

Who Politicizes the International Criminal Court?

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The International Criminal Court ('ICC' or 'the Court') was created as the world's permanent penal court to hold accountable those individuals considered most responsible for committing atrocities. Its legitimacy hinges in part on the Court's real and perceived independence from outside political interference. The ICC's first decade, however, featured a widespread perception that the Court *is* politicized. There have been increasing accusations from states, scholars, and non-governmental organisations ('NGOs') that political interests external to the Court have biased its judicial activities.¹ Even the ICC Prosecutor raised the concern that "we are a judicial institution but there have been several attempts to politicize the court and that is wrong. It sends the wrong signals to people that the court is political".² While the Office of the Prosecutor's prosecutorial strategy and general performance is not free from criticisms, much unease about the ICC boils down to one issue: whether the Court can operate in a manner that is independent of the political interests of outside actors. This brief seeks to identify external actors whose activities risk politicizing the ICC and undermining the image of the Court as an independent institution.

1. The United Nations Security Council

The relationship between the United Nations Security Council ('UNSC') and the ICC formed a central and controversial part of the negotiations that produced the ICC Statute. Concerns were raised that, by providing the UNSC with the power to refer cases to the ICC and the power to block the Court's proceedings, the ICC Statute would subordinate the Court to the Council and thus in effect to its permanent members and their political interference. The idea of an international criminal justice sys-

tem completely immune from political influence, however, appeared hypocritical and unrealistic. While it is true that both Articles 13(b) and 16 of the ICC Statute provide avenues for the UNSC to exert its political influence, a sound normative evaluation of these articles can only be made when the political dimensions of the Court's activities are properly acknowledged and understood.

Situations dealt with by the ICC will almost always involve atrocities that frequently challenge international peace and security in a manner that triggers the responsibility of the UNSC to serve as the primary guardian of the maintenance of international peace and security. The establishment of the *ad hoc* tribunals by the UNSC was inspired by the conviction that the prosecution of major international crimes constitutes a means to maintain international peace and security. Article 13(b) of the ICC Statute, which makes the Court available to the UNSC to intervene judicially in situations posing threats to international peace and security, similarly assumes that justice could be an instrument of peace. Even though the UNSC's decision of referral can hardly be described as anything but political, it is through the Council that the jurisdiction of the ICC is extended to cover even non-States Parties. On the other hand, tensions exist where the achievement by the UNSC of its peace mandate may require a different approach from that being pursued by the ICC as part of its justice mandate. As such, Article 16 allows for a limited extent of intervention in the Court's jurisdiction by the UNSC where the demands of peace so require. While the ICC Statute is not oblivious to these political realities, compromise should not be confused with unjustified political interference into the ICC's judicial processes.

Since the start of the work of the ICC in 2002, the UNSC has adopted a series of resolutions that have sought to circumscribe the jurisdictional reach of the ICC. This practice commenced with Resolution 1422

¹ Good Governance Africa, 'Ten years of the ICC: politicised puppet or legal pioneer?', 1 October 2012 (<http://www.legal-tools.org/doc/37da68/>).

² 'ICC will not entertain politics', *The Star News*, 1 December 2013 (<http://www.legal-tools.org/doc/634d84/>).

which aimed at securing exemptions from the ICC for nationals from non-States Parties to the ICC Statute.³ Though this resolution expressed fidelity to Article 16 of the ICC Statute, it clearly contradicted the true nature of that provision, which was meant to be invoked on a case-by-case basis where a particular situation arises necessitating a deferral. Further attempts in that direction can be seen from the subsequent UNSC Resolutions 1487 and 1497, which followed a similar modality to carve out non-State Party nationals from the reach of ICC's jurisdiction.⁴ The two UNSC referrals with regard to Darfur in 2005 and Libya in 2011 similarly reflected political considerations which tainted the justice process.⁵ While referring situations in non-States Parties to the ICC, both resolutions contained significant caveats. The proposed resolution on Syria⁶ once again limited the referral to the conflict between the Assad government, its allied militias, and armed opposition groups in order to avoid giving the ICC jurisdiction over potential Israeli activities in the Golan Heights. The resolution, like the other two referrals, would also exempt current or former officials or personnel of countries that are not party to the ICC Statute (except Syria).⁷

The perception that the UNSC interfered in the work of the ICC – deferring or referring situations with strict conditions – has been widespread. If the UNSC continues to follow this practice, it could seriously compromise the independence of the ICC unless the Court refuses to accept deferrals or referrals that contain such limitations. However, so far the Court has made no challenge as to UNSC resolutions with flawed provisions.

2. The ICC Assembly of States Parties

At the 12th Session of the Assembly of States Parties to the ICC Statute ('ASP' or 'the Assembly'), on 28 November 2013, the Assembly decided to amend, by consensus, Rule 134 of the ICC Rules of Procedure and Evidence ('RPE'), which opened the possibility for high ranking government officials to be excused from being present in the courtroom during their trials at the ICC. New rules of procedure – RPE 134*bis*, *ter*, and *quater* – were designed for excusals from physical presence at trial "due to extraordinary public duties". The amendments allow persons in authority to participate in the trial through the use of video technology or representation by

³ UNSC Res. 1422 (2002), para. 1 (<http://www.legal-tools.org/doc/1701d5/>).

⁴ UNSC Res. 1487 (2003), paras. 1 and 2 (<http://www.legal-tools.org/doc/20e269/>); UNSC Res. 1497 (2003), para. 7 (<http://www.legal-tools.org/doc/43299a/>).

⁵ UNSC Res. 1593 (2005) (<http://www.legal-tools.org/doc/4b208f/>) and UNSC Res. 1970 (2011), para. 6 (<http://www.legal-tools.org/doc/00a45e/>).

⁶ UN Doc. S/2014/348, 22 May 2014, para. 1. (<http://www.legal-tools.org/doc/f8f995/>).

⁷ *Ibid.*, para. 7.

counsel.

The two tiers of accused created by Rule 134*quater* are arguably incompatible with Article 27 of the ICC Statute, which provides that all alleged perpetrators of international crimes should be held accountable for their crimes before the ICC regardless of their official capacity. Article 63(1) of the ICC Statute requires the accused to be present during trial and does not recognize special treatment for any accused person. Special excusals from presence at trial, therefore, require amendment of Article 63(1), not Rule 134, especially when the new rules are inconsistent with the ICC Statute.⁸ The ASP, nonetheless, attempted to circumvent Article 63(1)'s presence requirement by amending the RPE instead.

The ASP adopted these amendments in response to intense lobbying from some vocal African states in support of Uhuru Kenyatta and William Ruto, who were elected respectively President and Vice-President of Kenya after having been indicted by the ICC for core international crimes related to the post-2007 election violence. It seems that amending the ICC Statute was neither easy nor quick enough for the ASP to diffuse the confrontation between the Court and certain States Parties. With the apparent political objective in mind, the ASP decided to amend the RPE in ways that contravene the ICC Statute. The influence of such political decision will possibly go beyond the Kenya case in terms of politicizing the ICC. It not only reintroduces the very element of selectivity that the ICC was in part designed to reject, but also endangers the independence of the Court and puts the judges in a difficult position where they might be called upon to apply rules that actually contradict the ICC Statute.

3. The African Union

In recent years, there has been a great deal of criticism directed at the ICC by the African Union ('AU'), which has consistently accused the ICC of hunting African leaders and ignoring atrocities elsewhere. The criticisms have intensified following the indictment of Kenya's President and his deputy by the Court. In October 2013, the AU held a special summit to discuss its relationship with the ICC. Though the AU's proposal to withdraw collectively from the ICC was defeated, its Member States voted unanimously to declare that heads of states should not be tried during their tenure in office.⁹

⁸ Article 51(4) of the ICC Statute provides that "the Rules of Procedure and Evidence, amendments thereto, and any provisional Rule shall be consistent with this Statute", while Article 51(5) provides that "[i]n the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail".

⁹ Decision on Africa's Relationship with the International Criminal Court, Doc. Assembly/AU/Dec.1, October 2013, para. 10 (<http://www.legal-tools.org/doc/c36610/>).

This declaration, however, is hardly compatible with the law that governs the Court, which so many African countries have endorsed. Article 27 of the Statute is unequivocal in stating that the Court will not make any distinction based on official capacity, and that high-level government positions “shall in no case exempt a person from criminal responsibility” through the ICC. The motivation behind the AU’s somewhat hostile attitude towards the ICC appears to be the “concern on the politicization and misuse of indictments against African leaders by the ICC”.¹⁰ The UNSC’s non-acceptance of the AU’s demand to defer the ICC trial of the two Kenyan leaders seems to have intensified the AU’s scepticism towards the ICC.

The standoff between the AU and the ICC on the question of deferrals was not an isolated incident. When the UNSC refused to act on its request for a deferral of the Darfur situation, the AU issued a mandatory decision prohibiting all its Member States from co-operating with the ICC’s efforts to arrest President Bashir.¹¹ President Bashir travelled with immunity to a couple of ICC States Parties after the AU decision was made, by that greatly undermining the ICC’s mandate. This time, on the issue of excusal from presence at trial for heads of states or governments, the AU turned its attention to the ASP, where it has more political leverage. Although these politically motivated actions by the AU signalled discontent with the UNSC, they undermined the ICC.

4. States

The above-mentioned UNSC resolutions and ASP decision send an unfortunate message that the ICC cannot deliver justice independently when its Member States cave in to political pressure. There have been several attempts by non-States Parties to politicize the Court through the UNSC, but they could not succeed without support or acquiescence of ICC Member States. Worse still, the ASP was actually politically manoeuvred by states that have created and committed themselves to this very Court, an institution premised on the aspiration to transcend politics.

UNSC Resolution 1422 basically yielded to the demand of non-States Parties to the ICC Statute, in particular the United States, which threatened to veto the renewal of peace-keeping mandates. Whereas many states on the Council – in their capacity as ICC States Parties – denounced the United States position, Resolution 1422 was passed unanimously. In the subsequent Resolutions 1487 and 1497, certain ICC States Parties similarly endorsed this kind of Security Council practice, bending to

the preference of the mighty. Such exemptions were also inserted into the language of the two Security Council referral resolutions regarding Darfur and Libya, which received the full support by ICC Member States when adopted. The proposed referral resolution for the Syria situation was drafted virtually on the same pattern. To garner support from the United States government, the text was politically tailored to exempt personnel of countries that have not ratified the ICC Statute (except Syria). The draft resolution was also designed to ensure that the Golan Heights – a slice of Syrian territory that Israel has held since 1967 – is not exposed to the ICC investigations. By adopting or proposing the politically tainted referrals, the ICC States Parties concerned may have expected to expand the Court’s reach of accountability, but in fact they undermined it.

It was the UNSC that Kenya’s President Kenyatta and Vice President Ruto initially requested to defer their trials at the ICC. Failing that, they shifted their focus to the ASP. The Kenya government, through the African Union, put a lot of pressure on the ASP. After a significant diplomatic push to achieve rule modification, Kenya declared the outcome of the ASP Session a “major victory for Kenya”. We are left with the impression that, by insisting on RPE modification through the ASP, political considerations of Kenya and other AU ICC States Parties prevailed over the commitment to the integrity of the ICC. Instead of defending the ICC’s legal infrastructure from unjustified political interference, ICC States Parties outside of Africa simply compromised their initial commitment to the rule of international law.

5. Civil Society

Civil society – including NGOs, scholars, and the media – appears verbally alert to possible attempts to undermine the independence of the ICC. The UNSC has been called upon to avoid the inclusion of language exempting certain nationals from the jurisdiction of the Court. Criticisms were also raised concerning the consensus decision by the ASP regarding the amendments to the RPE. The Coalition for the International Criminal Court cautioned that the “political campaign leading to new rules on appearance at trial risks undermining Court’s independence”.¹² Similarly, it was suggested that “the Assembly of States Parties has thrown the rule of law out of the window and replaced it with the rule of politics”.¹³ The contrast between these strong words and actual State Party practice leaves us with questions about the efficacy of civil society.

¹² The Coalition for the International Criminal Court, ‘ICC must be defended from political interference’, 28 November 2013 (<http://www.legal-tools.org/doc/8f93d1/>).

¹³ The International Federation for Human Rights, ‘Justice at Risk: States Parties to the ICC Statute Concede to Political Pressure’, 28 November 2013 (<http://www.legal-tools.org/doc/58cb5f/>).

¹⁰ *Ibid.*, para. 4.

¹¹ Decision of the Meeting of African States Parties to the ICC Statute, Doc. Assembly/AU/13/(XII), 1–3 July 2009, p. 10 (<http://www.legal-tools.org/doc/bf6f1e/>).

While civil society plays an increasingly important role in the fight against politicizing of the ICC, it may be necessary to consider whether its activities, if not exercised with due diligence, would further add to the perception that the Court is politicized. Some advocates of international justice were actually critical of the political dimensions of the Court, which should be properly separated from the issue of politicization. They claim that the Court is politicized in the context where the UNSC's permanent members have been highly selective about which situations they deem worthy of ICC attention. This kind of political selectivity is institutionally *inherent* in the ICC Statute, and should not be confused with the problem of politicization.

Attention has also been drawn to the fact that state referrals can be used as an external judicial means for regimes in power to eliminate political enemies or wage a political battle against other states. Some commentators have even gone to extra lengths to brand this kind of activities as 'lawfare'. It is correct that ICC action might have political ramifications for states that entertain political calculations when referring situations to the Court, but this should not simply be interpreted as politicization. Civil society should, in other words, exercise caution to avoid generating further misconceptions about politicization.

6. In Conclusion

The controversial use of deferral and referral powers by the UNSC, exacerbated by the ASP's unnecessary political compromises, has generated allegations of lack of credibility, impartiality and independence towards a Court that many had hoped would transcend state politics. The driving force of politicizing the ICC, however, comes from states, albeit through various political fora such as the UNSC, the ASP or the AU.

The ICC is a young institution trying to establish itself, and is far from enjoying universal participation and support. There is inevitable resistance from powerful non-States Parties, especially when both the United States and China, permanent members of the UNSC, share similar concerns regarding ICC jurisdiction and nationals from third states. While the outcome of this tension is still uncertain, it is essential that ICC States Parties defend the Court against claims of politicization or

bias.

More importantly, rather than standing up to political manipulation by the outside actors, ICC States Parties have to a certain extent become part of the problem of politicization. This cements doubts about the independence and, consequently, legitimacy of the ICC. While the legal basis of the Court has not changed since these states ratified the Statute, the political will to implement it has eroded. The way ICC States Parties handle political pressure will determine whether the Court will be perceived as a legitimate actor in its own right or just another political tool in the hands of the powerful.

Civil society, on the other hand, should be the defendant of the independence of the ICC. But this depends on the integrity and professionalism of the main NGOs in this area. Have they sufficiently developed and articulated concrete recommendations on how to manage or contain the issue of politicization? Is their performance adequately professional given the seriousness of the challenge to an independent and impartial ICC?

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