial integrity, critics argue that it has also become a vector through which powerful States shield themselves from scrutiny, more particularly where national mechanisms are not objectively assessed or are deliberately incapacitated by political considerations.^{16,17}

⁷ Mahmood Mamdani, *The Politics of Naming: Genocide, Civil War, Insurgency*, LONDON REV. BOOKS, Mar. 8, 2007, <https://www.lrb.co.uk/the-paper/v29/n05/mahmood-mamdani/the-politics-of-naming-genocide-civil-war-insurgency>.

⁸ B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMMUNITY L. REV. 3, 3–8 (2006).

⁹ Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 201–12 (2001).

¹⁰ Charter of the International Military Tribunal, *supra* note 1, art. 6.

¹¹ Charter of the International Military Tribunal for the Far East, *supra* note 2, art. 5.

¹² Cassese, *supra* note 3, at 3–12.

¹³ Statute of the International Tribunal for the Former Yugoslavia arts. 1–5, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (May 3, 1993), adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

¹⁴ S.C. Res. 955, Statute of the International Tribunal for Rwanda arts. 1–4, U.N. Doc. S/RES/955 (Nov. 8, 1994).

¹⁵ Schabas, *supra* note 4, at 1–16.

¹⁶ Rome Statute, *supra* note 5, art. 1.

¹⁷ Rome Statute, *supra* note 5, art. 17.

Kevin Jon Heller has examined how complementarity can be manipulated by States that mount sham proceedings in order to block ICC intervention, while Mahmood Mamdani has argued that the application of ICL has disproportionately targeted Africa, reinforcing historical patterns of domination under the guise of justice.^{18,19}

C. Geopolitical selectivity and the prosecution record of the Court

The most trenchant criticism of the ICC has concerned its apparent focus on African nations. The early docket of the Court was drawn almost entirely from Africa, with formal investigations in Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, Kenya, Libya, Mali and Côte d'Ivoire. Investigations have since been opened beyond the continent, in Georgia in 2016, Bangladesh/Myanmar in 2019, Afghanistan in 2020, the Philippines, Venezuela and the State of Palestine in 2021 and Ukraine in 2022. Critics nonetheless maintain that atrocities credibly alleged in Syria, Iraq, Afghanistan and Palestine, including those attributed to Western actors, have not attracted equivalent prosecutorial attention.^{20,21,22,23}

Some scholars have referred to this as “selective justice”. Critics have questioned the discretionary referral power of the Security Council under Article 13(b) of the Rome Statute, arguing that the veto held by the permanent members entrenches impunity for certain States. That critique is echoed by human rights organisations and by leaders in the Global South, who regard the pattern of prosecution of the Court as evidence of a neo-colonial legalism that reinforces structural hierarchy in global governance.^{24,25}

III. RESEARCH PROBLEM

Despite its founding promise of impartiality and universality, the operations of the International Criminal Court exhibit a persistent pattern of geopolitical selectivity, raising fundamental questions about the neutrality, legitimacy and sustainability of the ICL regime. The problem is compounded by three factors.

¹⁸ Rome Statute, *supra* note 5, art. 17; Mamdani, *supra* note 7.

¹⁹ Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 255–58 (2006).

²⁰ *Situations under Investigation*, *supra* note 6.

²¹ *Prosecutor v. Muthaura, Kenyatta & Ali*, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012).

²² *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

²³ *Prosecutor v. Gaddafi & Al-Senussi*, ICC-01/11-01/11-1, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi” (June 27, 2011).

²⁴ Rome Statute, *supra* note 5, art. 13(b).

²⁵ U.N. Charter art. 27, ¶ 3.

- Disproportionate targeting of African nations, with negligible accountability for actors from powerful or geopolitically strategic States.
- Political manipulation of referrals and investigations, especially through the Security Council referral mechanism under Article 13(b) and the use of the veto by the permanent members.
- Institutional limitations within the Court, including prosecutorial discretion that lacks clear criteria for prioritisation and insulation from external political pressure.

This article hence seeks to analyse the juridical, institutional and political dimensions of selective prosecution in ICL, and to evaluate the extent to which that selectivity compromises the core normative goals of justice, equality before the law and global peace.

IV. OBJECTIVES

The overarching aim of this study is to examine the structural, political and institutional factors that facilitate geopolitical selectivity in the enforcement of international criminal law. The specific objectives are as follows.

- To interrogate critically the jurisprudential and geopolitical contours of prosecutorial patterns within the International Criminal Court, with specific emphasis on the disproportionate targeting of African States juxtaposed against the impunity said to be enjoyed by hegemonic global actors.

This objective entails a systematic dissection of empirical and case-based trends in ICC indictments and investigations, problematising the apparent regional bias of the Court. It involves scrutinising the normative implications of that overrepresentation, especially in the context of post-colonial power asymmetries, and evaluating the extent to which such patterns undermine the principle of universal accountability and erode the credibility of the Court in the Global South.

- To deconstruct the influence of prosecutorial and United Nations Security Council referral mechanisms as instrumental conduits of selective justice under the Rome Statute regime.

The focus here is on the dual loci of discretion, the Office of the Prosecutor (OTP) and the Security Council, as key nodes of potential politicisation. The objective is to analyse how discretionary thresholds such as complementarity and gravity are applied inconsistently, and how referrals and vetoes, wielded predominantly by the permanent members, serve to insulate

allied or powerful States from scrutiny. The goal is to elucidate the structural vulnerabilities that render the Court susceptible to political instrumentalisation.

- To interrogate whether the institutional architecture, procedural modalities and normative commitments of the Court facilitate or constrain geopolitical selectivity in enforcement.

This objective seeks to conduct an institutional and structural analysis of the ICC, evaluating how its statutory provisions, funding dependencies and jurisdictional limitations may inadvertently reinforce inequities in global criminal accountability. It also considers whether existing checks and balances within the Court, such as judicial oversight by the Pre-Trial Chamber, sufficiently mitigate the risk of politicised prosecutions.

- To formulate normative and procedural reforms aimed at insulating the Court from external political pressure, thereby enhancing its impartiality, legitimacy and efficacy as a universal adjudicator of international criminal responsibility.

The inquiry here shifts from critique to construction, proposing institutional safeguards such as reform of the referral process, greater transparency in prosecutorial decision-making, enhanced representational diversity and a possible recalibration of the relationship between the Court and the Security Council.

V. RESEARCH QUESTIONS

- To what extent does the authority of the United Nations Security Council to initiate or obstruct referrals to the International Criminal Court, particularly through the exercise of the veto by its permanent members, contribute to the politicisation and selective enforcement of international criminal norms, thereby undermining the principles of impartiality, universality and equal accountability in the administration of international criminal law?^{26,27}
- What meaningful reforms can be introduced to rebuild the credibility of the International Criminal Court and to promote a more consistent and universal application of international criminal justice? In light of growing concern over selective enforcement and political influence, how can the institutional design, procedural safeguards and decision-making practices of the Court be reshaped to ensure that justice is not only done but seen to be done for all States and individuals, regardless of their geopolitical power or influence?

²⁶ Rome Statute, *supra* note 5, art. 13(b).

²⁷ U.N. Charter, *supra* note 25, art. 27, ¶ 3.

VI. HYPOTHESIS

The procedural reliance of the International Criminal Court on referrals from the United Nations Security Council embeds a systematic imbalance within the international justice framework, one that effectively allows dominant geopolitical powers to shape the initiation of investigations in line with their strategic interests. Through the discretionary authority vested in the Security Council, and more particularly the veto held by its five permanent members, China, France, the Russian Federation, the United Kingdom and the United States, those States are afforded the capacity to shield themselves and their allies from legal accountability, irrespective of the gravity of the crimes alleged. This selective invocation of justice creates a dual track of enforcement, one that exposes less influential States, often in the Global South, to the full force of international criminal prosecution while leaving major powers and their allies markedly less exposed to it. What was envisioned as a universal institution of justice therefore risks being perceived as a politically compromised mechanism, more responsive to the will of global hegemony than to the principles of impartiality and the rule of law. That perception not only delegitimises the Court in the eyes of affected States and communities but also undermines its broader credibility as an unbiased adjudicator of the most heinous crimes of concern to the international community.

VII. RESEARCH METHODOLOGY

This research employs a qualitative doctrinal approach combined with comparative case analysis, and is anchored in critical legal theory and Third World Approaches to International Law (TWAIL). The sources are as follows.

A. Primary sources

- The Rome Statute of the International Criminal Court.
- Decisions and procedural documents of the International Criminal Court and of the ad hoc tribunals.
- United Nations Security Council resolutions referring, or declining to refer, situations to the International Criminal Court.^{28,29}

²⁸ S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); U.N. Doc. S/2014/348 (May 22, 2014).

²⁹ S.C. Res. 1970, *supra* note 28; U.N. Doc. S/2014/348, *supra* note 28.

B. Secondary sources

- Scholarly articles, books and legal commentaries addressing international criminal law, the prosecutorial practice of the International Criminal Court and geopolitical influences.
- Reports by non-governmental organisations and international institutions such as Human Rights Watch, Amnesty International and the African Union.

C. Comparative case studies

- The proceedings of the International Criminal Court in Kenya arising from the post-election violence of 2007–2008.³⁰
- The non-prosecution of Western actors in the Iraq and Afghanistan conflicts.³¹
- The Security Council referral of Libya as against the non-referral of Syria.^{32,33}

VIII. FINDINGS AND ANALYSIS

A. The prosecutorial record of the Court and the African predominance

A deeply troubling pattern has defined the prosecutorial trajectory of the International Criminal Court. For most of the history of the Court those charged have been nationals of African States. Every situation the Court investigated before 2016 was African and, leaving aside the Article 70 proceedings for offences against the administration of justice arising from the *Bemba* case, no warrant or summons was issued against a non-African national in any situation until the Georgia warrants issued on 24 June 2022 (made public on 30 June 2022).³⁴ This pronounced imbalance, specifically when contrasted with the equally grave yet largely unaddressed atrocities committed in other global conflict zones, has drawn intense and sustained criticism and has ignited accusations of systemic bias, casting doubt on the claim of the Court to universality and impartiality. African leaders in particular have vociferously condemned the ICC for what they perceive as a rebranded form of neo-colonialism, an international justice

³⁰ Muthaura, Kenyatta & Ali, *supra* note 21.

³¹ Office of the Prosecutor, Situation in Iraq/UK: Final Report (Dec. 9, 2020); Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan (Sept. 27, 2021).

³² S.C. Res. 1970, ¶¶ 4–8, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

³³ U.N. SCOR, Draft Resolution, U.N. Doc. S/2014/348 (May 22, 2014) (vetoed by China and the Russian Federation).

³⁴ *Situation in Georgia*, INT'L CRIM. CT., <https://www.icc-cpi.int/georgia> (last visited Oct. 2, 2026) (investigation authorised by Pre-Trial Chamber I on 27 January 2016); INT'L CRIM. CT., Press Release, *Situation in Georgia: ICC Pre-Trial Chamber Delivers Three Arrest Warrants*, ICC-CPI-20220630-PR1663 (June 30, 2022), <https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants> (warrants issued on 24 June 2022; public redacted versions released on 30 June 2022); *Situation in Georgia*, ICC-01/15-40-Red, Public Redacted Version of 'Corrected Version of the "Arrest Warrant for Mikhail Mayramovich Mindzaev"' (June 24, 2022).

mechanism that disproportionately scrutinises the Global South while insulating powerful nations from equivalent accountability. Warrants issued since 2016 in the situations concerning Georgia, Ukraine, the State of Palestine and the Philippines have begun to broaden that geography, but the perception of selective enforcement has eroded trust and reinforced the view that international criminal law, rather than levelling the global playing field, often mirrors the same hierarchies it purports to dismantle.^{35,36,37,38}

A poignant manifestation of this asymmetry is the Kenya situation, which emerged in the aftermath of the post-election violence of 2007 and 2008 that left over a thousand people dead and hundreds of thousands displaced. The Prosecutor proceeded *proprio motu* under Article 15 of the Rome Statute, and Pre-Trial Chamber II authorised the investigation on 31 March 2010.³⁹ Summonses to appear were issued in March 2011 against six prominent Kenyan political figures, and on 23 January 2012 the Chamber confirmed charges against four of them, among them Uhuru Kenyatta and William Ruto, who took office as President and Deputy President in 2013, while declining to confirm the charges against the remaining two.⁴⁰ The Prosecutor withdrew the charges against Kenyatta in December 2014, citing insufficient evidence and the non-cooperation of the Kenyan State, and the proceedings against him were terminated in March 2015; the charges against Ruto and Joshua Sang were vacated in April 2016, without prejudice to a future prosecution.⁴¹ The episode underscored the fragile interplay between legal

³⁵ *Situations under Investigation*, *supra* note 6.

³⁶ *Muthaura, Kenyatta & Ali*, *supra* note 21.

³⁷ *Al Bashir*, *supra* note 22.

³⁸ *Gaddafi & Al-Senussi*, *supra* note 23.

³⁹ *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010); INT'L CRIM. CT., Press Release, *ICC Judges Grant the Prosecutor's Request to Launch an Investigation on Crimes Against Humanity with Regard to the Situation in Kenya*, ICC-CPI-20100331-PR512 (Mar. 31, 2010), <https://www.icc-cpi.int/news/icc-judges-grant-prosecutors-request-launch-investigation-crimes-against-humanity-regard>; *Situation in the Republic of Kenya*, INT'L CRIM. CT., <https://www.icc-cpi.int/kenya> (last visited Oct. 2, 2026) (recording the Prosecutor's submission that over 1,000 people were killed and approximately 350,000 displaced).

⁴⁰ *Prosecutor v. Ruto, Kosgey & Sang*, ICC-01/09-01/11-1, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Mar. 8, 2011); *Prosecutor v. Muthaura, Kenyatta & Ali*, ICC-01/09-02/11-1, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kimani Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Mar. 8, 2011); *Prosecutor v. Ruto, Kosgey & Sang*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012) (declining to confirm the charges against Kosgey); *Muthaura, Kenyatta & Ali*, *supra* note 21 (declining to confirm the charges against Ali); *Prosecutor v. Kenyatta*, ICC-01/09-02/11-809, Defence Request for Conditional Excusal from Continuous Presence at Trial ¶ 9 (Sept. 23, 2013) (Kenyatta sworn in as President on 9 April 2013); INT'L CRIM. CT., *Questions and Answers on the Developments in the Case The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-PIDS-Q&A-KEN-01-003/13_Eng (June 18, 2013), <https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/publications/RutoKosgeySang-QA-Eng.pdf> (Ruto's request of 17 April 2013 to be excused so as to perform his duties as Deputy President).

⁴¹ INT'L CRIM. CT. Off. of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta* (Dec. 5, 2014), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-withdrawal-charges-against-mr>;

accountability and political pragmatism, and the decision to proceed absent a Security Council referral and amid pronounced political volatility within Kenya bolstered perceptions of selectively aggressive enforcement targeted at African States.

In glaring disparity, documented allegations of war crimes and crimes against humanity perpetrated by military personnel from the United States and the United Kingdom during operations in Iraq and Afghanistan have failed to culminate in comparable charges. Extensive dossiers compiled by non-governmental organisations, international human rights bodies and whistleblowers have presented what those bodies describe as credible *prima facie* evidence implicating Western actors in unlawful detention practices, torture and civilian casualties, yet the pursuit of justice by the Court in these contexts has been markedly tepid. The Office of the Prosecutor examined the allegations against British personnel in Iraq for more than six years and closed the preliminary examination on 9 December 2020 without seeking authorisation to investigate: although it found a reasonable basis to believe that members of the British armed forces had committed war crimes, it could not conclude that the United Kingdom authorities had been unwilling genuinely to investigate or prosecute.⁴² The Office also opened a preliminary examination into the situation in Afghanistan, but that inquiry encountered formidable political resistance: in 2019 the United States, despite not being a party to the Rome Statute, imposed visa restrictions on ICC officials, including the then Prosecutor Fatou Bensouda, and in 2020 it imposed economic sanctions on her under an executive order. Human rights organisations condemned both measures as an attempt to punish the Court for contemplating accountability for United States nationals.⁴³

Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on the Withdrawal of Charges Against Mr Kenyatta (Mar. 13, 2015); *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-2027-Red-Corr, Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal (Apr. 5, 2016); INT'L CRIM. CT., Press Release, *Ruto and Sang Case: ICC Trial Chamber V(A) Terminates the Case Without Prejudice to Re-prosecution in Future*, ICC-CPI-20160405-PR1205 (Apr. 5, 2016), <https://www.icc-cpi.int/news/ruto-and-sang-case-icc-trial-chamber-va-terminates-case-without-prejudice-re-prosecution>.

⁴² INT'L CRIM. CT. Off. of the Prosecutor, *Prosecutor of the International Criminal Court, Fatou Bensouda, Re-opens the Preliminary Examination of the Situation in Iraq* (May 13, 2014), <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-re-opens-preliminary-examination>; Office of the Prosecutor, *Situation in Iraq/UK: Final Report*, *supra* note 31, ¶¶ 1–2, 12–13; INT'L CRIM. CT. Off. of the Prosecutor, *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Iraq/United Kingdom* (Dec. 9, 2020), <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-iraq/united>.

⁴³ INT'L CRIM. CT., Press Release, *ICC Judges Reject Opening of an Investigation Regarding Afghanistan Situation*, ICC-CPI-20190412-PR1448 (Apr. 12, 2019), <https://www.icc-cpi.int/news/icc-judges-reject-opening-investigation-regarding-afghanistan-situation> (noting the opening of the preliminary examination in 2006); Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, *Remarks to the Press* (Mar. 15, 2019) (transcript available at <https://2017-2021.state.gov/remarks-to-the-press-6/index.html>) (announcing visa restrictions on persons responsible for any ICC investigation of U.S. personnel); Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 15, 2020); Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, *Secretary Michael R. Pompeo at a Press Availability* (Sept. 2, 2020) (transcript available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-a->

This reality lays bare the entrenched structural inequities that underpin the architecture of the international criminal justice system. Critics contend that it reveals a system in which powerful nations habitually exploit their geopolitical leverage to evade accountability for themselves and their allies, while less influential States are exposed to relentless and often harsh scrutiny. Rather than embodying a universal forum for impartial justice, what unfolds on this account is a fragmented and hierarchical order in which the application of international law is neither consistent nor principled but heavily influenced by political expediency and global power dynamics. In such a landscape justice is neither blind nor impartial; it is selectively dispensed, reinforcing global power asymmetries rather than correcting them. Selective enforcement of this kind continues to erode the credibility of the ICC, undermining its moral and legal authority and casting serious doubt on its commitment to the foundational principle of universal accountability.

B. The politics of Security Council referrals and vetoes

Under Article 13(b) of the Rome Statute the International Criminal Court is vested with the authority to exercise jurisdiction over situations referred to it by the United Nations Security Council acting under Chapter VII of the Charter, even where the State concerned is not a party to the Statute. This provision, ostensibly designed to overcome jurisdictional limitations and to foster a universal regime of criminal accountability, has in its practical operation, critics argue, metamorphosed into a mechanism of geopolitical arbitration, one that reflects the asymmetrical power dynamics entrenched in the international order rather than an equitable pursuit of justice.^{44,45}

Libya epitomises this duality. The Security Council referred the situation unanimously to the Court by Resolution 1970 of 26 February 2011, and all five permanent members, China, France, the Russian Federation, the United Kingdom and the United States, endorsed the referral even though Libya was not a State Party to the Rome Statute.⁴⁶ Syria, which is similarly outside the jurisdiction of the Court, has by contrast been repeatedly insulated from referral by the strategic deployment of the veto: a draft resolution that would have referred the situation was vetoed by the Russian Federation and China on 22 May 2014. That protection endured despite findings by

press-availability-12/) (designating Prosecutor Bensouda under Executive Order 13928); Press Release, HUM. RTS. WATCH, *US Threatens International Criminal Court: Visa Bans on ICC Staff* (Mar. 15, 2019), <https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court>; Press Release, HUM. RTS. WATCH, *US Sanctions International Criminal Court Prosecutor: Trump Administration's Action Tries to Block Justice for World's Worst Crimes* (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/us-sanctions-international-criminal-court-prosecutor> (recording that the United States revoked the Prosecutor's visa in 2019).

⁴⁴ Rome Statute, *supra* note 5, art. 13(b).

⁴⁵ U.N. Charter, *supra* note 25, art. 27, ¶ 3.

⁴⁶ S.C. Res. 1970, *supra* note 32, ¶¶ 4–8.

United Nations bodies, among them the Independent International Commission of Inquiry on the Syrian Arab Republic, of crimes against humanity and war crimes attributed to the Assad Government and forces aligned with it.⁴⁷

The pronounced inequality between these two situations reflects, on this view, not a principled application of international criminal law but a selective invocation of justice filtered through the lens of geopolitical self-interest. The veto prerogative, a relic of post-1945 power structures enshrined in Article 27(3) of the United Nations Charter, has become a formidable barrier to impartial accountability. It allows the permanent members to shield themselves and their allies from prosecutorial scrutiny, effectively immunising certain actors from the reach of international justice while subjecting other and often weaker States in the Global South to invasive legal examination.

Thereupon, what emerges is not a universal architecture of justice but a fragmented edifice in which legal thresholds are shaped less by the gravity of the crimes than by the strategic calculus of dominant powers. In relying on Security Council referrals to extend its jurisdictional reach, the Court becomes implicated in a system that privileges power over principle and hierarchy over humanity. That erodes not only the coherence of international criminal law but also the moral authority of the Court as a global arbiter of accountability.

C. Prosecutorial discretion and the absence of transparent criteria

The Office of the Prosecutor of the International Criminal Court is empowered under Article 53 of the Rome Statute and is vested with considerable latitude in determining which situations and cases warrant formal investigation and prosecution. While prosecutorial discretion was conceived as a means to afford strategic flexibility and operational autonomy, its exercise in the absence of codified, transparent and consistently applied criteria has drawn sharp criticism. What was intended as a functional prerogative has increasingly come to be seen as a conduit for arbitrariness and, more troublingly, a site vulnerable to political influence and selectivity.⁴⁸

The Afghanistan situation is a conspicuously revealing example of this disquieting dynamic. The Office of the Prosecutor requested authorisation to investigate alleged war crimes committed by United States military personnel, CIA operatives, the Taliban and Afghan security forces, but on 12 April 2019 Pre-Trial Chamber II refused that authorisation on the ground that an investigation would not serve the “interests of justice”. That vague and discretionary

⁴⁷ U.N. Doc. S/2014/348, *supra* note 33; Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/25/65 (Feb. 12, 2014).

⁴⁸ Rome Statute, *supra* note 5, art. 53; Office of the Prosecutor, Policy Paper on Preliminary Examinations (Nov. 2013).

standard, left largely undefined within the Statute, was roundly criticised by scholars, practitioners and civil society as a politically expedient justification for inaction, and the Appeals Chamber reversed the ruling on 5 March 2020 and authorised the investigation.⁴⁹ In September 2021, however, the Prosecutor announced that the resumed investigation would concentrate on the Taliban and Islamic State Khorasan Province and would “deprioritise other aspects of this investigation”, which comprised the allegations against United States and Afghan government forces.⁵⁰ Critics argue that this sequence reflects an accommodation of geopolitical pressure rather than a principled application of legal criteria, and that it compromises the moral and institutional integrity of the Court.

The situation in the State of Palestine provides another illustration of this discretionary inertia, although the record is more complex than the criticism sometimes allows. Despite multiple United Nations fact-finding missions, extensive documentation of alleged war crimes and detailed submissions from international and local human rights organisations, the Office of the Prosecutor conducted a preliminary examination for close to five years (January 2015 to December 2019), sought a ruling on territorial jurisdiction and opened a formal investigation on 3 March 2021; it made no application for warrants concerning the conduct of Israeli officials until 20 May 2024.⁵¹ Pre-Trial Chamber I issued warrants of arrest against Prime Minister Benjamin Netanyahu and former Defence Minister Yoav Gallant on 21 November 2024 in respect of alleged war crimes and crimes against humanity, together with a warrant in respect

⁴⁹ *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019); INT’L CRIM. CT., Press Release, *ICC Judges Reject Opening of an Investigation Regarding Afghanistan Situation*, *supra* note 43; *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan ¶¶ 4–5 (Mar. 5, 2020); INT’L CRIM. CT., Press Release, *Afghanistan: ICC Appeals Chamber Authorises the Opening of an Investigation*, ICC-CPI-20200305-PR1516 (Mar. 5, 2020), <https://www.icc-cpi.int/news/afghanistan-icc-appeals-chamber-authorises-opening-investigation>.

⁵⁰ Statement of the Prosecutor, Karim A.A. Khan QC, *supra* note 31; *see also Situation in the Islamic Republic of Afghanistan*, ICC-02/17-138, *supra* note 49, ¶ 4 (recording that the Prosecutor’s request concerned the Taliban and affiliated groups, the Afghan National Security Forces and the armed forces of the United States and its Central Intelligence Agency).

⁵¹ *State of Palestine*, INT’L CRIM. CT., <https://www.icc-cpi.int/palestine> (last visited Oct. 2, 2026) (preliminary examination opened on 16 January 2015); INT’L CRIM. CT. Off. of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court’s Territorial Jurisdiction* (Dec. 20, 2019), <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine>; INT’L CRIM. CT. Off. of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine* (Mar. 3, 2021), <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>; INT’L CRIM. CT. Off. of the Prosecutor, *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine* (May 20, 2024), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

of a Hamas commander.⁵² Critics of the Court point to the length of that delay, and to the diplomatic pressure and sanctions that followed the warrants,⁵³ as evidence that prosecutorial decisions in politically exposed situations are shaped as much by diplomatic sensitivities as by legal imperatives.

In both cases the absence of a clearly articulated, objective and consistently applied framework for case selection has led to serious concerns about the impartiality of the Court. Without a transparent methodology for prioritising situations, the discretion of the Office of the Prosecutor risks being perceived as discretionary only in name, and in practice deeply susceptible to the gravitational pull of international politics.

In consequence, what emerges on this account is not a prosecutorial apparatus grounded in the even-handed application of law but a malleable institution that too often evades confrontation with power. That not only undermines the credibility and normative authority of the ICC but also sends a disheartening message to victims in conflict zones: that the availability of international justice may depend less on the gravity of their suffering than on the geopolitical identity of the perpetrator.

D. Undermining of complementarity

At the very heart of the Rome Statute lies the principle of complementarity, enshrined in Article 17, which establishes the International Criminal Court as a court of last resort. Under this doctrine the Court is authorised to intervene only where national legal systems are demonstrably unwilling or unable genuinely to undertake investigations or prosecutions of crimes within the jurisdiction of the Court. Normatively, the principle reflects respect for State sovereignty while ensuring that impunity does not prevail where domestic justice fails; in practice it has repeatedly been compromised, distorted and rendered susceptible to political manipulation.⁵⁴

Powerful nations, especially those with robust legal infrastructures and extensive international influence, are said to have exploited the ambiguities inherent in the complementarity framework. By initiating superficial or strategically timed domestic proceedings, such States may request that the Prosecutor defer to their own investigations under Article 18 or challenge

⁵² INT'L CRIM. CT., Press Release, *Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel's Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant* (Nov. 21, 2024), <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>.

⁵³ See Exec. Order No. 14,203, 90 Fed. Reg. 9369 (Feb. 12, 2025) (citing the arrest warrants for Netanyahu and Gallant and listing Prosecutor Karim Khan in the Annex); INT'L CRIM. CT., *ICC Condemns the Issuance of US Executive Order Seeking to Impose Sanctions on the Court* (Feb. 7, 2025), <https://www.icc-cpi.int/news/icc-condemns-issuance-us-executive-order-seeking-impose-sanctions-court>.

⁵⁴ Rome Statute, *supra* note 5, art. 17.

the admissibility of a case under Article 19. These gestures of nominal accountability, often amounting to no more than performative legalism, are rarely subjected to rigorous scrutiny by the Office of the Prosecutor, and the historical reluctance of that Office to challenge the authenticity or effectiveness of such domestic processes, especially when undertaken by influential global actors, underscores the asymmetrical application of the principle. That selective deference erodes the foundational ideal of impartial justice and reinforces a troubling double standard in which the powerful are presumed compliant and the weak presumed delinquent.

Several African nations, including Uganda and the Democratic Republic of the Congo, have by contrast proactively referred situations within their borders to the Court. While such self-referrals are procedurally legitimate and have in some cases facilitated accountability for grave crimes, critics have argued that they also reveal a more complex dynamic: a self-referral may become entangled with domestic political strategy, allowing a referring government to present itself as a partner of international justice while directing the Court's attention towards its armed opponents rather than towards its own forces. The Court thereby risks being instrumentalised, not as an independent tribunal dispensing impartial justice but as an external arm of internal political consolidation.

This dichotomy reveals the fragility of complementarity in practice. Where powerful nations can immunise themselves through the illusion of domestic judicial action and weaker States can weaponise ICC mechanisms to serve parochial political interests, the claim of the Court to universality is seriously compromised. The principle of complementarity, far from being a shield against impunity, becomes a tool of geopolitical choreography, its application dictated not by objective legal thresholds but by the relative power and political calculus of the actors involved.

The attrition of this principle not only destabilises the moral authority of the Court but also deepens the credibility deficit afflicting the broader project of international criminal justice. Until the ICC develops robust mechanisms to interrogate and evaluate the sincerity and adequacy of national proceedings, irrespective of the geopolitical stature of the State concerned, complementarity will remain less a safeguard against impunity than a mechanism of selective accountability cloaked in legalism.

IX. CONCLUSION

The International Criminal Court was conceived as a juridical milestone, a court that would transcend national boundaries and historical failures to hold the perpetrators of genocide, war

crimes and crimes against humanity to account. Rooted in the legacy of Nuremberg and galvanised by the atrocities of Rwanda and the Balkans, the Court was created by the Rome Statute adopted in 1998 and came into existence when that Statute entered into force on 1 July 2002, with an aspirational mandate to serve as a bastion of international justice, immune to political manipulation and sovereign exceptionalism. It was imagined not merely as a tribunal but as a moral institution, a mechanism through which humanity, speaking through the voice of law, might redress its deepest wounds.

In spite of that, more than two decades since its inception the moral promise remains gravely jeopardised. The living reality of the ICC today stands in stark contrast to its founding ethos: instead of becoming a universal forum of impartial justice, the Court appears increasingly entangled in the geopolitical architecture it was meant to rise above. Geopolitical selectivity in prosecution, the preferential treatment of certain States and the disproportionate targeting of others has, on the argument advanced here, metastasised into a systemic infirmity, gnawing away at the legitimacy of the institution and disfiguring the very fabric of international criminal law.

At the root of this malaise is the conspicuous disproportionality of the Court in prosecutorial attention. A cursory glance at its docket reveals an overwhelming preoccupation with actors from the Global South, more particularly Africa. While it is incontrovertible that grievous atrocities and heinous crimes have occurred in several African States, the selective invocation of international criminal jurisdiction in those contexts, alongside the comparative silence regarding equally egregious violations alleged against powerful nations of the Global North, speaks volumes. The absence of prosecutions against officials of major powers in relation to alleged unlawful uses of force, drone campaigns and alleged complicity in torture illustrates, critics contend, a failure of political will as much as any jurisdictional limit. This selective gaze undermines the universality of the mandate of the Court and reinforces perceptions that international criminal law is wielded more as a sword of domination than as a shield of justice.

Compounding this crisis is the instrumentalisation of the United Nations Security Council in ICC proceedings. The provisions of the Rome Statute granting the Security Council referral powers under Article 13(b) were intended to fill jurisdictional gaps and to empower the Court to act where domestic mechanisms failed. In practice those powers have become vehicles for *realpolitik*: the veto prerogatives of the five permanent members of the Council, China, France, the Russian Federation, the United Kingdom and the United States, effectively gatekeep the access of the Court to certain situations. This procedural dependency institutionalises selective justice, enabling powerful nations to shield themselves and their allies from scrutiny while

facilitating prosecution against geopolitically expendable actors. The failure to refer the situations in Syria and Myanmar, the latter reaching the Court only through the territorial jurisdiction of Bangladesh, underscores the profound asymmetries embedded within this model despite widespread documentation of mass atrocities. By virtue of this structural entanglement the International Criminal Court risks being perceived not as a neutral adjudicator but as a legal appendage of global hegemony.

This moment of reckoning necessitates more than cosmetic reform; it demands a profound recalibration of the institutional architecture and operational culture of the Court. The Court must reassert its normative independence by insulating itself from geopolitical manipulation. That requires, *inter alia*, amending the Rome Statute to curtail the political overreach of the Security Council, enhancing procedural transparency in prosecutorial functions and institutionalising external oversight mechanisms capable of holding the Office of the Prosecutor to account without compromising its autonomy. The Court must furthermore broaden its geographic and thematic scope to reflect a more balanced jurisprudential footprint, investigating not only the easily accessible but also the politically inconvenient.

Withal, a deeper engagement with affected communities, civil society and regional institutions is imperative if the Court is to re-establish its social legitimacy. Justice is not merely about punishing perpetrators; it is about affirming the dignity of victims, restoring moral order and building trust in legal institutions. The ICC must move beyond the cold proceduralism of courtroom trials and embrace a more victim-centred, context-sensitive and globally inclusive vision of international justice.

In sum, the International Criminal Court today stands at a critical inflection point, poised precariously between its founding aspirations and its faltering reality. The controversy over geopolitical selectivity threatens to erode the credibility of the Court and to harm the fragile consensus on which the edifice of international criminal law rests. If the matter is left unaddressed, the selective application of justice will not merely delegitimise the Court; it will deepen global cynicism towards the very idea of international law as a neutral arbiter. Yet in this crisis lies an opportunity, a chance to confront the institutional biases that haunt the system and to imagine a court that is more independent, more equitable and more attuned to the demands of global justice. The future of international criminal accountability hinges not on rhetorical reaffirmations but on structural transformation, and on the political courage to confront impunity in all its forms, however powerful its architects. Only then can the ICC reclaim its mantle, not as an instrument of selective judgment but as a genuine custodian of global justice.