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THE INTERNATIONAL CRIMINAL COURT: CHALLENGES TO UNIVERSAL JURISDICTION AND STATE COOPERATION

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ABSTRACT

The International Criminal Court (ICC) represents a landmark achievement in the evolution of international criminal justice, established to prosecute the most serious crimes of international concern. However, two decades after its establishment, the Court faces significant challenges that undermine its effectiveness and legitimacy. This paper examines the principal obstacles confronting the ICC, focusing on two interrelated issues: the challenges to universal jurisdiction and the persistent problem of state non-cooperation. Through analysis of key case studies, including the Al-Bashir warrant and recent developments involving major power conflicts, this paper demonstrates that the ICC's aspirations for universal justice are constrained by geopolitical realities, selective enforcement, and the absence of effective enforcement mechanisms. The paper argues that while the ICC has achieved important symbolic and normative victories, fundamental reforms in state cooperation mechanisms and jurisdictional reach are necessary to fulfill its mandate. The analysis concludes that the future effectiveness of the ICC depends on addressing legitimacy concerns, expanding membership among major powers, and developing more robust enforcement tools while maintaining its commitment to ending impunity for mass atrocities.

Keywords: International Criminal Court, Universal Jurisdiction, State Cooperation, International Justice, Rome Statute, Complementarity

I. INTRODUCTION

The establishment of the International Criminal Court in 2002 marked a watershed moment in the development of international criminal law. Born from the ashes of the ad hoc tribunals for the former

Yugoslavia and Rwanda, and building upon the legacy of Nuremberg and Tokyo, the ICC represented humanity's renewed commitment to ensuring accountability for genocide, crimes against humanity, war crimes, and the crime of aggression.¹ The Rome Statute, which established the Court, was premised on a fundamental principle: that the most serious crimes of concern to the international community should not go unpunished, and that their prosecution must be ensured through measures at the international level.²

Yet, more than two decades after its inception, the ICC finds itself at a critical juncture. While it has achieved notable successes in bringing perpetrators to justice and establishing important legal precedents, the Court faces mounting challenges that threaten its effectiveness and legitimacy. Two interconnected problems stand at the forefront: the limitations on universal jurisdiction and the chronic lack of state cooperation in executing the Court's mandate.³

This paper examines these fundamental challenges, arguing that the ICC's vision of universal justice remains constrained by political realities, selective application, and structural weaknesses. The first part analyzes the ICC's jurisdictional framework and the theoretical basis for universal jurisdiction in international criminal law. The second part explores the practical challenges to universal jurisdiction, including non-ratification by major powers and allegations of bias. The third part examines state non-cooperation through detailed case studies, demonstrating how the absence of enforcement mechanisms undermines the Court's work. Finally, the paper considers potential reforms and alternative approaches to strengthening international criminal justice.

Understanding these challenges is crucial not only for assessing the ICC's current effectiveness but also for charting a path forward that balances idealistic aspirations with pragmatic realities. The stakes could not be higher: at issue is nothing less than the international community's ability to hold accountable those responsible for the world's worst atrocities.

II. THE ICC'S MANDATE AND JURISDICTIONAL FRAMEWORK

A. THE ROME STATUTE AND CORE CRIMES

The ICC's jurisdiction is defined by Article 5 of the Rome Statute, which grants the Court authority over four categories of crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.⁴ These crimes represent the "most serious crimes of concern to the international

community as a whole," reflecting a consensus that certain acts transcend national boundaries and threaten international peace and security.⁵

Genocide, as defined in Article 6, encompasses acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.⁶ Crimes against humanity, outlined in Article 7, include murder, extermination, torture, and other inhumane acts committed as part of a widespread or systematic attack against a civilian population.⁷ War crimes, detailed in Article 8, cover grave breaches of the Geneva Conventions and serious violations of the laws and customs of war.⁸ The crime of aggression, added through amendments in 2010 and activated in 2018, addresses the planning, preparation, initiation, or execution of acts of aggression by state leaders.⁹

B. JURISDICTIONAL BASES AND THE PRINCIPLE OF COMPLEMENTARITY

The ICC can exercise jurisdiction under three primary circumstances. First, the Court has territorial jurisdiction when crimes are committed on the territory of a state party to the Rome Statute.¹⁰ Second, it has nationality jurisdiction when the accused is a national of a state party.¹¹ Third, the United Nations Security Council may refer situations to the ICC, regardless of whether the relevant states are parties to the Rome Statute.¹²

Critically, the ICC operates according to the principle of complementarity, enshrined in the Preamble and Article 17 of the Rome Statute.¹³ This principle establishes that the ICC is intended to complement, not replace, national criminal jurisdictions. The Court may only exercise jurisdiction when national courts are unwilling or unable genuinely to investigate or prosecute alleged crimes.¹⁴ This reflects a delicate balance between respecting state sovereignty and ensuring accountability for international crimes.

C. UNIVERSAL JURISDICTION IN THEORY AND PRACTICE

Universal jurisdiction represents the principle that certain crimes are so heinous that any state may prosecute them, regardless of where they were committed, the nationality of the perpetrator, or the nationality of the victim.¹⁵ The concept rests on the idea that perpetrators of certain crimes are *hostis humani generis*—enemies of all humankind.¹⁶

While the ICC embodies elements of universal jurisdiction, it does not exercise pure universal jurisdiction. Unlike the theoretical concept, which would permit prosecution of any international crime

anywhere, the ICC's jurisdiction is limited by the constraints of the Rome Statute.¹⁷ The Court cannot prosecute crimes committed on the territory of or by nationals of non-party states unless the situation is referred by the Security Council or the non-party state accepts the Court's jurisdiction on an ad hoc basis.¹⁸

This hybrid approach reflects the tension between the aspirational goal of universal accountability and the practical realities of state sovereignty. It is within this tension that many of the ICC's most significant challenges emerge.

III. CHALLENGES TO UNIVERSAL JURISDICTION

A. NON-RATIFICATION BY MAJOR POWERS

Perhaps the most fundamental challenge to the ICC's claim to universal jurisdiction is the absence of several major powers from the Rome Statute system. As of 2024, notable non-parties include the United States, Russia, China, and India—countries representing significant portions of global population and military power.¹⁹

The United States initially signed the Rome Statute in 2000 but subsequently "unsigned" it in 2002, expressing concerns about potential politically-motivated prosecutions of American military personnel and infringement on national sovereignty.²⁰ Congress enacted the American Service-Members' Protection Act, colloquially known as "The Hague Invasion Act," authorizing the use of military force to free any American held by the ICC.²¹ The U.S. has also negotiated numerous bilateral immunity agreements under Article 98 of the Rome Statute, seeking to shield its nationals from ICC jurisdiction.²²

Russia initially signed the Rome Statute but never ratified it, and in 2016, following the ICC Prosecutor's classification of the situation in Crimea as an international armed conflict, Russia formally withdrew its signature.²³ This was particularly significant given the ICC's subsequent issuance of an arrest warrant for President Vladimir Putin in 2023 related to alleged war crimes in Ukraine.²⁴

China has consistently opposed the ICC, viewing it as a tool of Western powers and an infringement on state sovereignty.²⁵ India, meanwhile, has expressed concerns about the definitions of crimes, the role of the Security Council, and the potential for the Court to be used as an instrument of political pressure.²⁶

The absence of these major powers creates significant gaps in the ICC's jurisdictional reach and undermines its claim to represent universal values. Critics argue that a system of international justice that excludes the world's most powerful states lacks both legitimacy and practical effectiveness.²⁷

B. THE AFRICAN UNION CRITIQUE AND ALLEGATIONS OF BIAS

A second major challenge to the ICC's legitimacy has come from the African Union (AU) and African states, which have accused the Court of disproportionately targeting African leaders while ignoring crimes committed elsewhere.²⁸ This criticism reached its peak in 2016-2017 when Burundi, South Africa, and The Gambia announced their intention to withdraw from the Rome Statute, citing concerns about neo-colonial bias.²⁹

The statistics appear to support concerns about geographic concentration: of the Court's first major investigations, a significant proportion focused on African situations.³⁰ The prosecution of Kenyan President Uhuru Kenyatta and Deputy President William Ruto while they were in office proved particularly controversial, with the AU accusing the ICC of undermining African sovereignty and leadership.³¹

However, the ICC and its supporters contend that this criticism overlooks important context. Many of the African situations were self-referrals by African governments themselves, including Uganda, the Democratic Republic of Congo, Central African Republic, and Mali.³² Additionally, two situations (Sudan and Libya) were referred by the UN Security Council, not initiated by the Prosecutor.³³ The Court argues that its focus on Africa reflects where the most serious crimes were occurring and where states were unable or unwilling to prosecute, not bias.³⁴

Nevertheless, the perception of bias—whether justified or not—has damaged the Court's legitimacy and complicated its operations. The threat of mass African withdrawal, though ultimately involving only Burundi, highlighted the fragility of the ICC's support base and the challenges of maintaining legitimacy in a world marked by post-colonial sensitivities and power imbalances.³⁵

C. HEAD OF STATE IMMUNITY AND JURISDICTIONAL DISPUTES

A third challenge involves the contentious issue of head of state immunity. Article 27 of the Rome Statute explicitly provides that official capacity as a head of state or government shall not exempt a person from criminal responsibility under the Statute.³⁶ However, this provision conflicts with

customary international law principles that generally grant sitting heads of state immunity from prosecution in foreign jurisdictions.³⁷

This tension has manifested most clearly in the case of Sudanese President Omar al-Bashir, for whom the ICC issued arrest warrants in 2009 and 2010 for genocide, crimes against humanity, and war crimes.³⁸ Despite these warrants, al-Bashir traveled to numerous countries, including several ICC state parties, without being arrested.³⁹ When South Africa failed to arrest al-Bashir during an African Union summit in 2015, it argued that customary international law granted him immunity as a sitting head of state, despite South Africa's obligations under the Rome Statute.⁴⁰

More recently, the ICC's issuance of arrest warrants for Russian President Vladimir Putin and Israeli Prime Minister Benjamin Netanyahu has brought renewed attention to this issue.⁴¹ These cases illustrate the practical difficulties of enforcing ICC arrest warrants against sitting leaders, particularly when powerful states refuse to cooperate or when competing legal principles create ambiguity.⁴²

The head of state immunity debate encapsulates broader questions about the relationship between international criminal law and state sovereignty. While the Rome Statute seeks to eliminate immunity as a barrier to accountability, the practical reality is that arresting sitting heads of state remains extraordinarily difficult without the cooperation of states willing to challenge traditional norms of diplomatic immunity.⁴³

IV. STATE NON-COOPERATION: THE ENFORCEMENT GAP

A. THE STRUCTURAL PROBLEM

Unlike domestic legal systems, the ICC lacks its own police force or enforcement apparatus. Article 86 of the Rome Statute obligates state parties to cooperate fully with the Court in its investigation and prosecution of crimes, while Article 89 specifically requires states to comply with requests for arrest and surrender of persons.⁴⁴ However, the ICC possesses limited mechanisms to compel compliance when states fail to fulfill these obligations.⁴⁵

When a state party fails to cooperate, the Court may refer the matter to the Assembly of States Parties or, if the case was referred by the Security Council, to the Security Council itself.⁴⁶ However, these referrals rarely result in meaningful consequences. The Assembly of States Parties lacks enforcement

powers, while Security Council action is often blocked by political considerations and the veto power of permanent members.⁴⁷

This structural weakness creates what scholars have termed the "enforcement gap"—a fundamental disconnect between the ICC's legal authority and its practical ability to carry out its mandate.⁴⁸ The following case studies illustrate how this gap manifests in practice.

B. CASE STUDY: THE AL-BASHIR SAGA

The case of Omar al-Bashir exemplifies the challenges of state non-cooperation in stark terms. After the ICC issued arrest warrants in 2009 and 2010, al-Bashir embarked on what some observers called a "tour of defiance," traveling to numerous countries to demonstrate the impotence of the ICC's warrants.⁴⁹

Between 2009 and 2019, al-Bashir visited at least 13 ICC state parties, including Chad, Kenya, Djibouti, Malawi, the Democratic Republic of Congo, South Africa, Uganda, and Jordan.⁵⁰ In each case, the hosting state failed to execute the arrest warrant, often citing various legal or political justifications. Some states claimed head of state immunity, others cited competing obligations under regional agreements, and some simply ignored their Rome Statute obligations without explanation.⁵¹

The ICC's response to these violations was largely toothless. The Court issued judicial decisions finding non-compliance and referred several cases to the Assembly of States Parties and the UN Security Council.⁵² However, no meaningful sanctions were imposed on the non-complying states. In the case of South Africa, the Pre-Trial Chamber even found that the government's failure to arrest al-Bashir constituted a violation of its obligations, but South Africa initiated withdrawal proceedings from the Rome Statute rather than face consequences.⁵³

The al-Bashir case revealed several critical weaknesses: the inadequacy of the ICC's enforcement mechanisms, the willingness of even state parties to prioritize political considerations over legal obligations, and the inability of the international community to impose effective costs on non-complying states.⁵⁴ While al-Bashir was eventually deposed in a coup in 2019 and faces potential trial in Sudan, his ability to evade ICC justice for over a decade stands as a testament to the Court's enforcement limitations.⁵⁵

C. CASE STUDY: THE KENYA SITUATION

The ICC's intervention in Kenya following the 2007-2008 post-election violence presented a different set of cooperation challenges. The situation was unusual in that it involved the prosecution of individuals who subsequently became President (Uhuru Kenyatta) and Deputy President (William Ruto) of Kenya.⁵⁶

Initially, Kenya cooperated with the ICC investigation, as the domestic political and legal system was deemed unable to prosecute the high-level perpetrators.⁵⁷ However, once Kenyatta and Ruto were elected in 2013, cooperation deteriorated dramatically. Witnesses recanted testimony, disappeared, or were intimidated. Evidence became unavailable. The Kenyan government mobilized political opposition to the ICC, framing the prosecutions as an affront to Kenya's sovereignty and democracy.⁵⁸

The cases eventually collapsed due to insufficient evidence, with charges against Kenyatta dropped in 2014 and the case against Ruto terminated in 2016.⁵⁹ The Prosecutor cited witness interference, intimidation, and lack of state cooperation as key factors in the failure of the prosecutions.⁶⁰

The Kenya cases demonstrated how a state party could effectively undermine ICC prosecutions through passive non-cooperation and systematic obstruction while technically remaining within the Rome Statute system.⁶¹ The cases also illustrated the political dimensions of ICC prosecutions, with the Court accused of interfering in domestic politics by targeting elected leaders.⁶²

D. CASE STUDY: RECENT GEOPOLITICAL CHALLENGES

Recent developments have further highlighted cooperation challenges in politically charged situations. The ICC's investigation into alleged crimes in Afghanistan, including potential crimes by U.S. military personnel and CIA agents, prompted unprecedented threats from the United States.⁶³ In 2020, the Trump administration imposed sanctions on ICC Prosecutor Fatou Bensouda and another ICC official, marking the first time a permanent member of the Security Council had sanctioned an international judicial institution.⁶⁴

The situation in Ukraine following Russia's 2022 invasion has presented both opportunities and challenges for the ICC. While Ukraine has accepted ICC jurisdiction and cooperation from many Western states has been robust, Russia's status as a non-party state and permanent Security Council member ensures that key Russian officials will likely never face trial at the ICC.⁶⁵ The arrest warrant

issued for President Putin, while symbolically significant, is unlikely to be executed given Russia's non-cooperation and the reluctance of many states to arrest a nuclear-armed state's leader.⁶⁶

Similarly, the ICC's investigation into the situation in Palestine and the subsequent arrest warrants for Israeli officials have generated intense political controversy and raised questions about selective application of international justice.⁶⁷ The United States and Israel have rejected the ICC's jurisdiction, while other states face difficult diplomatic choices about whether to enforce the warrants.⁶⁸

These recent cases illustrate how the ICC increasingly finds itself caught in geopolitical crosscurrents, with cooperation dependent on political alignments rather than legal obligations.⁶⁹

V. OBSTACLES TO EFFECTIVE COOPERATION

The challenges documented above reflect several underlying obstacles that systematically undermine state cooperation with the ICC.

A. POLITICAL OBSTACLES

Foremost among these are political factors. States often prioritize national interests, regional solidarity, or bilateral relationships over ICC obligations.⁷⁰ The principle of sovereignty remains powerful in international relations, and many states are reluctant to cede authority to an international institution, particularly when doing so conflicts with perceived national interests.⁷¹

Regional solidarity can also trump ICC obligations, as demonstrated by African Union resolutions calling on member states not to cooperate with certain ICC investigations and warrants.⁷² Similarly, bilateral relationships may lead states to shield allied leaders from arrest, even when legally obligated to do so under the Rome Statute.⁷³

Great power politics further complicates cooperation. The permanent members of the UN Security Council wield enormous influence, and their positions significantly affect whether other states cooperate with the ICC.⁷⁴ When powerful states like the United States openly oppose ICC investigations or impose sanctions on Court officials, it emboldens other states to resist cooperation.⁷⁵

B. LEGAL AND INSTITUTIONAL OBSTACLES

Legal ambiguities and conflicts also impede cooperation. As noted earlier, the tension between Article 27 of the Rome Statute and customary international law regarding head of state immunity creates genuine legal uncertainty.⁷⁶ States facing competing legal obligations—between the Rome Statute and other international agreements or domestic constitutional provisions—may choose to prioritize obligations other than ICC cooperation.⁷⁷

Additionally, some states maintain that the ICC Prosecutor's interpretations of jurisdiction exceed the proper scope of the Rome Statute.⁷⁸ Disputes about whether the Court has jurisdiction in particular situations can lead states to withhold cooperation based on legal disagreement rather than political obstruction.⁷⁹

C. PRACTICAL AND RESOURCE CONSTRAINTS

Finally, practical challenges limit the ICC's effectiveness. The Court operates with a limited budget, constraining its ability to conduct thorough investigations, particularly in multiple situations simultaneously.⁸⁰ Gathering evidence in active conflict zones poses enormous logistical and security challenges.⁸¹ Witness protection remains a persistent problem, as the ICC lacks the resources and reach to provide adequate security for witnesses who may face retaliation.⁸²

The length and cost of ICC trials—often lasting years and consuming significant resources—further strain the Court's capacity.⁸³ These practical limitations mean that even when states cooperate, the ICC can only address a fraction of potential cases, raising concerns about selectivity and the ability to achieve meaningful deterrence.⁸⁴

VI. PATHWAYS FORWARD: REFORMS AND ALTERNATIVES

Despite these formidable challenges, the ICC remains an important institution, and various reforms could enhance its effectiveness and legitimacy.

A. STRENGTHENING ENFORCEMENT MECHANISMS

One set of proposals focuses on creating more robust enforcement mechanisms. Some scholars advocate for the development of a multilateral enforcement regime, perhaps modeled on UN

peacekeeping, that could assist in executing ICC warrants.⁸⁵ Others propose stronger sanctions for non-complying states, including suspension from the Assembly of States Parties or loss of other international privileges.⁸⁶

Creating positive incentives for cooperation, such as capacity-building assistance for national judiciaries or preferential treatment in other international forums, might also encourage compliance.⁸⁷

Regional arrangements, such as specialized African enforcement mechanisms, could leverage regional solidarity to improve cooperation.⁸⁸

B. ADDRESSING LEGITIMACY CONCERNS

Improving the ICC's legitimacy requires addressing perceptions of bias and selectivity. Greater transparency in case selection, clear criteria for prioritization, and balanced investigation across regions could help dispel accusations of bias.⁸⁹ Ensuring geographic and cultural diversity among ICC staff and leadership is also important for maintaining legitimacy across different regions.⁹⁰

Engaging more deeply with affected communities, including through outreach and participation mechanisms, could strengthen local ownership and support for ICC prosecutions.⁹¹ The Court might also benefit from explaining more clearly why certain situations are prioritized over others, helping to counter perceptions of political motivation.⁹²

C. EXPANDING MEMBERSHIP AND ENGAGEMENT

Expanding ICC membership, particularly to include major powers, would significantly enhance the Court's reach and legitimacy. This requires sustained diplomatic engagement to address the specific concerns of non-party states.⁹³ For the United States, addressing concerns about frivolous prosecutions and sovereignty might involve clarifying the complementarity principle or considering modifications to the Rome Statute.⁹⁴ For countries like China and Russia, the pathway to membership likely requires broader shifts in international relations and power dynamics.⁹⁵

Even absent full membership, engaging non-party states in dialogue about international criminal justice could foster greater acceptance of ICC principles and potentially lead to ad hoc cooperation in specific situations.⁹⁶

D. COMPLEMENTARY APPROACHES

Finally, strengthening complementary mechanisms could enhance accountability even where ICC jurisdiction is limited. This includes supporting national prosecutions through capacity building, technical assistance, and encouraging the use of universal jurisdiction in domestic courts.⁹⁷ Hybrid tribunals that combine international and national elements, such as those established for Sierra Leone, Cambodia, and Lebanon, offer another model for achieving accountability.⁹⁸

International pressure through sanctions, diplomatic isolation, and other non-judicial mechanisms can also play a role in deterring atrocities and isolating perpetrators, even when prosecution is not immediately feasible.⁹⁹ A comprehensive approach to international justice requires viewing the ICC as one element within a broader ecosystem of accountability mechanisms.¹⁰⁰

VII. CONCLUSION

The International Criminal Court stands at a crossroads. Twenty-two years after its establishment, the Court has achieved significant successes: it has prosecuted and convicted individuals responsible for serious international crimes, established important legal precedents, and contributed to a growing normative consensus that impunity for atrocities is unacceptable. Yet the challenges examined in this paper—limitations on universal jurisdiction and chronic state non-cooperation—reveal fundamental tensions between the ICC's aspirations and the political realities within which it operates.

The absence of major powers from the Rome Statute system creates significant jurisdictional gaps and undermines the Court's claim to represent universal values. Allegations of bias, whether justified or not, have damaged the ICC's legitimacy in important regions. The structural enforcement gap—the disconnect between the Court's legal authority and its practical ability to compel cooperation—has allowed fugitives to evade justice and has emboldened states to ignore their Rome Statute obligations with impunity.

The case studies examined demonstrate that these are not merely theoretical concerns but practical obstacles that have repeatedly frustrated the ICC's work. From al-Bashir's decade of impunity to the collapse of the Kenya cases to the recent geopolitical controversies surrounding Ukraine and Palestine, state non-cooperation has been a consistent impediment to the Court's effectiveness.

Yet, the challenges facing the ICC should not obscure its important achievements or the continuing need for international criminal justice. The alternative to an imperfect ICC is not a perfect system of accountability but rather a return to an era when perpetrators of the worst crimes could act with near-

total impunity. The ICC, despite its limitations, has made such impunity less certain and has provided a forum for victims' voices to be heard.

Moving forward, the international community must acknowledge that the ICC's effectiveness depends not only on the Court itself but on the political will of states to support international justice even when doing so conflicts with short-term interests. This requires sustained diplomatic efforts to expand membership, institutional reforms to address legitimacy concerns, creative solutions to the enforcement gap, and a broader ecosystem of complementary accountability mechanisms.

The vision of universal jurisdiction and consistent state cooperation remains aspirational rather than operational. However, aspirations matter in international law. They establish standards against which state behavior can be judged and create normative pressure that, over time, can shift behavior. The ICC's struggles reflect the broader challenges of constructing a rules-based international order in a world where power remains unevenly distributed and state sovereignty remains a fundamental organizing principle.

Ultimately, the fate of the ICC will depend on whether the international community—and particularly state parties to the Rome Statute—recommits to the principles that inspired the Court's creation. The challenges are formidable, but they are not insurmountable. With political will, institutional reform, and sustained support, the ICC can evolve to better fulfill its mandate of ending impunity for the world's worst crimes. The question is whether states will rise to meet this challenge or whether the promise of international criminal justice will remain, in the words of the Rome Statute's Preamble, "determined to put an end to impunity" but unable to do so in practice.

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