Does the ICC Work? Legal Innovation and Political Constraints in Global Justice

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The International Criminal Court (ICC) aims to end impunity for atrocity crimes, but its effectiveness faces persistent questions (Clarke 2019, pp. 1-3). Whether the ICC is "working" cannot be measured simply by counting its milestones, but rather by examining how its institutional design, political dependencies, and cognitive assumptions influence its practical operation. Despite its numerous innovations, the ICC remains constrained by political obstacles and flawed institutional design. Crucially, the ICC's reliance on state cooperation and referrals to the UN Security Council exacerbates selective justice and prioritises power over principle. In a world of unequal sovereignty, the ICC's promise of universal justice remains aspirational. This creates a paradox: the ICC pursues legal idealism within the constraints of political realism. An assessment of the ICC's effectiveness must consider not only what it has achieved but also what it has sacrificed.

Legal Innovation and Enforcement Failure

The ICC's jurisprudential legacy constitutes its most notable success. It pioneered victim-centred procedures, expanded substantive legal categories, and transformed international criminal law (Shimoyachi 2024, pp. 1-2). Unlike previous ad hoc tribunals, the Rome Statute institutionalised victim participation, allowing victims to participate "throughout the investigation, trial, and appeal" (Weiss & Wilkinson 2018, p. 718). This innovative process redefined victims as stakeholders rather than mere witnesses. The ICC passed landmark rulings, classifying mass rape as genocide (in the Akayesu case) and cultural destruction as a war crime (in the Mahdi case) (Weiss & Wilkinson 2018, p. 711). These redefinitions further catalysed normative evolution. They demonstrated the ICC's capacity to adapt international law to contemporary patterns of violence, particularly regarding gender-based crimes, which humanitarian law has historically neglected. Complementarity—the principle that the ICC acts only when states are unwilling or unable—has also fostered domestic legal reforms (Nimigan 2019, pp. 1019-1020). States with robust judicial independence see fewer ICC preliminary examinations (Prorok et al. 2024, p. 10), proving that complementarity incentivises domestic accountability mechanisms.

While the existence of the ICC compels states to strengthen their judicial systems to avoid international scrutiny, its operational framework remains constrained by structure and politics. Its enforcement deficit stems not from a mere lack of police force, but from deliberate state obstruction and institutional design flaws. The UN's consistent prioritisation of "sovereign equality over ICC cooperation" illustrates this political calculus (Buitelaar & Hirschmann 2021, p. 558). Field missions engage in "silent ad hoc prioritisation", providing low-visibility assistance (e.g., intelligence sharing) while avoiding overt actions like arrests that might jeopardise host-state relations. This creates perverse selectivity: non-state actors become "easy" targets while state-linked perpetrators evade accountability. Repressive regimes weaponise the ICC process by destroying evidence, intimidating witnesses, and strategically exploiting complementarity (Hashimoto 2020, p. 340). Venezuela's case exemplifies how states outsource politically costly trials while capable domestic judiciaries shirk responsibility (Garfunkel 2021, p. 23). This strategy transforms legal safeguards into tools of impunity, exposing a fatal flaw: the ICC's dependence on the very political actors it seeks to constrain.

The enforcement-innovation dichotomy originates in unresolved tensions within the Rome Statute itself. The

jurisdictional compromise between universalists and consensualists created a hybrid monster: a court claiming supranational authority while relying entirely on state cooperation (Gissel 2022, pp. 129-130). Consensualists warned that compulsory jurisdiction would sacrifice universality for potency—a prophecy fulfilled when superpowers rejected the Court. This design flaw ensures the ICC exercises authority primarily over politically vulnerable states. Even the ICC's progressive innovations harbour potential drawbacks. Victim participation, while impressive in numbers (over 12,000 participants), often amounts to "procedural tokenism" when divorced from local justice paradigms (Benyera, 2022, pp. 54-55). Following the conviction of Thomas Lubanga, communities in the Democratic Republic of the Congo faced escalating violence without protection mechanisms, exposing the hollowness between the courtroom rituals of the Hague Tribunal and the material needs of victims. The Court's rigid legal categories further exacerbate epistemic violence by forcing intersecting experiences (such as minority women) into a single racial or gender framework (Maucec 2021, p. 68). This reflects a deeper problem: the Eurocentric legal epistemology exported by the ICC may distort local understandings of accountability.

Symptom of Systemic Failure: Africa Bias

The ICC's relationship with Africa stands as the defining paradox of its existence: a court designed for universal justice stands accused of becoming a selective instrument focused disproportionately on one continent (Iommi 2020, p. 107). Africa hosts most of the ICC investigations despite representing just over a quarter of member states (Benyera 2022, p. 55). This disproportionality functions not as an isolated prejudice but as a diagnostic lens revealing the Court's foundational tensions between principle and power, between legal ambition and political reality. Whether the ICC "works" depends fundamentally on how it navigates—or perpetuates—these asymmetries. Explanations proliferate: critics cite deliberate targeting, while defenders note Africa's high self-referral rates and conflict severity (AI's perspective also remains at this level). Both narratives obscure more profound structural truths. The Office of the Prosecutor's (OTP) case selection follows statistically verifiable patterns where increased civilian fatalities predict engagement—a tenfold rise in killings nearly triples examination likelihood (Hultman et al. 2025, p. 421). Africa's post-Cold War conflicts tragically satisfy these criteria, making the continent vulnerable to procedural attention. Yet this quantitative approach masks qualitative selectivity: powerful states evade scrutiny through non-ratification and Security Council vetoes, while weaker nations become laboratories for international jurisprudence (Christiano 2023, p. 477).

Three mechanisms drive this disproportionality. First, strategic instrumentalisation: African governments often initiate self-referrals not as acts of principled justice but as tactical moves. Uganda's referral of the Lord's Resistance Army coincided with Western support, allowing it to offload a politically dangerous conflict while appearing cooperative (Garfunkel 2021, pp. 34-35). The ICC becomes complicit in this bargain, gaining jurisdictional access while states gain legitimacy. Second, institutionalised enforcement priorities: UN peacekeeping missions subordinate justice to stability. According to the United Nations Security Council (2009, pp. 3 & 11), in Congo, the United Nations Organisation Mission in the Democratic Republic of the Congo refused to arrest figures like Bosco Ntaganda, citing "stability risks" while providing intelligence support for rebel prosecution. The result is de facto immunity for state-linked actors and selective accountability. Finally, epistemic hierarchies: the ICC's legal framing reduces intersectional victimhood to narrow categories (Grey 2019, p. 9). Atrocities against African women, for example, are prosecuted as either gender-based or ethnic, rarely both (Maucec 2021, pp. 73-74). This mirrors colonial knowledge practices, where Western legal frameworks define justice and marginalise local understandings (Tzouvala 2020, pp. 4-5).

The African experience answers "Does the ICC Work?" with painful ambiguity. As a normative entrepreneur, the Court has advanced jurisprudence on child soldiers, sexual violence, and cultural destruction. Its mere presence has pressured domestic reforms and given victims symbolic recognition. But as a delivery mechanism, the record is compromised: prosecutions target rebels, not states; reparations are individualised and court-centric; Western corporate complicity in conflicts remains untouched. Africa's disproportionality is not an anomaly—it is the logical consequence of a system that delivers justice only when politically convenient.

Power Paradox: Institutional Design Guarantees Selective Justice

The ICC's existential crisis stems not merely from operational failures but from its foundational DNA: a justice mechanism conceived in idealism yet gestated within a power-structured world. The question "does the ICC work?" must confront this uncomfortable reality: the Court functions precisely as designed—to deliver justice only when it aligns with dominant political interests. Its selectivity is not incidental but ingrained (Kotecha 2020, pp. 107-108).

Its original sin lies in the compromise between judicial power and sovereign protection. The Rome Statute's negotiation process birthed fatal contradictions that haunt the Court today. As Gissel (2022, pp. 129-131) reveals, the compromise between universalists (seeking automatic jurisdiction) and consensualists (demanding state-by-state consent) created a hybrid entity claiming supranational authority while lacking autonomous enforcement power. This schizophrenic design manifests in several critical flaws. First, the Security Council's exclusive power to refer non-member state situations under Article 13(b) politicises justice at its inception. Cases involving powerful states like the US (Afghanistan) or Israel (Palestine) stall indefinitely due to geopolitical calculations, while weaker states face scrutiny (Chigowe 2022, pp. 700-701 & 717). This asymmetry transforms the ICC from a global arbiter into an instrument of selective enforcement. Second, complementarity—intended to respect sovereignty—becomes an escape hatch. The "unwilling or unable" test under Article 17 provides sophisticated regimes with legal camouflage: states like Venezuela stage domestic judicial theatrics, such as show trials or investigative commissions, to feign willingness while obstructing ICC access (United Nations Human Rights Council 2019, p. 3). Meanwhile, autocrats destroy evidence and intimidate witnesses under the guise of national proceedings (Hashimoto 2020, p. 340), and the Court cannot meaningfully challenge these facades. Third, the non-ratification by major powers (the US, China, and Russia) creates jurisdictional black holes where atrocities escape scrutiny unless referred by the Security Council—an institution hostage to veto politics (DeGuzman 2020, pp. 66-67). This renders the ICC's universalist pretensions geographically constrained to politically vulnerable regions.

Conclusion

The ICC's operations can be considered a limited success: its legal legacy has advanced international law, but its enforcement remains constrained by geopolitics. From the Security Council's veto power to loopholes in the principle of complementarity, structural asymmetries allow powerful nations to evade accountability while targeting weaker nations, particularly in Africa. Thus, the ICC's "working" is selective: it has catalysed normative progress but has failed to become a consistent judicial enforcement mechanism. Its effectiveness does not stem from malice but from inheriting an unequal world order. Ultimately, the ICC reflects the power imbalances it seeks to correct, necessitating fundamental institutional reform to transcend the paradox between its current symbolic ambitions and instrumental failures.

To move beyond this constrained condition, reforms should aim to overcome institutional and cognitive barriers. That requires reigning in the Security Council's politics of gatekeeping, fortifying the Court's independence to open its investigations and welcoming restorative justice systems relevant to local demands. In particular, the broader ICC that we are calling for should contest its Eurocentric-shaped legal assumptions while including other notions of harm and responsibility. The ICC can only become more of a global justice instrument and not play the role of an empty signifier for selective enforcement if it faces these underlying imbalances.

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