

Why does the International Criminal Court Fail to End Impunity: An Analysis of ICC's Operative and Structural Flaws

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Abstract:

The International Criminal Court was established to end impunity while sentencing some of the worst criminals committing brutal mass murders. Facing doubts from critics regarding its effectiveness, it is only a matter of time before this court meets its end. Past research usually offers suggestions with a third party's involvement, while this research focuses on empowering the court itself and its root causes: legal and operational flaws. Methods such as data analysis of the ICC's financial report and past cases are utilized. These findings are later used to propose recommendations that ensure more effective communication between ASP and the ICC and amend the Rome Statute to grant the ICC more authority. The specific areas of flaws tested in this research can become valuable information for future research, while the ICC can consider the legal recommendations from this research as guidance for future actions.

Keywords: International Criminal Court, Rome Statute, impunity, Assembly of State Parties.

1. Introduction

"Little more than a political tool employed by unaccountable international elites," William Barr, the former United States Attorney General, commented about the International Criminal Court ("ICC") after it opened an investigation for war crimes in Afghanistan, including the US [1]. However, the US's rejection of cooperation and even further sanctions against ICC officers while ignoring the ICC's role as an international court, a part of the UN, is a slap in the face of the ICC's authority and dignity. In 2002, 60 countries signed the Rome Statute, establishing the ICC. The statute aims to "investigate and prosecute war criminals" [2]. Countries that are signatories later became part of the Assembly of State Parties ("ASP"). The ASP oversees the ICC, provides support such as the annual budget, and has the right to amend the Rome Statute [3]. Though as the founding document, the Rome Statute itself does not grant ICC much authority with its weak languages, such as parts 9 and 12, which will be further discussed in the data analysis of the annual report from the committee of finance and case studies of Al-Bashir and Kenyatta. Thus, the court's expectation of state cooperation can not be processed smoothly with its limited authority, significantly hindering its mission to end impunity even after 22 years since its founding.

Furthermore, the ICC's current lack of funding prevents it from providing basic resources for its operation [4]. Meanwhile, its current system's operative and structural flaws

still need to be discovered and addressed. To fully target and eliminate the ICC's operative and structural flaws, the root cause, the Rome Statute, should be addressed. Thus, the Rome Statute must be amended to make cooperation obligatory for member states and impose penalties on member states that fail to cooperate. This research focuses not only on past cases but also on the financial situation of the ICC, offering future researchers new insight to discuss while offering more professional suggestions regarding the ICC's budget. It also provides recommendations for the ICC and the ASP to ensure a stronger bond and transparent communication between these two organizations while also targeting the lack of support for the ICC. Additionally, the research's focus on the ICC's own structural framework and flaws allows it to empower itself, offering long-term solutions for the ICC's future operations. The structure of this article will be organized with a literature review of current critics' suggestions and an analysis of areas of flaws that led to the ICC's inefficiency. Second, the methodology of this research and an explanation of the three hypotheses targeting the question of what structural and operational constraints stand in the way of ending impunity will be provided. Third, case studies and data analysis of the ASP Committee of Finance and Budget report, ICC's failed prosecution cases of Omar Al-Bashir and Uhuru Kenyatta, and current Rome Statute articles. Fourth and final, a conclusion with recommendations of amending the Rome Statute while suggesting other areas of flaws that can be addressed.

2. Literature reviews

Past researchers have discussed the ICC's current structural and operational constraints extensively, proving its ineffectiveness. Many have offered similar opinions, targeting the ICC's current resources and the issue of non-cooperating states. The first step in increasing the ICC's effectiveness is to ensure its foundation's stability—sufficient resources. Critics have offered various suggestions regarding the ICC's finances and staffing, which can be a cause of its current inability to end impunity. M. Cherif Bassiouni discusses ICC's current issue with proper funding and suggests a model of reserve funds to increase efficiency and provide financial needs promptly [4]. However, Bassiouni's model failed to examine the current harsh budgeting conditions of the ICC [5]. In addition to Bassiouni's suggestion on ICC's operation improvements, the Coalition for the International Criminal Court stresses the need for civil engagement in monitoring the proper use of the ICC funds and the participation of the ASP Committee of Finance and Budget sessions [6]. Though public pressure can influence ICC's actions, the coalition vaguely addresses the difficulties the public may face in accessing the detailed funds and resources ICC currently holds and to what extent such influence can change the actions and ensure efficient budgeting.

Though staffing was not a widely discussed flaw, some researchers believe that improvements in current staffing can be a solution for a more efficient process. Alex Whiting suggests the ICC's long-term staffing is the cause of insufficiency and requires new energy and fresh ideas to address challenging cases and strong nation's impunity [7]. To combat this issue, Whiting proposes working with other organizations "to amend the institute's procedures and HR policies" [7]. Although the ICC's current staff may have suspicion, fearing political pressure and the politicization of the court with the bias against African countries, it is also essential to consider their familiarization with the ICC cases, which require a long period to prosecute and investigate. Another question arises: Would the process of new staff familiarizing themselves with current cases add insufficiency? Liaquat Ali Khan offers a similar view on prosecutors' choices in the ICC using prosecutor Fatou Bensouda. Bensouda faced threats and political pressures from both nations and PESTS for requesting an open investigation of Afganistan and the Gaza Strip regions for the US and Israeli impunity [8]. Bensouda's background as a prosecutor serving multiple positions in her home country, Gambia, can be a factor in her courage and strength to challenge political powerhouses; it is hard to promise that prosecutors from similar African regions can have similar characteristics [8]. Moreover, even when

prosecutors have the authority and courage to request an open investigation, the pre-trial chamber may still reject these requests due to political pressures.

Researchers have also provided information regarding possible approaches while analyzing the current difficulty faced by the ICC for non-cooperating states. Annika Jones targeted the ICC's inefficient response to non-cooperation by addressing the ICC's failure to find non-cooperation for a State Party and request assistance from the ASP or UNSC [9]. Jones further suggested utilizing the ICC's past self-reflection report for the ASP, which can be a practical solution. The ASP has also imposed possible solutions to increase state cooperation: "Paragraph 16 of the Assembly procedures on non-cooperation ... calls for the appointment of ... five focal points on non-cooperation from among all States Parties" [10]. Though these focal points may effectively target non-cooperation in its regions, political pressure and foreign affairs may be obstacles. If even the ICC cannot face political pressures, how can country officials responsible for protecting their own country neglect this factor? Lana Ljubojob further examines such challenges by discussing the US involvement and actions of being noncooperative and creating bilateral agreements to combat the ICC's impunity policies [11]. The Article 98 Agreement from the US claims that US citizens are free from ICC's jurisdiction but can still engage internationally. Around 100 countries are also signatories to this article, "promised that it would not waive diplomatic immunity or surrender citizens of the other signatory to the ICC unless both parties agree in advance to the alteration" [11]. The US's strong opposition to the ICC by covering up for its own citizens' crimes further demonstrates the ICC's lack of authority and strength. The US's noncooperation is a leading factor in the ICC's inability to end impunity. Still, it is important to consider the sovereignty of a country while asking for cooperations.

3. Methodology and Hypotheses:

Methodology: This article's methodology consists of a qualitative case study and data analysis, which provides credible and resourceful information that can be analyzed to test the hypotheses listed below.

Hypothesis 1: The ICC's lack of proper financial support can delay investigations, evidence collection, and even timely access to judges and prosecutors. Such obstacles can hinder the mission of ending impunity.

Hypothesis 2: The ICC's dependence on state cooperation is also its fundamental weakness, as the absence of state cooperation severely undermines the prosecution process. A lack of cooperation in the prosecution process can often bring

proceedings to a halt, thereby hindering the mission to end impunity.

Hypothesis 3: Political pressure from multiple countries can significantly alter the ICC’s approach towards prosecution with the possibility of closing cases, further hindering efficient prosecution and the court’s process to end impunity.

4. Case Studies and Data Analysis

Hypothesis 1: ICC’s lack of financial support

The resources and budget provided to the ICC create a foundation for the ICC’s stable operation of cases. Analyzing the report of the Committee of Finance and Budget in 2022, the support of resources and budget, these crucial parts of ICC’s efficient operation, faces obstacles from both the lack of state commitment and ICC’s own flaw in organizing areas of expenses productively.

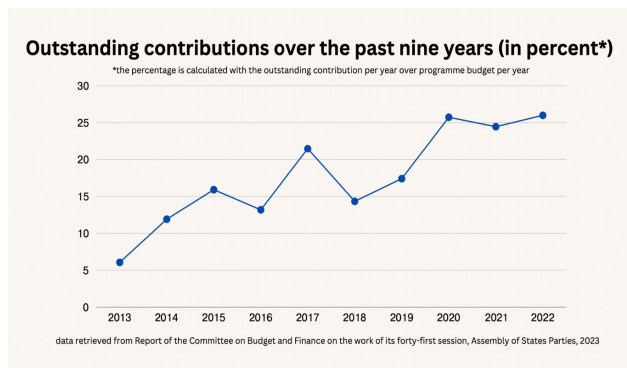


Figure 1: Outstanding contributions from 2013 to 2022 in percent [5].

Fig. 1 illustrates the percentage of outstanding contributions over the program budget, excluding 2017’s data as additional funds were issued for the permanent premise project [12]. The graph follows an increasing trend reflecting the ICC’s growing need for funds over the years and ASP’s failure to provide such resources. However, even with a growing need, some state members still neglected their responsibilities as a part of the ASP to provide sufficient funds, as the states were in arrears [5]. Some of the ICC’s largest funder such as Japan, France, and United Kingdom also appeared in the top 10 debtors in 2019 [13,14]. Japan was ranked top 2 with almost 17 million euros in debt [13]. The Rome Statute, again, doesn’t address the consequences of overdue funds. In addition to the large funder’s inability to pay its amount in time, the zero growth policy that prohibits the court to change its funding year to year was also championed by the same group of countries [14]. Connecting back to Fig.1 which demonstrates the growing need of funding over the years, this policy serves the opposite usage to the court’s current needs. It becomes another obstacle to the court’s efficient

and serving its missions of ending impunity like prosecutor Fatou Bensouda said that “the State Parties should not be ‘blinded by short-term apparent savings that result in long term losses and greater inefficiencies’” [14].

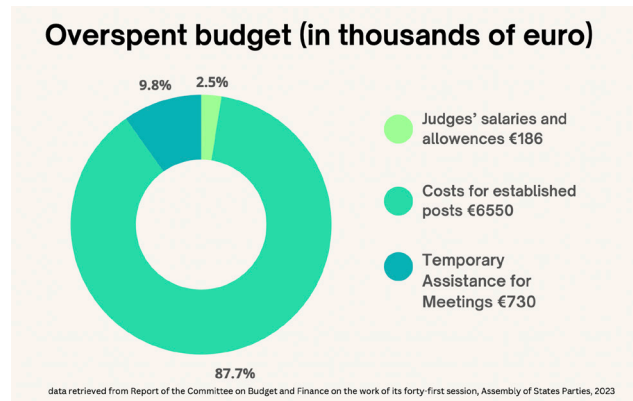


Figure 2: ICC Overspent budget in 2022 in thousands of euros [5].

The 2013 proposed budget document reflects a direct correlation of the lack of budget to the efficiency of the prosecution of cases directly as “reductions in the OTP’s budget have led to a slowdown in investigations and prosecutions, and any further reductions would ‘greatly impact’ the OTP’s ability” [14]. According to Fig. 2, the overspent budget in 2022 reflects a lack of issued budget for established posts, TAM, and judges’ allowances, which are some of the most crucial parts of a court process. Similar to the correlation made in 2013, without an efficient procedure for these parts of funding shown in 2022 report, cases cannot be prosecuted in timely manner. Thus further hindering the courts mission to end impunity [5].

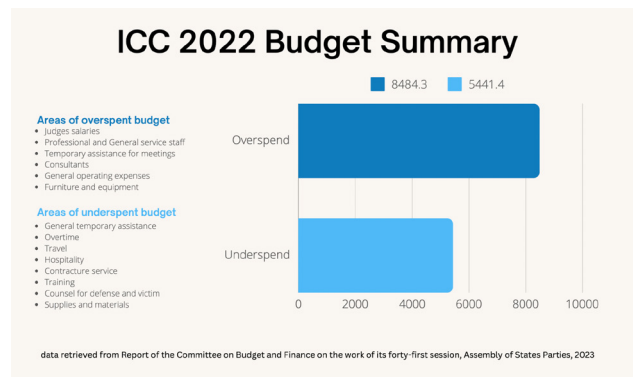


Figure 3: ICC 2022 Budget summary (areas of overspent and underspent budget) [5].

In Fig. 3, the overspending amount almost doubled the underspent area. The ICC not only failed to acquire proper budgeting but also was not able to properly distribute expenses ahead of time. One of the largest amounts of fund transfer in 2022 is the 900 thousand euros that “was

transferred from staff costs in the OTP's Unified Teams Section of the B1 Prosecution Pillar to the OTP's Unified Teams Section of the B2 Prosecution Pillar to cover the payroll for the month of October 2022. This large amount of transfer of funds and the later reliance on the Contingency Fund to cover further adds to the inefficiency of the ICC can significantly delays the prosecution of cases and the mission of ending impunity.

Hypotheses 2 & 3: Lack of state cooperation and political pressure

Omar Al-Bashir, the ex-president of Sudan, was convicted of a crime against humanity and war crimes for his government's cruel behavior after the UNSC referred the case [4]. Yet, the AU responded with a refusal to cooperate and an accusation of the ICC of bias against African countries for indicting predominantly African leaders [15]. Using Article 98(1), which states that "member states are not permitted to cooperate with the ICC if the member state has an international obligation ..." many AU countries provided immunity for Al-Bashir, even those who are a part of the ASP and received ICC's request assisting arrest [15]. Al-Bashir is still at large and has not been arrested after traveling to multiple African countries [16]. As for Sudan's government, it rejected the ICC's visit, creating the biggest obstacle in collecting evidence, connecting with victims and witnesses, and the overall prosecution of Al-Bashir [16].

In Kenya, President Kenyatta was charged with "five counts of crimes against humanity allegedly," which resulted in the "deaths of approximately 1,200 people" [17,18]. Because of Kenya's domestic tribunal's failure, the ICC was granted the right to start an investigation using the complementarity principle [18,19]. However, this case was eventually closed because of insufficient evidence resulting from Kenya's action of witness tampering and remains non-compliance [17,19]. In both cases, the rejection of the ICC's request for cooperation is commonly seen. The ASP's current procedure to combat such situations, the "Toolkit" for non-cooperation, only instructs further negotiation with noncooperating states [20]. It is crucial for the ASP to establish further in-depth procedures and encourage the ICC to request assistance immediately when facing noncooperation situations. However, the root causes remain with the Rome Statute's weak wording, granting limited authority to the ICC when facing complexity and noncooperation in Part 9. Wordings such as "The Court shall have the authority to make requests to States Parties for cooperation" are commonly used within part 9, highlighting that even as a state member, ICC does not have full authority to demand cooperation and assistance in other aspects which significantly hinders its ability to end impunity when the decision-making power of

simple cooperation is given to the states themselves [21]. Besides the ICC's own flaw in its legal documents, the AU's involvement adds political pressure and creates greater obstacles to the ICC's investigation. For Al-Bashir, though the AU does not have direct actions interfering with Al-Bashir's case, providing immunity for Al-Bashir also increases the pressure on the ICC with its bad reputation of bias to a certain extent. Furthermore, AU's involvement politicizes the court as it shifts the question of serving justice to a question of international affairs and discrimination. In Kenyatta's case, AU's involvement increases with its attempt to defer the case in the UNSC conference [18]. The AU aimed not even to give the ICC basic authority to investigate the cases and brutally interfered with the court's procedures. However, the ICC also had very successful cases, proving the possibility of achieving the ICC's goal of ending impunity. Thomas Lubanga Dyilo was found guilty as the president of Union des Patriotes Congolais ("UPC"), a military group, for "enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities" [22]. His case was initially referred to by the government of the Democratic Republic of the Congo (DRC), which ratified the Rome Statute. Unlike the previous two cases, Lubanga's case was successful because of the efficiency of arresting Lubanga. The arrest warrant was issued under seal on February 10, 2006, and only two months later, on March 16, 2006, he was already transferred to the Hague after being arrested and surrendered by the Congolese authorities, surrendered to the court for further prosecution [22]. Lubanga's case had the DRC government's full support, which eventually led to the success, but also the efficiency of arrest that is not seen in any other cases. The case could be processed into the next step of prosecution while it is still a "new" and "fresh" case of the ICC, which was given full attention and enough resources to process. Although Lubanga served his sentence and is now released while doing collective service-based reparations approved by the chamber, the prosecution procedure still faced obstacles with the prosecutor's inability to share confidential documents with the court or defense lawyers as confidential agreements were signed [22, 23]. Most importantly, these documents may have contained exculpatory evidence [23]. The proceeding was halted until the prosecution consented to share most documents with the defense lawyers [23]. Though it still faces issues in the prosecution procedures within the ICC, Lubanga's case also reflects that issues within the ICC do not stand in the way of later continuing the case and rightfully judging the case as the other two cases, which involve the country's non-cooperation. The goal of ending impunity faced threats and obstacles from both ICC's own flaws and the

country's neglect of the Rome Statute, yet it is not hard to determine that the country's non-cooperation serves as the bigger cause and creates more harm.

5. Conclusion

The ICC's current use serves more as a deterrent than a court serving justice. The goal of ending impunity seems distant, and even with sufficient resources and support, such a goal still seems quite unreachable due to the political complexity within foreign affairs. However, it is important to recognize the necessity of slowly approaching this goal globally to establish a more united world. Though hard to reach, it is not a useless goal to look forward to and improve towards. To fulfill its obligations as an international court, the Rome Statutes, parts 9 and 12, need to be amended first, and communication between the ASP and the ICC should be strengthened. Using 2010, the success of the Article 8 amendment, as an example, another review of the Rome Statute of the ICC should be held to discuss the amendment of part 9 to make state member cooperation obligatory upon the ICC's request [24]. Overall, this reform requires the wording change from "request" to "must" for most articles in part 9, which adds a sense of urgency and establishes authority for the ICC. Furthermore, Rome Statute part 12 should also be amended, targeting states' obligation to provide funds for the ICC. Penalties for overdue funds need to be added as a deterrence for states in arrears, such as the refusal of the country's judges in future cases, which will be discussed in detail in a later argument. As for member states in financial difficulties, payment plans should be encouraged to be utilized and sent along with payment notices to certain states in the arrear government [5]. Increased state financial support can reduce outstanding contributions, allowing ICC to function properly for all departments without considering fund transfers from one area to another and forcefully underspending certain areas.

Operational reforms can be established in addition to legal reforms. A more detailed budget report should be submitted, including an analysis of past years' overspent and underspent to the ASP to target particular areas needing additional funds next year. Additionally, a clear plan to section out different degrees of budget for various degrees of cases, from minor cases of rebellious members to the sitting head of state, should be discussed to confirm the annual budget alone with the proper number of cases that need to be addressed each year and most importantly can be proceeded with ICC's current resources. Although the zero growth policy can still stand in the way of the ICC's sufficient budget, the previous recommendations suggested are short term solutions to prove the functionality of

the court itself, which can later motivate and prove to the larger funding countries the importance of the ICC. Thus, also a long term strategy to regain its reputation as an efficient and effective court.

However, the Vienna Convention on the Law of Treaties does grant former members of the treaty protection from amendments, allowing states to have "a vested right in the continued application of the treaty in its original form unless an amendment occurs in the way foreseen by the said treaty" [24]. If countries can choose not to adopt amendments, what is the purpose of proposing these amendments? First, it lays a foundation for future member states who choose to ratify the treaty. Second, compromises can be made whereby the ICC establishes a set list of the most needed documents, information, and witnesses for investigations. This guideline must be followed except for special requests for additional information after the pre-trial chamber hearing, including at least one judge from the cooperating nation. This list would allow states to visualize the required materials from their country ahead of time while reflecting the ICC's recognition of state sovereignty. Third, under special circumstances where the investigation concerns a sitting head of state or peace has not yet been restored in the investigating country, the ICC would limit the number of staff permitted enter the country given its previous history with ICC staff detained for "security breach" reasons in Libya [25]. The country's domestic court can prepare information on the list and potentially other information approved by the pre-trial chamber in advance while under the support of ICC staff if needed. However, if suspicions arise regarding the materials provided by the domestic court, the case and issue would be referred to the UNSC for further discussion after informing the cooperating nation and attempting to resubmit evidence.

Balancing legal obligations and politics, addressing old and new cases, restoring justice, and protecting peace are discussions crucial to the ICC's further improvements and touch upon the moral values each person or country holds differently. Although the ICC is currently not a political body capable of overcoming other countries' political pressures, it remains a place dedicated to justice. It is an overarching framework guarding peace and navigating complex global politics while maintaining neutrality. Looking at the future of ICC, though having more legal obligations can restrict and organize better operation procedures, it does not serve as an ultimate solution for ICC's current struggles with the refusal of cooperation. It is crucial to look deeper into the ICC's possibility of collaborating with other associations, such as the International Criminal Police Organization (INTERPOL) to assist arrests instead of relying only on member states. In-

creasing connection with other organizations or branches of the UN can bring great benefits to not only the operation of the ICC but also the safety of ICC's own staff, as the possible involvement of UN peacekeepers in certain cases to protect witnesses and ICC staff can help eliminate minor issues ICC faces in the process of prosecution. Understanding the urgency of such amendments is crucial, as the ICC is gradually losing its purpose and standing as an international court. The ICC must shift from a passive to an active role to fulfill its mission. There is still a long way to go in combating impunity, as countries always prioritize the nation's own interests in politics, even facing the obligation of serving justice. Yet, great hopes for the ICC remain with its significant growth potential.

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