INTERNATIONAL CRIMINAL COURT (ICC) AND THE PURSUIT OF GLOBAL JUSTICE: "A COURT WORTH HAVING"—PREDICAMENTS TO THE COURT'S ENFORCEMENT AND FRAMEWORKS FOR IMPROVING COMPLIANCE

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ABSTRACT

Despite its ambitious mandate to prosecute the world's most heinous crimes, the International Criminal Court (ICC) remains hamstrung by its inability to enforce its own rulings. Without an independent enforcement mechanism, the Court is forced to rely on state cooperation—cooperation that is often withheld due to political interests, strategic alliances, or outright defiance. This Note examines the structural weaknesses that leave the ICC vulnerable to non-compliance, with a particular focus on the Assembly of States Parties (ASP). While the ASP was envisioned as a crucial pillar of ICC enforcement, its role has been largely performative, issuing non-binding resolutions that do little to compel states to execute arrest warrants or surrender fugitives. This Note argues that the ASP must be reimagined—not as a passive observer but as an active enforcer. To that end, it proposes a set of reforms that would give the ASP meaningful leverage over non-cooperative states, including diplomatic repercussions, financial penalties, possible amendments to the Rome Statute,

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and stronger engagement with international bodies like the United Nations Security Council. Ultimately, without a fundamental shift in how the ICC navigates state resistance, the promise of global justice will remain just that—a promise, unfulfilled.

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INTRODUCTION

In 1998, the international community, scarred by the atrocities of the Second World War as well as those committed in the former Yugoslavia and Rwanda, came together to establish a permanent international criminal court.[1] After lengthy negotiations, the Rome Statute entered into force in 2002, establishing the International Criminal Court (ICC).[2] The court was tasked with pursuing justice for the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity, and later, the crime of aggression.[3] However, since its inception, the court has been heavily criticized for its inability to enforce its judgments or to bring those responsible to justice, failing to be the promised "court worth having."[4] Critics have attacked the court's lengthy and often painstakingly slow proceedings,[5] its disproportionate prosecution of crimes in certain African countries,[6] and its general lack of power to

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1. INT'L CRIM. CT., INTERNATIONAL CRIMINAL COURT AT A GLANCE 1, https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf (last visited Oct. 29, 2025) (on file with the *Columbia Human Rights Law Review*); Howard S. Levie, *The History and Status of the International Criminal Court*, 75 INT'L L. STUD. 247, 255 (2000); *see* WILLIAM A. SCHABAS**,** AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 7–9 (6th ed. 2020) (describing early international efforts to establish tribunals, codify international law, and establish an international criminal court to prosecute war criminals following the Second World War); *see also* DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 164 (2012) (providing an insider's account of the international efforts to prosecute individuals responsible for genocide, war crimes, and crimes against humanity during the 1990s. As the first U.S. Ambassador-at-Large for War Crimes Issues, Scheffer played a pivotal role in establishing tribunals for conflicts in the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia, as well as in the creation of the International Criminal Court. He describes the complexities faced during the Rome negotiations due to the United States' particular political interests and concerns).

2. INT'L CRIM. CT., *supra* note 1, at 1.

3. *Id.*

4. Lloyd Axworthy, Minister of Foreign Affairs, Canada, Opening Remarks at the Rome Conference on the Establishment of the ICC (June 15, 1998).

5. Ismehen Melouka, *Report on "It's about time: Revisiting the timing and duration of decision-making at the International Criminal Court,"* GLOBAL JUST. J. (May 27, 2020), https://globaljustice.queenslaw.ca/news/report-on-its-about-time-revisiting-the-timing-and-duration-of-decision-making-at-the-international-criminal-court [https://perma.cc/58BP-83V5].

6. Kenneth Roth, *Africa: Attacks on the International Criminal Court*, HUM. RTS. WATCH (Jan. 14, 2014), https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court [https://perma.cc/7HUL-EP2J].

enforce its warrants or judicial decisions without the cooperation of states, especially the United States.[7]

While the Rome Statute sought to establish a robust international system for criminal accountability, the ICC's dependency on state cooperation has left critical gaps in enforcement, compromising its ability to address severe human rights abuses. Without a dedicated enforcement body, the ICC relies heavily on both state cooperation and on the Assembly of States Parties (ASP), the "management oversight and legislative body of the Court," to encourage cooperation.[8] However, the ASP lacks binding authority to compel states to act, resulting in repeated cases of non-compliance and unfulfilled arrest warrants.[9]

This Note will examine the Court and the ASP's limitations as compliance enforcers and argue for an expanded role for the ASP that includes stronger, more effective mechanisms to address non-cooperation. The Note proposes reforming the ASP as an active player, rather than just a legislative body, that can engage the United Nations Security Council (UNSC) and other States Parties and non-States Parties to reform the enforcement mechanisms of the Court. Part I provides background on the ASP's current role under the Rome Statute, highlighting the historical context and political limitations that have constrained its enforcement capabilities. Part II outlines the problem of non-cooperation of states and explains why the current system cannot effectively address states' unwillingness to comply with ICC mandates. Part III proposes specific reforms to empower the ASP as a central enforcement body for the ICC, capable of providing both diplomatic support and meaningful consequences for non-compliance. Finally, Part IV evaluates the broader implications of an empowered ASP, considering how it could strengthen the ICC's mandate and restore confidence in international justice.

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7. Irene Marinakis, *A Weak ICC: Can the ICC Succeed without U.S. Participation?*, 5 EYES ON THE ICC 125, 155–57 (2009).

8. Courtney Hillebrecht & Scott Straus, *Who Pursues the Perpetrators? State Cooperation with the ICC*, 39 HUM. RTS. Q. 162, 165–66 (2017); *Assembly of States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int [https://perma.cc/8637-QY62] (last visited Feb. 24, 2025).

9. Hillebrecht & Straus*, supra* note 8, at 165–66. *See*, *e.g.*, International Criminal Court Assembly of States Parties [ASP], *Resolution on Cooperation*, ICC-ASP/20/Res.2, (Dec. 8, 2021) (ASP referring to the non-binding nature of their resolutions: "Recalls the importance of the non-legally binding Declaration of Paris on asset recovery annexed to resolution ICC-ASP/16/Res.2").

I. FOUNDATIONAL LIMITS: THE ROME STATUTE'S DESIGN AND ITS POLITICAL TRADE-OFFS

The enforcement challenges facing the International Criminal Court today are rooted in the political compromises and jurisdictional limitations negotiated at its founding. During the negotiations in Rome in 1998, the United States' efforts to restrict or exempt the ICC's jurisdiction over its nationals led to concessions made by delegates that many view as the root of the Court's alleged weakness.[10] The principle of complementarity, which gives the ICC jurisdiction only as a court of last resort and only if national authorities are "unwilling or unable" to prosecute the alleged crimes, was adopted by Rome delegates to safeguard against politically motivated prosecutions.[11] Article 17 of the Rome Statute describes the criteria by which a state's ability and willingness to prosecute are assessed.[12] This assessment is conducted as a preliminary matter, giving states the opportunity to prosecute crimes under the ICC's jurisdiction that have been referred to the Court pursuant to Article 13(a).[13]

Scholars criticize complementarity as undermining the path to justice by deferring too much to the national courts, which may use politically biased legal systems to shield individuals from accountability.[14] Emblematic of this issue was the release of Libya's former president's son, Saif al-Islam Gaddafi, by national courts,

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10. Kenneth Roth, *The Court the US Doesn't Want*, N.Y. REV. (Nov. 19, 1998), https://www.nybooks.com/articles/1998/11/19/the-court-the-us-doesnt-want [https://perma.cc/PBH6-L6KX]*; see also* SCHEFFER, *supra* note 1, at 167 (describing the United States' concerns during the talks for the ICC and other governments' confusion in response to those concerns).

11. Roth, *supra* note 10, at 3; *see also* SCHEFFER, *supra* note 1, at 181, 187 (describing the United States' successful efforts during U.N. talks in advocating for the principle of complementarity to be included in the Rome Statute); Rome Statute of the International Criminal Court art. 17(1)(a), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

12. Rome Statute, *supra* note 11, art. 17.

13. *Id.* art. 13(a).

14. *See* Kelebogile Zvobgo & Stephen Chaudoin, *Complementarity and Public Views on Overlapping Domestic and International Courts*, 87 J. POL. 1028, 1028 (2025) (surveying 10,000 participants across five countries reveals only slight evidence that the principle of complementarity improves individuals' support for the ICC).

citing an amnesty law passed by Libya's parliament.[15] Although the ICC charged Gaddafi with crimes against humanity, Libya did not cooperate with the ICC arrest warrant, demonstrating how the ICC's reliance on complementarity can be exploited in post-conflict settings to avoid meaningful prosecutions.[16] As a court of last resort, the ICC was thus prevented from intervening due to Libya's right to use complementarity and prosecute Gaddafi domestically. While Gaddafi was initially sentenced to death for war crimes by Libyan authorities and held in a prison in Zintan, he was released in June 2017, and his amnesty was declared by the Tobruk-based government later that month.[17]

National courts' misuse of the complementarity principle has caused local public perceptions to erode, further undermining the ICC's credibility.[18] However, proponents of complementarity argue that it increases national engagement and accountability while strengthening the national judicial systems.[19] The prospect of

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15. *Libya: Surrender Saif al-Islam Gaddafi to ICC,* HUM. RTS. WATCH (June 15, 2017), https://www.hrw.org/news/2017/06/15/libya-surrender-saif-al-islam-gaddafi-icc [https://perma.cc/C6G5-LFAZ].

16. INT'L CRIM. CT., CASE INFORMATION SHEET: THE PROSECUTOR V. SAIF AL-ISLAM GADDAFI, ICC-01/11-01/11-662 (2022), https://www.icc-cpi.int/sites/default/files/2022-08/GaddafiEng.pdf [https://perma.cc/ZYT3-AL2H]. Despite the ICC rejecting challenges to admissibility by Libya, upholding charges against him, and keeping Saif Gaddafi's arrest warrant live, Libya refused to comply with the warrant. CARLA FERSTMAN, ET AL., THE INTERNATIONAL CRIMINAL COURT AND LIBYA: COMPLEMENTARITY IN CONFLICT 8 (2014). *See also* Marta Bo, *The Situation in Libya and the ICC's Understanding of Complementarity in the Context of UNSC-Referred Cases*, CRIM. L. F. 25, 505–40 (2014) (explaining that admissibility decisions show how the ICC attempts to strike the balance between international justice and states' rights to exercise their territorial, criminal jurisdiction. In relation to cases triggered by UNSC referrals, these decisions also mark the ICC's interaction with the politics of the UNSC. Bo argues that in the case against Saif al-Islam Gaddafi, the ICC seems to have taken a deferential approach toward the highly authoritative mechanism that triggered the case).

17. *Saif al-Islam Gaddafi Freed from Prison in Zintan*, AL JAZEERA (June 11, 2017), https://www.aljazeera.com/news/2017/6/11/saif-al-islam-gaddafi-freed-from-prison-in-zintan [https://perma.cc/UFL6-4USH].

18. Yvonne M. Dutton**,** *Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge*, 56 COLUM. J. TRANSNAT'L L. 71, 93 (2017).

19. *See* Frédéric Mégret & Marika Samson, *Holding the Line on Complementarity in Libya*, 11 J. INT'L CRIM. JUST. 571, 581 (2013) (arguing that allowing the domestic courts to prosecute the cases would display "equality before the law," meaning it would send a message that a national who has committed

intervention from the ICC, proponents argue, pressures the states to enforce long-term legal reforms and capacity-building in transitional or post-conflict societies.[20] Complementarity also restricts overreach by the ICC, ensuring state sovereignty while also reducing the court's caseload and operational costs, allowing the court to focus on the direst situations.[21]

Nonetheless, despite the principle of complementarity enshrined in Article 17 of the Rome Statute, the U.S. was not satisfied with complementarity as a check on the Court's reach.[22] The U.S. proposed that before the ICC could initiate an investigation, the UNSC would have to expressly authorize it.[23] This would, in effect, empower the UNSC's permanent members to immunize themselves and their close allies from criticism by the only international criminal authority with binding power.[24] The Singapore compromise, which was ultimately accepted by all delegates at the Rome negotiations, granted the Security Council the power to suspend an ICC prosecution for a one-year period by a vote of nine of its fifteen members and the acquiescence of all five permanent members, preventing any single permanent member from using its veto power to prevent an investigation.[25]

The other major concession made to alleviate U.S. fears of ICC overreach was to limit how the Court would gain jurisdiction over an individual. During major negotiations, the U.S. delegates intended to limit the Court's jurisdiction to situations where either the victim's state or the state with custody of the suspect had ratified the Statute.[26] The delegates retained only one of the U.S.-sought concessions: the ICC would have jurisdiction if either the suspect's state of nationality or the state on whose territory the crime occurred had ratified the Statute.[27] This meant that, in practice, when a leader commits atrocities against their own citizens, so long as their own

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certain grave crimes will face the same judicial system as everyone else in that country, even if that judicial system is less than perfect).

20. *Id.*

21. *Id.*

22. SCHEFFER, *supra* note 1, at 182.

23. *See* DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS, 40–49 (2014) (explaining the process during the Rome Statute negotiations by which the U.S. negotiated the UNSC's intervention).

24. *Id.* at 40.

25. Roth, *supra* note 10; s*ee also* Rome Statute, *supra* note 11, art. 16.

26. SCHEFFER, *supra* note 1, at 209, 211.

27. Rome Statute, *supra* note 11, art. 12.

government has not ratified the statute, they remain outside the reach of the ICC—unless the UNSC refers the situation to the Court under Chapter VII of the U.N. Charter.[28] These concessions still did not satisfy the American officials and, in the end, the United States did not ratify the Rome Statute.[29] The United States nonetheless retains a contradictory flexibility in supporting the Court's mission and has assisted in its operations in the past.[30]

Moreover, it is of vital importance to the Court's legitimacy that the U.S. and other strong, non-ratifying international states, such as Russia and China, support the ICC in its mission.[31] Without the cooperation of the United States and other non-party states, the ICC—which relies entirely on state cooperation to enforce its judgments—will face many obstacles in conducting its investigations and judicial responsibilities.[32] For example, the crimes against humanity and war crimes in the Darfur region could only be investigated under the ICC's jurisdiction through a UNSC referral, since Sudan was not a party to the Statute and the perpetrators were Sudanese nationals.[33] The United States vehemently opposed the idea of a referral, however, and instead suggested the creation of a new court within the International Criminal Tribunal for Rwanda and its existing infrastructure to try the case rather than refer it to the ICC.[34] The UNSC ultimately referred the Darfur situation to the ICC Prosecutor in 2005 through Resolution 1593.[35] The United States abstained from voting and reiterated its objections to the Rome Statute, the possibility of politicized prosecutions, and the overreach of the ICC's jurisdiction over non-States Parties.[36] Despite the success of the UNSC in referring the situation and surviving a veto, the Sudanese perpetrators (aside from Ali Muhammad Ali Abd-Al-Rahman, who surrendered himself voluntarily) and many others remain at large. It has been posited that without the cooperation of

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28. SCHEFFER, *supra* note 1, at 182, 193, 221.

29. SCHEFFER, *supra* note 1, at 224–25.

30. *See* BOSCO *supra* note 23, at 56–57, 70–71 (discussing U.S. support).

31. For instance, the U.S. supported the UNSC's referral of Libya's situation to the ICC in 2011 despite abstaining from voting to refer the situation in Sudan in 2002. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); *infra* note 35 and accompanying text.

32. Marinakis, *supra* note 7, at 155–57.

33. *Id*. at 139.

34. *Id*.

35. S.C. Res. 1593, ¶1 (Mar. 31, 2005); U.N. SCOR, 60th Sess., 5158th mtg. at 3, U.N. Doc. S/PV.5158 (Mar. 31, 2005) (U.S. abstaining from voting).

36. *Id*.

the United States and other powerful allies, the ICC may not be able to succeed in adjudicating its cases.[37]

Relatedly, on February 6, 2025, the United States imposed sanctions against the ICC, further perpetuating a cyclical contest between the United States and the Court.[38] While these measures aim to further interfere with the Court's freedom to investigate crimes under its mandate and enforce its decisions, parts of the international community seem poised to further support the Court.[39] In particular, several States Parties, such as South Africa and Malaysia, have formed coalitions to protect the Court from U.S. attacks.[40] The sanctions may have the effect of shifting the international order, which would minimize the role of the United States in affecting the independence of the Court in particular and supporting the rule of international criminal law in general.[41]

A. Measuring Enforcement and Non-Cooperation

In the context of the ICC, enforcement refers to the mechanisms and processes by which the Court ensures compliance with its judicial decisions, including the arrest and surrender of suspects, the protection of witnesses, and the execution of sentences.[42]

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37. Marinakis, *supra* note 7, at 156–57; *see also* Bruce Broomhall, *Toward U.S. Acceptance of the International Criminal Court*, 64 LAW & CONTEMP. PROBS. 141, 151 (2001) (arguing that U.S. geopolitical interests would be best served by supporting the Court despite concerns for prosecution of its nationals).

38. Exec. Order No. 14,203, 31 C.F.R. 528 (2025).

39. Kelebogile Zvobgo, *ICC Sanctions Will Hurt, Not Help, the United States*, BROOKINGS INST. (Feb. 12, 2025), https://www.brookings.edu/articles/icc-sanctions-will-hurt-not-help-the-united-states [https://perma.cc/V3VQ-4ZZ3].

40. Patrick Wintour, *South Africa and Malaysia to Launch Campaign to Protect International Justice*, THE GUARDIAN (Jan. 31, 2025), https://www.theguardian.com/law/2025/jan/31/south-africa-and-malaysia-to-launch-campaign-to-protect-justice [https://perma.cc/N6QN-LFEF].

41. *See* Zvobgo, *supra* note 39 (describing how sanctions have the potential to make the United States' efforts look weak and "give cover to U.S. adversaries such as Russia that also oppose the ICC"); Michelle Nichols & Bart H. Meijer, *Countries Vow 'Unwavering' Support for ICC, as Trump Hits It with Sanctions*, REUTERS (Feb. 7, 2025), https://www.reuters.com/world/trump-impose-sanctions-international-criminal-court-2025-02-06 (on file with the *Columbia Human Rights Law Review*).

42. *See* INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT (2020), https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf [https://perma.cc/MN9R-ZB6F] (explaining ICC structure, jurisdiction, procedures, and means for victim and witness participation). *See generally* Hirad Abtahi & Steven Arrigg Koh**,** *The Emerging Enforcement Practice*

In 2014, during its 13th session, the ASP discussed the need to improve the management of the Court's performance, calling for more qualitative and quantitative measures that would allow the ASP to assess performance.[43] The Court has, as a result, produced annual reports on Key Performance Indicators (KPIs) since 2015. Furthermore, in 2019, the ICC's Independent Expert Review (IER) was established to independently review the ICC's work and functions, as well as to make recommendations to the Court and the ASP by identifying ways to strengthen the Rome Statute system. Independent reviews by NGOs and academic institutions, and feedback received from victims, witnesses, and stakeholders, also provide insight into assessing the Court's performance.[44]

Further qualitative and quantitative data are also used to evaluate the Court's performance. The Court's judicial effectiveness, speed of proceedings, adherence to due process, state cooperation, impact and deterrence, and operational and financial efficiency are all metrics used to evaluate the overall effectiveness of the Court.[45] Among the most prevalent factors cited as impediments to the Court's performance is non-cooperation.[46]

As defined by the ASP, non-cooperation ". . . could be understood as the failure by a State Party or a State which has entered into an *ad hoc* arrangement or an agreement with the Court

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of the International Criminal Court, 45 CORN. INT'L L. J. 1, 3–6 (2012) (examining the ICC's enforcement mechanisms and discussing the Court's dependence on state cooperation for implementing its mandates, highlighting the practical challenges in areas such as arrest procedures and sentence enforcement).

43. International Criminal Court Assembly of States Parties [ASP], *Strengthening the International Criminal Court and Assembly of States Parties*, ICC-ASP/13/Res.5, Annex I, ¶ 7(b) (Dec. 17, 2014).

44. *Happenings in The Hague: How the Independent Expert Review of the ICC's Performance Can Strengthen the Court*, INT'L FED'N HUM. RTS., (June 22, 2020), https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/happenings-in-the-hague-how-the-independent-expert-review-of-the-icc [https://perma.cc/688Z-8K5R]. *See also NGOs and Civil Society*, INT'L CRIM. CT., https://www.icc-cpi.int/get-involved/ngos [https://perma.cc/E9Q3-5MED] (briefly summarizing the historical and modern role of NGOs in the ICC).

45. Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 245 (2012).

46. Annika Jones, *Non-Cooperation and the Efficiency of the International Criminal Court*, *in* COOPERATION AND THE INTERNATIONAL CRIMINAL COURT: PERSPECTIVES FROM THEORY AND PRACTICE 1, 18 (Olympia Bekou & David Birkett, eds., 2016). *See also* INT'L CRIM. CT., 2022 REPORT OF THE COURT ON KEY PERFORMANCE INDICATORS 40–43 (2023) (showing that some requests for cooperation by the ICC do not lead to actual cooperation).

(hereafter: "requested State") to comply with a specific Court request for cooperation."[47] The ASP's 2022 KPIs report measures non-cooperation through quantitative information on Requests for Cooperation, Information, and Assistance, parties' "positive," "negative," or "pending" replies, and the average time taken to respond to requests.[48] The report indicates that, in 2022, the ICC's Office of the Prosecutor (OTP) sent 422 cooperation requests to more than 70 different parties, including both States Parties and non-States Parties, as well as NGOs and private institutions.[49] It received 240 positive responses, 154 pending responses, and 9 negative responses, indicating a substantial gap in cooperation.[50] These figures indicate that while the Court received positive responses to many of its requests, there remain significant pending requests, prolonging the process of the ICC's investigations and proceedings. Some of these pending requests may also be met with non-compliance, further preventing the Court's enforcement of its mandate.

At its tenth session, the ASP also adopted the "Assembly Procedures Relating to Non-Cooperation,"[51] which requires the ASP's Bureau on non-cooperation to provide annual reports "on the outcome of any activities it undertook with regard to non-cooperation, including any recommendations for action."[52] The ASP's working group on non-cooperation, as well as its annual reports and related resolutions, continuously request the cooperation and engagement of States Parties and non-States Parties and the implementation of non-cooperation procedures, but fail to provide concrete direction for preventing future or recurring non-compliance.[53]

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47. International Criminal Court Assembly of States Parties [ASP], *Assembly Procedures Relating to Non-Cooperation*, ICC-ASP/10/Res.5, Annex II ¶ 4 (2011).

48. INT'L CRIM. CT., *supra* note 46, at 40.

49. *Id.* at 41.

50. *Id.*

51. International Criminal Court Assembly of States Parties [ASP], *Report of the Bureau on Non-Cooperation*, ICC-ASP/17/31, Annex II (Nov. 28, 2018), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP17/ICC-ASP-17-31-ENG.pdf [https://perma.cc/ED78-EWFN].

52. International Criminal Court Assembly of States Parties [ASP], *Non-Cooperation*, https://asp.icc-cpi.int/non-cooperation [https://perma.cc/SRZ6-WXQQ] (last visited Feb. 24, 2025) [hereinafter *Non-Cooperation*].

53. *See e.g.*, International Criminal Court Assembly of States Parties [ASP], *Strengthening the International Criminal Court and Assembly of States Parties*, ICC/ASP/22/Res.3, Annex I, ¶ 3(l)–(n) (asking "States Parties to comply with their obligations under the Rome Statute, in particular the obligation to cooperate").

B. Enforcement, the ASP, and the Problem of Non-Cooperation

From the early years of the Rome Statute regime, political resistance and jurisdictional limits laid the groundwork for the enforcement failures we see today. The ICC faces significant challenges when state cooperation is lacking, which raises questions about the Court's ability to deliver justice.[54] Without such cooperation, the Court faces significant delays in proceedings, ultimately leading to perpetrators remaining at large and evading justice. In recent years, with South Africa's refusal to arrest the then-president of Sudan, Omar al-Bashir,[55] and Mongolia's refusal to execute an ICC arrest warrant for Russian President Vladimir Putin, rising international criticism has suggested that the Court is not up to the tasks set out for it in 1998.[56] Some argue that the ICC's failure to engage the cooperation of States Parties or hold the non-obliging parties liable before the Court signals the ICC's limited mechanisms for compelling state cooperation.[57]

In the event of non-compliance by a state that is party to the Rome Statute (such as South Africa), the language of the Statute clearly indicates that once such non-compliance has been found, a

54. *See, e.g.*, Moncef Khane, *The ICC's credibility is hanging by a thread*, AL JAZEERA (Oct. 13, 2024), https://www.aljazeera.com/opinions/2024/10/13/the-iccs-credibility-is-hanging-by-a-thread [https://perma.cc/C3SZ-N29Q] (arguing that the Court would be delegitimized if it failed to act on the Gaza situation, even though arrest of the Israeli prime minister remains all but impossible, with the U.S. and Mossad as obstacles). *See also* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 415 (2000) (claiming that "the Court's enforcement jurisdiction is so feeble that it has the potential to completely undermine the efficacy of the Court…").

55. Windell Nortje, *South Africa's Refusal to Arrest Omar Al-Bashir*, FICHL POLICY BRIEF SERIES, No. 85 (2017), https://www.toaep.org/pbs-pdf/85-nortje [https://perma.cc/JPG5-7UVC].

56. Ketrin Jochecová, *Sorry not sorry, says Mongolia after failure to arrest Putin*, POLITICO (Sep. 3, 2024), https://www.politico.eu/article/mongolia-failure-arrest-vladimir-putin-international-warrant-international-criminal-court/ [https://perma.cc/7B22-V3JW]; *ICC rules against South Africa on shameful failure to arrest President Al-Bashir*, AMNESTY INT'L (July 6, 2017), https://www.amnesty.org/en/latest/news/2017/07/icc-rules-against-south-africa-on-shameful-failure-to-arrest-president-al-bashir [https://perma.cc/HKP8-UZUQ].

57. Allan Ngari, *The real problem behind South Africa's refusal to arrest al-Bashir*, INST. FOR SEC. STUD. (July 10, 2017), https://issafrica.org/iss-today/the-real-problem-behind-south-africas-refusal-to-arrest-al-bashir [https://perma.cc/R98K-DSVX].

referral to the ASP or the UNSC is warranted.[58] In the face of South Africa's obstruction of justice, the ICC could have reported the situation to the UNSC, which had referred the situation in Darfur to the Court. However, the ICC judges did not do so, allowing South Africa to face no sanctions despite its transgressions.[59] The ICC acknowledged that since South Africa's national courts decided that the state erred in not arresting al-Bashir, a referral to the Security Council was unwarranted.[60] This highlights the ICC's willingness to engage constructively with the states and its reliance on their cooperation for the success of its operations. The main reason for such inaction on the ICC's part against non-compliant states may stem from the lack of clear guidelines in the Rome Statute as to what the ASP or the Security Council should do when they receive such referrals.[61] Furthermore, states' impunity in the face of non-cooperation signifies a gap in the workings of the Rome Statute as to what the appropriate measures for the ASP or the UNSC should be when a government fails to cooperate with the ICC.

The ASP's resolutions and mechanisms play a crucial role in facilitating cooperation and addressing the enforcement challenges and gaps that hinder the Court's effectiveness. In its latest resolution on strengthening the ICC in 2023, the ASP reiterated the need for States Parties and the international community to enhance cooperation with the Court.[62] This resolution reflects a renewed focus on securing political support, enhancing cooperation frameworks, and addressing gaps in enforcement and capacity at the national level. Acknowledging that the Court faces an ongoing challenge in fulfilling its mandate, the ASP called on States Parties not only to comply with their legal obligations under the Rome Statute in areas like arrest warrant execution and enforcement of judicial decisions, but also through constitutional and legislative framework implementation

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58. Rome Statute, *supra* note 11, art. 87(7) ("Where a State Party fails to comply . . . preventing the Court from exercising its functions and powers . . . the Court may make a finding to that effect and refer the matter to the Assembly of State Parties or, where the Security Council referred the matter . . . to the Security Council.")

59. *Id.*

60. Prosecutor v. Al-Bashir, ICC-02/05-01/09-302, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request of the Court for the arrest and surrender of Omar Al-Bashir, ¶ 139 (July 6, 2017).

61. Rome Statute, *supra* note 11, art. 87(7).

62. International Criminal Court Assembly of States Parties [ASP], *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/22/Res.3, ¶ 21 (Dec. 13, 2023).

where domestic laws do not reflect said obligations.[63] Given the obstacles the ICC faces in enforcing arrest warrants, it calls on states to address these gaps by strengthening cooperation frameworks and promoting discussions on practical solutions to improve cooperation, especially regarding pending arrests and asset freezing and seizure.[64]

More importantly, the resolution encourages the states to provide political and diplomatic support to the Court to reinforce its operational success.[65] The ASP does not, however, provide any specific means by which states could support the Court beyond fulfilling their cooperative obligations. It's been suggested that the Court must engage with states' national judiciary and international law enforcement entities such as INTERPOL or utilize an independent tracking or police force to ensure arrest warrants are properly executed.[66]

Another significant part of the resolution points out the need for closer collaboration between the ICC and the United Nations, urging the Security Council to follow up on ICC referrals and to engage with the Court in peacekeeping missions and sanctions regimes.[67] This Note will further explore the importance of the UNSC's role in improving the cooperation of states as well as strengthening the enforcement of the ICC. It has long been argued that the Security Council could issue more resolutions urging the U.N. member states to do more to enforce arrest warrants. This could be achieved through an "express ban on member states' hosting ICC defendants, even for diplomatic gatherings," or by instituting travel bans through the Sanctions Committee to prevent indictees from moving freely and evading the Court's arrest.[68]

This Note will argue that through the enhanced cooperation of the member states with the reformed role of the ASP, as well as the UNSC, the ICC's legitimacy and enforcement power may be strengthened.

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63. *Id.* ¶ 22.
64. *Id.* ¶¶ 23–28.
65. *Id.* ¶ 21.
66. Beth Van Schaack, *ICC Fugitives: The Need for Bespoke Solutions*, ICC FORUM §§ III., IV.E. (Feb. 13, 2014), https://iccforum.com/arrest#Van-Schaack [https://perma.cc/4LRG-5B4L].
67. International Criminal Court Assembly of States Parties [ASP], *Strengthening the International Criminal Court and the Assembly of States Parties*, *supra* note 62, ¶ 41 (Dec. 13, 2023).
68. Van Schaack, *supra* note 66, § IV.B.

II. ENFORCEMENT AND COOPERATION LIMITATIONS WITHIN THE ICC

The ICC, as the world's first and only permanent international criminal court, lacks an independent enforcement mechanism and instead relies exclusively on state cooperation to enforce its arrest warrants and implement its judicial decisions. This reliance often proves ineffective when states, particularly those with political stakes, refuse to cooperate with the court. Such dependency weakens the ICC's mandate and its credibility, as non-cooperative states hinder the Court's ability to prosecute international crimes effectively.[69] In turn, this contributes to the perception that the ICC lacks authority and raises doubts about its role in upholding global justice.

Furthermore, this lack of enforcement can hinder the ICC Prosecutor's performance and ability to prosecute crimes impartially, as they may have to assess potential state support before launching an investigation.[70] An anticipated lack of enforcement is what led the Pre-Trial Chamber to decide against initiating an investigation of crimes in Afghanistan—as well as the related conduct of U.S. officials and the CIA—determining that the investigation would not be in the "interests of justice" due to lack of cooperation with the Prosecutor.[71] Article 15 of the Rome Statute allows the prosecution to initiate an investigation *proprio motu* (on their own initiative rather than through a referral by the UNSC or a State Party), subject to

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69. AMNESTY INT'L, *State non-cooperation and failure of international criminal tribunals to ensure release threaten the legitimacy of international justice* (May 9, 2023), https://hrij.amnesty.nl/state-non-cooperation-and-failure-of-international-criminal-tribunals-to-ensure-release-threaten-the-legitimacy-of-international-justice [https://perma.cc/98AA-DDED].

70. Frankie Wong, *Criticisms and Shortcomings of the ICC*, ACCESS ACCOUNTABILITY (Sept. 26, 2019), https://accessaccountability.org/index.php/2019/09/26/criticisms-and-shortcomings-of-the-icc [https://perma.cc/P926-X3BV].

71. International Criminal Court Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33 ¶¶ 89–90 (Apr. 12, 2019) [hereinafter Decision Pursuant to Article 15]. Taking into account the gravity of the crime and the interests of victims, the Pre-Trial Chambers can decide that despite jurisdiction and admissibility requirements being met, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. In the absence of clear language in the Statute, the Court found the meaning to be in "the overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities." *Id.* ¶ 89.

obtaining the prior authorization of the Pre-Trial Chamber.[72] The Pre-Trial Chamber must then determine, based on the information provided by the Prosecutor, whether the instigation of prosecution meets the requirements set out in Article 53(1)(a) to (c), namely whether the investigation is in the "interests of justice."[73] The Court decided that investigating the situation in Afghanistan, even for the limited purposes of a preliminary examination, was not in the interests of justice due to scarce cooperation.[74] This decision was perceived to be heavily influenced by U.S. pressure to sanction the Court in an effort to shield the actions of CIA and U.S. military personnel in Afghanistan from scrutiny.[75] This highlights that an anticipated lack of enforcement can affect the Prosecutor's decision making, compelling them to consider factors beyond the demands of justice, which further undermines the Court's legitimacy.

A. Enforcement Limitations Within the Rome Statute

In the face of ever-increasing mass atrocities happening around the world, the need to strengthen the ICC's enforcement mechanisms to ensure independent and objective investigations is more imperative than ever.[76] As currently codified by the Rome Statute, the enforcement power of the Court cannot address the issues the Court is facing. The principles of cooperation of States Parties and the enforcement powers of the ICC are enshrined in Articles 87, 91, 92, and 93, as well as Articles 103 to 111 of the Rome Statute.[77] Modeled primarily after the enforcement mechanisms of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), these articles set forth the obligations of States Parties.[78]

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72. Rome Statute, *supra* note 11, art. 15(1).

73. Rome Statute, *supra* note 11, arts. 15(3), 53(1).

74. *See* Decision Pursuant to Article 15, *supra* note 71, ¶ 91.

75. AM. C.L. UNION, *ACLU Comment on ICC Decision Not to Investigate U.S. War Crimes in Afghanistan* (Apr. 12, 2019), https://www.aclu.org/press-releases/aclu-comment-icc-decision-not-investigate-us-war-crimes-afghanistan [https://perma.cc/3LY2-FGVG].

76. Julian Borger, *World faces 'heightened risk' of mass atrocities due to global inaction*, THE GUARDIAN (Dec. 8, 2023), https://www.theguardian.com/law/2023/dec/08/un-and-us-efforts-to-stop-mass-atrocities-have-waned-activists-warn/ [https://perma.cc/K8MG-HTS4].

77. Rome Statute, *supra* note 11, arts. 87, 91, 93, 103–11.

78. Elizabeth Robbins, *Towards Enforcement in the International Criminal Court*, 3 EYES ON THE ICC 85, 85 (2006), https://heinonline.org/HOL/P?h=hein.journals/eyesicc3&i=87 [https://perma.cc/8DHH-2TBU].

The ICC differs, however, from both former tribunals in that the ICTY and ICTR relied on their rule-making powers and the broad wording of their governing statute to empower a multinational military force to execute arrest warrants.[79] For instance, Article 29 of the ICTY statute ("Cooperation and Judicial Assistance") obligates states to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including . . . the arrest or detention of persons."[80] The ICTR contains a similar provision, requiring states to assist in the arrest and surrender of accused persons.[81] While Article 86 of the Rome Statute has a similar provision, its language is limited to the "investigation and prosecution of crimes," rather than the broader obligation of "any request for assistance" present in the ICTY.[82] Moreover, the ICTY and ICTR were created respectively by U.N. Security Council Resolutions 827 and 955, meaning states were legally bound to comply under Chapter VII of the U.N. Charter.[83] On the other hand, the ICC, established through a treaty (the Rome Statute), only binds its States Parties and lacks automatic enforcement power from the U.N. Security Council.[84]

Many scholars have argued that this difference in the structuring of the ICC has significantly impaired the Court's ability to enforce its judgments and pursue its mission of international justice.[85] Whereas the ICTY and ICTR were time-limited and focused on specific conflicts, the ICC has a permanent and much broader mandate, leading to more complicated issues of non-compliance.[86] It has also been argued that the approach of the ICTY in "publicly lauding" the states that complied with arrest warrants and criticizing those who failed to do so effectively managed "to convert the

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79. Han-Ru Zhou, *The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC*, 4 J. INT'L CRIM. JUST. 202, 207 (2006).

80. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 29, May 25, 1993, 32 I.L.M. 1192.

81. Statute of the International Criminal Tribunal for Rwanda**,** art. 28, Nov. 8, 1994, 33 I.L.M. 1602.

82. Rome Statute, *supra* note 11, art. 86.

83. S.C. Res. 827, ¶ 4 (May 25, 1993); S.C. Res. 955, ¶ 2, (Nov. 8, 1994).

84. Rome Statute, *supra* note 11, Preamble.

85. Abdullah Omar Yassen, *International Cooperation: From the ICTY and ICTR to the ICC*, 7 J. POLYTECHNIC 1, 3 (2017).

86. Rome Statute, *supra* note 11, Preamble; INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 10 (2020), https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf [https://perma.cc/MN9R-ZB6F].

principles the tribunal represented into meaningful political pressure."[87] The ICTY indicted over 160 people, including heads of state, prime ministers, and military leaders, such as Radovan Karadžić and Ratko Mladić, who were convicted for their roles in the 1995 Srebrenica genocide.[88] The ICTR has successfully indicted 90 individuals, and the remaining six fugitives are subject to rewards for their capture pursuant to the U.S. State Department's War Crime Rewards Program;[89] tracking teams formed by the ICTR continue their search to gather information about their whereabouts.[90]

This success rate underscores the significance of state cooperation and the role of the Court's strategic relations with States Parties to improve its legitimacy and ensure state compliance. Given the ICTY's limited mandate, the U.S. could retain its position as a supporter of international peace and security without being subject to the Tribunal's jurisdiction.[91] The same is not possible with the ICC, where the U.S. or its allies could come under scrutiny by the Court, which explains the reluctance of the U.S. to support the ICC as it did its predecessors.

Matters are further complicated since the express language of Article 86 merely creates a duty for states to "cooperate fully."[92] Beyond the referral to the ASP and the UNSC, the Court cannot take

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87. BOSCO, *supra* note 23, at 63.

88. *About the ICTY*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/about [https://perma.cc/H6V3-59JR].

89. U.S. DEP'T OF STATE, *War Crimes Rewards Program*, https://2017-2021.state.gov/war-crimes-rewards-program [https://perma.cc/2PP7-H3DR].

90. Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the United Nations Security Council (June 6, 2011), https://web.archive.org/web/20121202140338/http://www.unictr.org [https://perma.cc/AA2N-QTPL].

91. *See* S.C. Res. 827, 2, (May 25, 1993) (stating that the Tribunal was only for "the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"). Given that the ICTY was established to investigate crimes in "the territory of the former Yugoslavia," crimes committed elsewhere by other states, including the U.S., were not within its mandate or jurisdiction. Also, despite allegations of the U.S. and NATO committing war crimes, the ICTY concluded that "there was no deliberate targeting of civilians or unlawful military targets" and no basis to investigate. Press Release, Int'l Crim. Trib. for Former Yugoslavia, Prosecutor's Report on Nato Bombing Campaign, U.N. Press Release P.I.S./ 510-e (June 2, 2000). In contrast, the Rome Statute has a much broader jurisdiction which can be triggered by UNSC or State Party referrals, by the crimes being committed on a state party's territory, or the accused having the nationality of a State Party. Rome Statute, *supra* note 11, arts. 13–14.

92. Rome Statute, *supra* note 11, arts. 86–87.

any further measures to ensure compliance. The eventual success of the ICTY in obtaining custody over all defendants is largely attributed to the fact that "economic assistance," "European Union accession," and "closer ties to NATO via the Partnership for Peace," were made conditional on the former Yugoslavian states' cooperation with the tribunal.[93] Not only has the ICC not received this level of support from States Parties, but as an organization independent of the Security Council (rather than its subsidiary), it has also been neglected by that U.N. body.[94] The Court is ill-equipped to take any retaliatory actions that would meaningfully produce cooperation.[95]

B. Functional Limitations of the ASP

Under the Rome Statute, the ASP's main function is that of a legislative and oversight body with limited powers to enforce cooperation. While Article 112(2)(f) of the Statute empowers the ASP to "consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation," nothing in the language of either Article 112 or 87 specifies the role of the ASP in the event of transgressions or failure to cooperate by the states. [96] The resolutions passed by the ASP, although important in setting cooperative policies and encouraging state compliance, are non-binding.[97]

As mentioned, Article 87(7) of the Rome Statute provides that if a State Party fails to comply with ICC requests, such as executing arrest warrants or surrendering individuals, the Court can refer the situation to the ASP or the UNSC (if the UNSC originally referred the situation to the Court).[98] However, neither the ASP nor the UNSC has prescribed actions in the past to enforce compliance following

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93. Van Schaak, *supra* note 66, § II. *See also* DIANE ORENTLICHER, SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA 59, 60 (Diane Orentlicher ed., 2018) (explaining that the prospect of EU membership brought about much of former Yugoslavian states' cooperation with the ICTY).

94. Van Schaak, *supra* note 66, § II.

95. *See* Marco Bocchese, *Justice Denied: Making Sense of State Noncooperation with International Prosecutions*, 21 GEO. J. INT'L AFF. 195, 195–96 (2020) ("The Court is nearly completely dependent on state cooperation to carry out investigations and prosecutions").

96. Rome Statute, *supra* note 11, arts. 112(2)(f), 87(7).

97. *See* International Criminal Court Assembly of States Parties [ASP], *supra* note 9 (noting that ASP's resolutions, though important for cooperation, are not legally binding).

98. Rome Statute, *supra* note 11, art. 87(7).

these referrals.[99] This ambiguity and lack of follow-up mechanisms mean that even when non-compliance is formally recognized, there is often no actionable response.[100] As a result, beyond informal diplomatic efforts, such as issuing press releases or encouraging states to uphold their Rome Statute obligations, the ASP has no other remedies at its disposal.[101] Additionally, while the ASP has procedures in place for appointing regional focal points to assist the ASP President in cooperation efforts, these measures are mainly advisory.[102] This structure further underscores the ICC's reliance on the political goodwill of states and highlights the lack of enforcement capacity at both the ASP and the UNSC levels.[103]

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99. *See* SECURITY COUNCIL REPORT, IN HINDSIGHT: THE SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT, (July 31, 2018), https://www.securitycouncilreport.org/monthly-forecast/201808/in_hindsight_the_security_council_and_the_international_criminal_court.php [https://perma.cc/TDX2-NDQ2] ("The Council has also been relatively indifferent towards states' non-cooperation with the ICC on existing referrals, refraining from taking action on the 13 decisions of the court regarding the non-compliance of U.N. member states."); *see also* Olympia Bekou, *Dealing with Non-Cooperation at the ICC: Towards a More Holistic Approach*, 19 INT'L CRIM. L. REV. 1 (2019). Bekou argues that as a judicial body, the ICC's "main remedy for noncooperation is a judicial finding to that effect." *Id.* at 915. Reviewing the ICC's previous judicial findings of non-cooperation, Bekou argues that the lack of action following a referral to the UNSC or the ASP can signify a push for further conversations between the ICC and the states that may lead to cooperation. *Id.* at 923. Bekou notes, however, that these judicial findings made by the Court are not enough, and the ASP must engage further with states to take collective action against non-compliers. *Id.* at 925.

100. Bekou, *supra* note 99, at 924.

101. Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT'L L. J. 1584, 1595 (2011). *See also Non-Cooperation*, *supra* note 52 (detailing the general work of and the measures available to the ASP in instances of non-cooperation).

102. International Criminal Court Assembly of States Parties [ASP], *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/17/Res.5, Annex II, 2(D)(2)(a) (Dec. 12, 2018), https://asp.icccpi.int/sites/asp/files/asp_docs/ASP17/RES-5-ENG.pdf [https://perma.cc/T7XJ-DMMA].

103. *Id. See also* International Criminal Court Assembly of States Parties [ASP], *Procedures for Non-Cooperation*, ICC-ASP/19/Res.6 (Dec. 16, 2020), https://asp.icccpi.int/sites/default/files/iccdocs/asp_docs/ASP19/ICC-ASP-19-Res6-ENG.pdf [https://perma.cc/QN66-SP2P].

C. The Enforcement Challenges of the ASP

Without clear guidelines or real consequences for non-cooperation, ASP referrals tend to lead to limited action, often resulting in no repercussions for states that violate ICC obligations.[104] This, in turn, discourages accountability as states face minimal or no consequences for disregarding their duties under the Rome Statute, leading to cases of impunity and stalled proceedings for serious crimes.[105] In recent years, the Court has faced increased criticism due to non-cooperation by States Parties that do not enforce its arrest warrants with impunity.

For instance, in March 2023, the ICC Pre-Trial Chamber II issued arrest warrants for two individuals in connection to the situation in Ukraine: Vladimir Vladimirovich Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President for the Russian Federation.[106] Based on information submitted by the Prosecution, Pre-Trial Chamber II concluded that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation and transfer of children from occupied areas of Ukraine to the Russia.[107] In September 2024, following an official state invite from Mongolia, President Putin paid a visit to Mongolia's capital amid outcry from the international community over Mongolia's flagrant violation of its obligations as a

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104. INT'L PEACE INST., THE RELATIONSHIP BETWEEN THE ICC AND THE SECURITY COUNCIL 2 (2013), https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_relationship_bet__icc_and_sc__2_.pdf [https://perma.cc/5342-SLBE]. *See also* SOUTHERN AFRICA LITIGATION CTR., *Ensuring Cooperation with the ICC*, *in* INT'L CRIM. JUST. & AFR. 54 (2012), https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Cooperation-with-the-ICC.pdf [https://perma.cc/7VAX-R3TT] (explaining the lack of Security Council binding decisions in respect to cooperation with the ICC).

105. *See* Jeremy Sarkin, *Reforming the International Criminal Court (ICC) to Achieve Increased State Cooperation in Investigations and Prosecutions of International Crimes*, 9 INT'L HUM. RTS. L. REV. 27, 53 (May 24, 2020) (discussing the UN's ineffectiveness in stopping human rights issues in certain instances).

106. Press Release, ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (on file with the *Columbia Human Rights Law Review*).

107. *Situation in Ukraine*, *ICC-01/22*, INT'L CRIM. CT., https://www.icc-cpi.int/situations/ukraine (on file with the *Columbia Human Rights Law Review*) (last visited Oct. 21, 2024).

party to the Rome Statute.[108] The ICC in turn chose to refer Mongolia's non-compliance to the ASP.[109] The Court rejected Mongolia's invocation of the head of state immunity principle under international law,[110] as it had previously done in response to a similar justification raised by Chad and Malawi in failing to comply with an arrest warrant for former Sudanese president Omar al-Bashir.[111] The Court noted that while a referral to the ASP was not "the standard response to each instance of non-compliance," it was necessary when it was deemed to be "the most effective way of obtaining cooperation in the concrete circumstances at hand."[112]

The ASP, however, remains under-equipped to take any proper action following such referrals, as the Rome Statute does not mandate any concrete action to be taken towards the recalcitrant states. The ASP defines the general scope and nature of non-cooperation procedures in the context of two possible scenarios that may require action by the ASP: (1) where the Court has referred an incident of non-cooperation under article 87 of the Statute where urgent action by the ASP may bring about cooperation, or (2) where the Court has not referred the situation yet but a "specific and serious" instance of non-cooperation is impending or ongoing.[113] The ASP may then take either a formal and public approach (in scenario one) or an informal and diplomatic approach (in scenario two).[114] In the formal approach, the ASP recommends open letters, emergency meetings of the Assembly's bureau, and other public dialogues with the requested state and other parties.[115] In the informal approach, the president of the Assembly uses designated focal points to inform the requested state of the consequences of its actions in order to promote full cooperation.[116]

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108. Ruth Green, *Ukraine-Russia: Putin's Visit to Mongolia Defies ICC Arrest Warrant as the World Looks On*, INT'L BAR ASS'N (Sept. 30, 2024), https://www.ibanet.org/putin-visit-to-mongolia-defies-icc-arrest-warrant-as-world-looks-on [https://perma.cc/FJ5E-424P].

109. International Criminal Court Pre-Trial Chamber II, *Situation in Ukraine*, ICC-01/22-90, Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia, ¶ 40 (Oct. 24, 2024).

110. *Id.* ¶ 35.

111. *Ensuring Cooperation with the ICC, supra* note 104, at 56.

112. *Situation in Ukraine*, *supra* note 107, ¶ 41.

113. International Criminal Court Assembly of States Parties [ASP], *supra* note 102 ¶ 7.

114. *Id.* ¶¶ 10–11.

115. *Id*. ¶ 14.

116. *Id.* ¶¶ 20–22.

The ASP further refers to the toolkit for cooperation.[117] The toolkit recommends prevention tactics such as the use of social media to express concern about the travel plans of people for whom the ICC has issued arrest warrants, as well as "sensitizing interlocutors" such as foreign ministry officials on the issues of non-cooperation.[118] The toolkit also mentions the issue of non-States Parties' obligations under the Statute (for instance as raised by Sudan in al-Bashir's case) when the UNSC refers the situation to the ASP, and calls on the UNSC to include more definitive language in its resolutions "urg[ing]" non-States Parties to cooperate, even though they do not retain obligations to do so under the Rome Statute, in order to more accurately reflect UNSC resolutions establishing the ICTY and the ICTR.[119]

This language and procedural framework reflects the non-binding nature of the ASP's recommendations, which lack concrete enforcement measures, and calls for voluntary compliance. During the lifetime of the Court, the UNSC has only referred two situations, Sudan and Libya, to the ICC.[120] This means that in all other situations referred to the ICC by states or investigations commenced *proprio motu* by the Prosecutor, the ASP lacks a binding resolution mechanism in the event of non-cooperation.[121] Even in the case of UNSC referrals accompanied by binding Chapter VII resolutions, there are no clear enforceable action steps or binding responses, meaning that neither the ASP nor the Security Council is obligated to pursue concrete measures against non-compliant states.[122] Furthermore, the UNSC has not adopted any language to encourage or force States Parties and non-States Parties to comply with ICC requests for cooperation.[123] As of the date of this Note, neither the

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117. International Criminal Court Assembly of States Parties [ASP], *Report of the Bureau on Non-Cooperation*, ICC-ASP/17/31, Annex III (Dec. 4, 2018),https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP17/ICC-ASP-17-31-ENG.pdf [https://perma.cc/ED78-EWFN].

118. *Id.* ¶¶ 11–27, ¶¶ 28–42, ¶¶ 43–47 (detailing action plans and draft responses for instances of non-cooperation).

119. *Id.* ¶¶ 53–54.

120. *Id.* ¶ 48.

121. *See supra* note 113 and accompanying text.

122. *See infra* note 144 (neither case referred by the UNSC had a binding non-cooperation resolution).

123. Hemi Mistry & Deborah Ruiz Verduzco**,** *The U.N. Security Council and the International Criminal Court*, CHATHAM HOUSE, at 8 (Mar. 16, 2012), https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/160312summary.pdf [https://perma.cc/S9W8-YZUN].

ASP nor the UNSC have acted in response to the ICC's referral of Mongolia's non-compliance with Putin's arrest warrant.

D. Geopolitical Challenges

As a result of inconsistent and ineffective repercussions for ignoring ICC requests, states have chosen to disregard their obligations for political gain, dictated by strategic alliances or diplomatic concerns. This selective cooperation, contingent on political interests, undermines the ICC's intended impartiality.[124] As many of the world's powerful states (most notably the U.S., China, and Russia) remain non-ratifying parties to the Rome Statute, the ICC is plighted by political calculations and the deadlock of the UNSC due to P5 members' veto powers. Mongolia's decision not to comply with an outstanding arrest warrant for Putin due to its reliance on Russia for its energy and fuel needs,[125] South Africa's refusal to arrest Sudanese former president al-Bashir for fear of "political suicide"[126] within the African Union for acts against a sitting head of state, and the longstanding pressure from the U.S. to prevent the ICC from exercising jurisdiction over its nationals are but a few examples of political challenges interfering with the ICC's enforcement.[127] The ICC's dependence on state cooperation for enforcement of its mandate makes the Court susceptible to being pressured into indirectly partaking in states' political schemes.

The ICC operates in a world where geopolitical interests often override legal principles and states may selectively cooperate based on economic or political calculations, further complicating the Court's proper functioning.[128] At the UNSC, China, for instance, was unwilling to pressure Sudan to comply with the ICC's arrest warrant for al-Bashir, as it valued access to Sudan's natural resources more

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124. Nadia Shamsi, *The ICC: A Political Tool? How the Rome Statute Is Susceptible to the Pressures of More Power States*, 24 WILLIAMETTE J. INT'L L. & DIS. RES. 85, 93 (2016).

125. *See* Jochecová, *supra* note 56.

126. Benson Chinedu Olugbuo, *Law and Politics at the International Criminal Court*, OPENDEMOCRACY (Sept. 17, 2019), https://www.opendemocracy.net/en/openglobalrights-openpage/law-and-politics-at-international-criminal-court (on file with the *Columbia Human Rights Law Review*).

127. *See* Altanshagai, *infra* note 129; Ngari, *supra* note 57; Roth, *supra* note 10.

128. *See* Marinakis, *supra* note 7, at 156–57 (noting that the Ugandan government made a deal with rebels to try them in the Ugandan court system rather turn them over to the ICC).

than assisting the Court.[129] These geopolitical interests, however, may be used by other States Parties in an attempt to persuade their allies to comply with the ICC's requests. For instance, other States Parties to the Rome statute could support Mongolia, which relies heavily on its exports from neighboring countries, by providing it with needed resources to incentivize its compliance with the ICC's arrest warrants. This Note will turn to this issue again when discussing methods of strengthening state cooperation in Part III below.

Furthermore, the ICC does not have a formalized incentivization method in the Rome Statute. Beyond diplomatic outreach, open letters, and non-binding resolutions, the ICC and the ASP do not have any way to, nor have they traditionally attempted to, persuade the parties to comply with their treaty obligations in politically charged dilemmas.[130] This particularly hinders the ICC in the current volatile political environment around the world.

Political dynamics are increasingly testing the ICC's role in upholding justice. The Court must navigate the complexities of state cooperation and political pressure without compromising its commitment to justice. With arrest warrants for five of the atrocity crimes suspects in the Israel-Palestine war, the ICC needs to ensure that the Pre-Trial Chamber does not view the prospect of non-cooperation from States Parties and political pressure from the U.S.—a staunch opposer to the arrest warrants for its ally, Israel—as an obstacle to the "interests of justice," as it did with the Afghanistan

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129. *Id.* Marinakis points out that due to China's booming industry and its heavy investment in Sudan's petroleum industry as "a much-needed source of energy for its mushrooming economy, Beijing may make tactical moves to pressure Sudan, but it will not choose human rights over oil, a matter of paramount national interest." (quoting Morton Abramowitz & Jonathan Kolieb, *Why China Won't Save Darfur*, FOREIGN POL'Y, (June, 5 2007), https://foreignpolicy.com/2007/06/05/why-china-wont-save-darfur [https://perma.cc/P6KA-JJWV]). *See also* Telmen Altanshagai, *Why Mongolia Won't Arrest Vladimir Putin*, THE DIPLOMAT (Aug. 29, 2024), https://thediplomat.com/2024/08/why-mongolia-wont-arrest-vladimir-putin [https://perma.cc/L5HL-FNKZ] (explaining that Mongolia's dependence on Russian energy and fuel resources outweighs its legal obligations to arrest Putin under the ICC's warrant, even though Mongolia is a signatory to the Rome Statute).

130. *See, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 80 (showing the binding language of the ICTY's operating statute); Statute of the International Criminal Tribunal for Rwanda, *supra* note 81 (showing the binding language of the ICTR's operating statute); *cf.* Van Schaack, *supra* note 66, § IV.C. (where the European Union (EU) conditioned Serbian accession on its cooperation with the ICTY).

case.[131] While the Court was mandated to retain judicial impartiality, it may have outgrown that static characteristic in the face of the tumultuous political conditions, and it may have to adapt to the modern political arena, following in the footsteps of its tribunal predecessors, to ensure that the current atrocities facing humankind do not go entirely unpunished in the interest of judicial neutrality.[132]

The ASP's limited power to enforce ICC obligations reflects a significant gap in the Rome Statute framework. Without enforcement authority or consistent response mechanisms, the ASP struggles to address non-compliance effectively, allowing politically motivated non-cooperation to persist unchecked and hinder the ICC's mission. By presenting the ASP as an active player rather than simply a legislative body, the ASP's mandate should be expanded to help enforce ICC obligations.

III. COOPERATION: THE PATH FORWARD

A. Political Will

Law cannot work without an extra-legal source of power; on its own, law is made up of bundles of texts, existing ineffectually in the ether. For law to have an assertive component, it needs to be aligned with a source of practical power.[133] In the international legal

131. International Criminal Court Pre-Trial Chamber II, *supra* note 71, ¶ 96.

132. *See* Steven C. Roach, *How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy*, 19 GLOB. GOVERNANCE 507 (2013), https://www.jstor.org/stable/24526391 (on file with the *Columbia Human Rights Law Review*). Roach argues that instead of remaining "apolitical," the ICC can and should seek mutual accommodation from states. He develops and applies the term "diplomatic efficacy," or the political capacity of the ICC to produce acceptable solutions, by addressing the soft power dimension of such efficacy. According to Roach, the ICC's "diplomatic efficacy" is not only a reflection of its unique status as an independent judicial body within the international system but also a deliberate and strategic effort to navigate the political challenges that arise from its interventions and deference to national authorities. *Id.* at 509.

133. Legal positivism, for instance, posits that the authority of law is derived from social facts and human decisions rather than inherent moral values. This perspective suggests that for laws to be effective, they must be backed by practical enforcement mechanisms. As noted in the *Stanford Encyclopedia of Philosophy*: "It may fail, therefore, in certain ways only, for example, by being unjust, pointless, or ineffective. But law cannot fail to be a *candidate* authority, for it is constituted in that role by our political practices." *Legal Positivism*, STAN. ENCYCLOPEDIA PHIL. (Oct. 3, 2022), https://plato.stanford.edu/entries/legal-

order, that power is usually derived from states.[134] Incentivized by geopolitical gain and shared goals and responsibilities, and content with keeping the semblance of international order, states continue to lend their authority to mutual agreements in the international realm.[135] Setting aside the complexities of how such agreements are made and the particular motivations behind them, it is of interest to analyze how such agreements come to be enforced in the decentralized international arena. The silver bullet often credited for the success, or named the culprit for the failure, of international agreements is political will. Political scientist Linn Hammergren considers political will "the slipperiest concept in the policy lexicon."[136]

Defined as "the extent of committed support among key decision makers for a particular policy solution to a particular problem,"[137] political will is the lacking ingredient in the ICC's enforcement scheme. Generating it is essential to address non-cooperation. The success of the Court's predecessor, the ICTY,[138] and

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positivism (on file with the *Columbia Human Rights Law Review*). In simpler terms, the law is only that which is backed by the authority of states. Reginald Parker, *Legal Positivism*, 32 NOTRE DAME L. 31, 31 (December 1956). This underscores the idea that without alignment with practical power—such as enforcement by governing bodies—law remains merely a set of texts without real-world efficacy. Professor Monica Hakimi, Remarks in International Law at Columbia Law School (Nov. 13, 2024) (on file with the *Columbia Human Rights Law Review*).

134. Hakimi, *supra* note 133.

135. JEFFREY DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 25 (5th ed. 2020).

136. David Roberts, *What is "political will," anyway? Scholars take a whack at defining it*, VOX (Dec. 24, 2017), https://www.vox.com/2016/2/17/11030876/political-will-definition [https://perma.cc/PS2H-WE8H].

137. Lori Ann Post, et al., *Defining Political Will*, 38 POL. & POL'Y 653 (2010), https://doi.org/10.1111/j.1747-1346.2010.00253.x [https://perma.cc/7K5P-4KZM].

138. *See* Orentlicher, *supra* note 93, at 60. Not only was bringing perpetrators to justice seen as a crucial step towards reconciliation in one of the world's most violent conflicts, but states were also under significant pressure from the international community to cooperate with the ICTY, especially when dealing with high-profile cases. The EU conditioning membership on cooperation with the ICTY coupled with a desire to improve relations with the EU and receive aid from other governments pushed many states to cooperate. *See* Florence Hartmann, *The ICTY and EU Conditionality*, in *War Crimes, Conditionality and EU Integration in the Western Balkans*, 116 E.U. INST. SEC. STUD. 67, 67 (2009); Pierre Hazan, *ICTY Reflects Strengths and Weaknesses of International Justice*, JUST. INFO (April 5, 2016), https://www.justiceinfo.net/en/26728-icty-reflects-strengths-and-weaknesses-of-international-justice.html [https://perma.cc/B69L-JGQY]. These

its own success in completing proceedings against 35 of the 67 indictees, is in large part due to the willingness of states to lend power, generated by political will, and assist the Court in its mandate. The commitment of "[a] 'sufficient' set of decision makers . . . with a common understanding" of the problem to support a potentially effective solution is the requirement for political will to exist.[139] Despite the constraints on generating political will, especially in the face of conflicting preferences on solutions, the success of many multilateral regimes—like the World Trade Organization and Nuclear Proliferation Treaty—shows that states can successfully work through disagreements with political will.[140]

The following sections will explore possible avenues for the ICC to help effectively generate political will toward enhancing its enforcement regime. The first section examines the importance of coalition building between the Court, UN, and civil society as a means of aligning States Parties and international actors in support of the Court's objectives. The next part will discuss the use of pressure and incentives**,** highlighting how the ICC can leverage diplomatic and economic tools to encourage compliance with its decisions. Finally, the power of media and information will be discussed**,** exploring how public engagement and strategic

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measures are largely seen as the international community's collective "political will" to realize the ICTY's mandate and as ultimately responsible for its success. It must be noted that despite the varying degrees of cooperation from different states, the pressure exerted by the UNSC and by powerful states, such as the U.S. and the EU, are largely considered responsible for the level of cooperation achieved.

139. Post et al., *supra* note 137, at 659.

140. The WTO facilitates state cooperation by establishing rules-based international trade, with decisions made by consensus among all member governments. Its success in preventing all-out trade wars is largely attributed to state cooperation. *See* Ralph Ossa, *WTO Success: No Trade Agreement but No Trade War*, VOXEU (June 11, 2015), https://cepr.org/voxeu/columns/wto-success-no-trade-agreement-no-trade-war [https://perma.cc/Q2NY-3EKY]. ("[T]he WTO's success does not only depend on how well it promotes trade talks but also on how well it prevents trade wars. And its track record seems much better in this regard. Most notably, trade policy cooperation did not break down in the wake of the recent financial crisis even though this was a real concern given the precedent of the 1930s."). Similarly, the NPT facilitated peaceful cooperation among states largely through state backing and campaigns generating political will. *See, e.g.*, *America's Unwavering Support for Nuclear Nonproliferation*, U.S. EMBASSY & CONSULATES IN IT. (July 28, 2022), https://it.usembassy.gov/americas-unwavering-support-for-nuclear-nonproliferation/ [https://perma.cc/D76Z-32U8] (discussing the Tenth NPT Review Conference held in 2022).

communication can help shift political attitudes and galvanize support for the Court's mandate.

1. Coalition Building: States Parties & the U.N.

In today's inclement circumstances, where states hardly agree on the problems or the solutions, finding a "sufficient set of decision makers" supporting a solution is a herculean task.[141] Generating political will with a sufficient set of decision makers also includes working with powerful players with veto power.[142] The ICC's task in generating political will to battle non-cooperation, therefore, must involve routes to action with the least number of veto-wielding states. This may be possible in two ways: utilizing the U.N. apparatus, more specifically the General Assembly, and using regional, NGO, and other grassroots organizations.

As mentioned, in the absence of backing from the U.N. Security Council that bolstered the ICTY's support from states, the relationship between the ICC and the U.N. has been tenuous at best.[143] The Security Council has referred only two cases to the ICC: Sudan in 2005 (Resolution 1593) and Libya in 2011 (Resolution 1970).[144] However, further underscoring the issue of non-cooperation, neither of these resolutions had a binding non-cooperation resolution as was the case with the ICTY.[145] Overcoming this hurdle requires the ICC to mobilize support from its member states within the UNSC and General Assembly to lobby for its agendas and encourage the U.N. as a whole to assist the Court in fostering cooperation. Despite the recent and numerous deadlocks within the UNSC over initiating referrals even when atrocities warranted them (e.g. Syria, Myanmar, Afghanistan), the General Assembly has proven to be a more active body in pushing for action in the face of such atrocities.[146] While the

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141. Post et al., *supra* note 137, at 653.

142. Roberts, *supra* note 136.

143. Resolution 1207, adopted under Chapter VII of the UNC Charter, made cooperating with the ICTY binding on all States Parties. S.C. Res. 1207, ¶1 (Nov. 17, 1998).

144. S.C. Res. 1593, at 1 (Mar. 31, 2005); S.C. Res. 1970, at 2 (Feb. 26, 2011).

145. *Compare* S.C. Res. 1593, *supra* note 144, *and* S.C. Res. 1970, *supra* note 144, *with* S.C. Res. 1207, *supra* note 143 (where following non-cooperation, the UNSC acts under Chapter VII of the Charter to make cooperation binding on states).

146. Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting

resolutions adopted by the General Assembly are non-binding, they nonetheless carry significant weight in the international arena.[147] Such resolutions represent all U.N. members and are possibly more readily received than those by the ASP. For instance, the end of the apartheid regime in South Africa in the 1990s saw significant involvement from the General Assembly that led to eventual binding resolutions adopted by the UNSC.[148] The recent General Assembly resolution issued during its 10th emergency special session on September 18, 2024, demands, among other things, an end to Israel's occupation of Palestinian territory; while it did not directly address crimes alleged by the ICC arrest warrant, it lent incredible support to the Prosecutor's decision to request—and the Court's decision to issue—arrest warrants for Hamas and Israeli leaders involved in the conflict.[149] This show of support can be credited for generating the

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Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014), https://press.un.org/en/2014/sc11407.doc.htm [https://perma.cc/BRT2-VDZP]; Akshaya Kumar, *The U.N. Security Council's Astonishing Silence on Myanmar Atrocities*, HUM. RTS. WATCH (Sept. 5, 2024), https://www.hrw.org/news/2024/09/05/un-security-councils-astonishing-silence-myanmar-atrocities [https://perma.cc/YU58-EH2H]. *See also* AM. C.L. UNION, *supra* note 75 (referring to how U.S. resistance to exposing its security personnel to scrutiny by the ICC and its anticipated veto on any proposal at the UNSC led to the ICC terminating investigations).

147. In *Principles of International Law*, Brownlie acknowledges that while UNGA resolutions are not legally binding, they can contribute to the formation of customary international law. He notes that such resolutions, especially those addressing legal questions, may serve as evidence of *opinio juris*—the belief that a certain practice is carried out of a sense of legal obligation. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15–16 (7th ed. 2008). Malcolm Shaw also emphasizes that General Assembly resolutions, despite their non-binding nature, can have a substantial impact on the development of international law. He points out that certain resolutions, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (Resolution 2625), are regarded as authoritative interpretations of the U.N. Charter. Shaw notes that the International Court of Justice (ICJ) has referred to this resolution as reflective of customary international law, indicating its significant legal weight. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 94–95 (6th ed. 2008).

148. DUNOFF ET AL., *supra* note 135, at 142–50 (tracking the chronological set of activities and resolutions within the UNGA that led to the final binding resolution from UNSC).

149. *See* G.A. Res. ES-10/23, Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory (Sept. 18, 2024); Prosecutor v. Netanyahu, ICC-01/24, Warrant of Arrest (Nov. 21, 2024). The convergence of the U.N. General Assembly's resolution and the ICC's arrest warrants underscore a unified international effort to address longstanding issues in the Israeli-Palestinian conflict.

momentum, as well as political will, among many states—including Switzerland, Belgium, Spain, Namibia, South Africa, Jordan, Türkiye, and Ireland—to reiterate their commitment to comply with the ICC arrest warrant for Israeli Prime Minister Benjamin Netanyahu.[150]

Moreover, early and consistent support from the U.N. can create a path for ICC action that is seen as more legitimate and can thus lead to more cooperation. The support of the U.N. Independent Investigative Mechanism for Myanmar (IIMM) and its consistent cooperation in investigating crimes in Myanmar, despite the lack of definitive action from the UNSC on the issue, also allowed the ICC to pursue an arrest warrant for Hlaing, Commander-in-Chief of the Myanmar Defense Services, for the crimes against humanity of deportation and persecution of Rohingya.[151] Established in 2018 by the U.N. Human Rights Council (UNHRC) in response to reports of grave human rights violations rising to the level of serious international crimes, the IIMM has the support of 47 states of the UNHRC.[152] The Mechanism closely cooperates with the ICC Prosecutor's investigations into these crimes by providing the Office of the Prosecutor with a substantial amount of evidence and analysis, including witness statements, which filled the void of the UNSC's inaction for the ICC.[153] While not directly bearing on the issue of non-cooperation, this further legitimizes the actions taken by the ICC and creates a path towards compliance when U.N. member states' actions generate political will as a continuation of U.N. actions as opposed to independent or, as some speculate, biased arrest warrants issued by

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150. Following the United Nations General Assembly's adoption of Resolution ES-10/23 on September 18, 2024, demanding an end to Israel's unlawful presence in the Occupied Palestinian Territory, several countries reiterated their commitment to comply with the International Criminal Court's (ICC) arrest warrant for Israeli Prime Minister Benjamin Netanyahu. *See World Reacts to ICC Arrest Warrants for Israel's Netanyahu, Gallant*, AL JAZEERA (Nov. 21, 2024), https://www.aljazeera.com/news/2024/11/21/world-reacts-to-icc-arrest-warrants-for-israels-netanyahu-gallant [https://perma.cc/4MTH-XBCM] (reporting on the commitment of many states to comply with the ICC's Netanyahu arrest warrant).

151. *ICC – Situation of Bangladesh/Myanmar*, INDEP. INVESTIGATIVE MECHANISM FOR MYAN., https://iimm.un.org/en/icc-situation-bangladeshmyanmar [https://perma.cc/EZ2X-3VEU] (last visited Jan. 03, 2025).

152. *What Is the IIMM?*, INDEP. INVESTIGATIVE MECHANISM FOR MYAN., https://iimm.un.org/en/what-iimm [https://perma.cc/U43F-ERHL].

153. *Collecting, Preserving and Analyzing Evidence*, INDEP. INVESTIGATIVE MECHANISM FOR MYAN., https://iimm.un.org/en/collecting-evidence-and-case-building [https://perma.cc/U8VQ-SEWX].

the Court. If U.N. institutions were to further cooperate with the ICC, non-compliance would then be seen as states defying the will of the U.N. mechanisms that have support from both member states of the U.N. and the ICC.[154]

Furthermore, the support of civil society and grassroots organizations for an end to the Gaza war has also bolstered the legitimacy of the ICC's decision to issue the arrest warrants.[155] The organizations stated that all Member States must prevent further atrocities and ensure that those responsible for any violations of international law, including war crimes and crimes against humanity, are held accountable.[156] Recalling that generating political will requires sufficient policymakers to commit to a solution, it must nonetheless be noted that NGO and grassroots movements can push states to adopt positions reflecting popular demand. With the continuous engagement of these organizations, the ICC can push the supporting states to further cooperate with the Court to enforce its warrants.[157]

Public campaigns highlighting the consequences of inaction can increase political costs for UNSC members obstructing justice. The ICC can request cooperation and assistance on issues of non-cooperation from already-engaged civil society organizations directly under Article 87(6) of the Rome Statute.[158] Civil society's engagement

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154. *Reaction to ICC Prosecutor's Request for Arrest Warrant for Min Aung Hlaing*, INDEP. INVESTIGATIVE MECHANISM FOR MYAN. (Nov. 27, 2024), https://iimm.un.org/en/reaction-icc-prosecutors-request-arrest-warrant-min-aung-hlaing [https://perma.cc/7X4D-E9K4].

155. *See* 2024 CONF. OF CSOS WORKING ON THE QUESTION OF PAL., BUILDING BRIDGES WITH INTERNATIONAL CIVIL SOCIETY TO ADDRESS THE ONGOING NAKBA, at 3–4 (Dec. 31, 2024), https://www.un.org/unispal/document/building-bridges-with-international-civil-society-to-address-the-ongoing-nakba-2024-conference-of-csos-working-on-the-question-of-palestine/ [https://perma.cc/Q4KN-ER9X] (documenting forum discussions among experts, civil society organizations, and United Nations Members States and observers about obtaining a ceasefire in Gaza and holding Israel accountable for violations of international law).

156. *Id.*

157. INT'L FED'N FOR HUM. RTS. & COAL. FOR THE INT'L CRIM. CT., CIVIL SOCIETY AND THE INTERNATIONAL CRIMINAL COURT: PATHWAYS TO COLLABORATIVE AND GENUINE ENGAGEMENT 17 (2024), https://www.fidh.org/IMG/pdf/civil_society_and_the_international_criminal_court.pdf [https://perma.cc/6PMG-AEZ7].

158. Rome Statute, *supra* note 11, art. 87(6). ("The Court may ask any intergovernmental organization . . . for other forms of cooperation and assistance

to decry such actions and demand a change in course can further publicize states' non-compliance and pressure them to modify their behavior. The non-complying states would face more pressure domestically and would be more willing to save face and reputation internationally when the U.N. apparatus, NGOs, and civil society organizations all hold them accountable to their obligations under the Rome Statute.[159] Thus, civil society can further generate political will domestically, which can then lead to a more powerful tool—norm creation—when international society can act uniformly despite conflicting preferences for solutions.[160]

2. Pressure and Incentives

a. Challenges, Successes, and Failures

While the use of pressure points, leverages, and incentives does not always present a straightforward path to generating political will given the complicated international landscape, it has been successfully done before by the ICC and ICTY.[161] In the example of former Liberian president Charles Taylor, who was enjoying safety in Nigeria after being indicted by the Special Court for Sierra Leone on war crimes, the U.S., the U.K., and Liberia used many incentives to bring him to justice.[162] They used Nigeria's president's need for

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which may be agreed upon with such an organization and which are in accordance with its competence or mandate.").

159. INT'L FED'N FOR HUM. RTS. & COAL. FOR THE INT'L CRIM. CT., *supra* note 157, at 16–17.

160. As noted in the Oxford Research Encyclopedia of Politics, "The process of norm creation is complete when the new rule is internalized in domestic law and institutions and, ideally, becomes part of the taken-for-granted context that guides policy-making." Antje Wiener, *International Norm Change*, OXFORD RSCH. ENCYCLOPEDIA OF POL. (2017), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-588 [https://perma.cc/6LQN-R6EF]. The engagement of the ICC with civil society on state cooperation can lead to new norms where non-cooperating states would have to contend with defending their decisions before domestic institutions and constituencies. *See also* Mariana Olaizola Rosenblat**,** *The Role of Transnational Civil Society in Shaping International Values, Policies, and Law,* 23 CHI. J. INT'L L. 144, 149–50 (2022) (explaining how transnational civil society actors can act on state entities and influence their behavior to change international policies and law).

161. Van Schaack, *supra* note 66.

162. Richard Dicker, *Ramping Up Strategies for ICC Arrests: A Few Lessons Learned*, ICC FORUM (Feb. 2014), https://iccforum.com/arrest#Dicker [https://perma.cc/ET5X-2AMR].

international support for a third presidential term, forgiveness for Nigeria's debt, and a White House meeting with President George W. Bush as leverage to bring about Nigeria's eventual surrender of Taylor to the Special Court for Sierra Leone.[163]

The U.S. had strategic interests in West Africa, particularly in ensuring that no further instability in Liberia would allow terrorist groups or criminal organizations to establish footholds in the region.[164] Moreover, the U.S. had been an important player in the peace process in Liberia, and its involvement in pressuring Nigeria to surrender Taylor also aligned with its broader foreign policy goals in the region—supporting democracy, peace, and international justice.[165] Taylor's presence in Nigeria was seen as a destabilizing factor for the West African region.[166] Taylor, who had fled to Nigeria after stepping down from power in 2003 under international pressure, continued to wield influence over the war-torn region.[167] His potential return to power could have reignited conflict in Liberia or other parts of West Africa.[168] The U.S. wanted to ensure stability in the region, as resurgence of violence in Liberia would threaten regional peace and development.[169] This case illustrates how the strategic use of incentives and pressure can effectively generate the political will necessary to achieve international justice, demonstrating that even in complex geopolitical landscapes, coordinated efforts by influential actors can lead to tangible results.

In contrast, the former Sudanese president, Al-Bashir, flaunting his ICC arrests and traveling extensively became one of the more delegitimizing moments for the Court.[170] The potential of Al-

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163. *Id.*

164. LAUREN PLOCH, CONG. RSCH. SERV., RL34003, AFRICA COMMAND: U.S. STRATEGIC INTERESTS AND THE ROLE OF THE U.S. MILITARY IN AFRICA, 1, 18 (2013), https://sgp.fas.org/crs/natsec/RL34003.pdf [https://perma.cc/8KRB-C75L].

165. *Id.* at 32.

166. NICHOLAS COOK, CONG. RSCH. SERV., RL33185, LIBERIA'S POST-WAR DEVELOPMENT: KEY ISSUES AND U.S. ASSISTANCE 1, 4, 19 (2010), https://www.everycrsreport.com/files/20100519_RL33185_c9b49648264d6a464fbe96f5b850aeda4437cc30.pdf [https://perma.cc/E3K7-92MW].

167. *Id.*

168. *Id.*

169. *Id.* at 3.

170. *See infra* note 176 (demonstrating his consistent travel and evasion of arrest); REUTERS, *Sudan's Bashir to Visit China Despite International Arrest Warrant, Reuters* (Aug. 30, 2015), https://www.reuters.com/article/world/sudans-bashir-to-visit-china-despite-international-arrest-warrant-idUSKCN0QZ0P2 [https://perma.cc/AY38-4ZQE].

Bashir's travel to New York to attend the 68th session of UNGA would have further discredited the Court, but he did not attempt the trip in the end.[171] Given that the issue of perpetrators' uninhibited travel remains a recurring problem that undermines the Court's legitimacy, this underscored the need for the UNSC to provide further support and leverage, especially in a case it had referred to the ICC.[172] The language of the resolutions referring the cases in Libya and Sudan to the Court did not include obligations on states to cooperate with the ICC, in contrast to similar ICTY resolutions, and lacked binding language.[173]

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171. While the U.S., not a party to the Rome Statute, was under no obligation to arrest Al-Bashir, the president of the ASP and pre-trial chambers requested its cooperation. *Al Bashir Case: ICC Judges Invite the US to Arrest the Suspect and Surrender Him to the Court*, INT'L CRIM. CT. (Sept. 18, 2013), https://www.icc-cpi.int/news/al-bashir-case-icc-judges-invite-us-arrest-suspect-and-surrender-him-court (on file with the *Columbia Human Rights Law Review*). The 1947 Headquarters Agreement between the U.N. and the United States—which states at Section 11 that "the federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of . . . representatives of Members"—and the 1946 Convention on the Privileges and Immunities of the United Nations (the so-called "General Convention") would have legally allowed the U.S. to grant Al-Bashir a visa to travel to the U.S. Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, § 11, June 26, 1947, 11 U.N.T.S. 11; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.N.T.S. 251. The U.N. could always exclude individuals or states from the assembly, but it remained silent on the matter. It must be noted that Al-Bashir, while regularly referred to as one of the ICC's failures due to his extensive travels and elusiveness, is currently serving a sentence for war crimes in Khartoum, Sudan, following negotiations with ICC Chief Prosecutor and Darfurian rebels in 2020. *Omar Bashir: ICC delegation begins talks in Sudan over former leader*, BBC NEWS (Oct. 17, 2020), https://www.bbc.com/news/world-africa-54548629 [https://perma.cc/W26D-MU2L]. Therefore, despite his status as an indictee of the ICC remaining "at large," cooperation from many states led to his limited movement in recent years and eventual domestic incarceration. *Sudan crisis: Ex-President Omar al-Bashir moved to prison*, BBC NEWS (Apr. 17, 2019), https://www.bbc.com/news/world-africa-47961424 [https://perma.cc/P57L-4L2D]; *see also,* Dicker, *supra* note 162 (showing that limiting the movements of an indictee can lead to final surrender).

172. *See* Rome Statute, *supra* note 11, at art. 87(7) (Article 87(7) allows the Court to refer a State Party's failure to cooperate back to the Security Council when the Security Council originally referred the matter to the Court).

173. *Compare* S.C. Res. 1593, ¶¶ 1–2 (Mar. 31, 2005) *and* S.C. Res. 1970, ¶ 5 (Feb. 26, 2011) ("*urges* all States and concerned regional and other international organizations to cooperate fully"), *with* S.C. Res. 827, ¶ 4 (May 25, 1993) ("*Decides* that all States *shall* cooperate fully with the International Tribunal and its organs") (emphasis added).

b. The Role of the UNSC

Under Article 2 of the Rome Statute,[174] the Court and the United Nations have a Relationship Agreement that confirms the independence of both institutions while providing a basis for a range of cooperative endeavors.[175] In the case of Al-Bashir, despite referrals of non-cooperation of states such as Kenya, Malawi, Djibouti, and others by the ASP to the UNSC, the Security Council remained mostly unengaged with the situation and took no further actions to address and rectify the non-cooperation.[176] The authority of the UNSC to issue travel bans, sanctions, and asset freezing derives from the United Nations Charter.[177] Under Article 39, the Security Council determines the existence of any threat to peace, breach of peace, or act of aggression and decides what measures to take to maintain or restore international peace and security.[178] According to Article 41, the Council is authorized to impose measures not involving the use of armed force, such as economic sanctions, travel bans, and asset freezes.[179] These measures are binding on all U.N. Member States. Al-Bashir's blatant plans to travel for the UNGA would have been made impossible if he had been subject to such UNSC travel bans.[180] While the P5 veto power will make passing such resolutions for the current

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174. Rome Statute, *supra* note 11, art. 2 ("The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.")

175. International Criminal Court Assembly of States Parties [ASP], Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, art.11 (Oct. 4, 2004), https://www.icc-cpi.int/news/negotiated-relationship-agreement-between-international-criminal-court-and-united-nations [https://perma.cc/BV9G-T2B9].

176. Ephrem Rugiririza, *Uganda and Djibouti Referred to the U.N. for Non-Cooperation to Arrest Bashir: An Appeal in Vain by the ICC?*, JUSTICEINFO.NET (July 13, 2016), https://www.justiceinfo.net/en/28345-uganda-and-djibouti-referred-to-the-un-for-non-cooperation-to-arrest-bashir-an-appeal-in-vain-by-the-icc.html [https://perma.cc/7DSA-PG4Z]; Prosecutor v. Al Bashir, ICC-02/05-01/09-107, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya (Aug. 27, 2010); Prosecutor v. Al Bashir, ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 12, 2011).

177. U.N. Charter art. 41.

178. U.N. Charter art. 39.

179. U.N. Charter art. 41.

180. Van Schaack, *supra* note 66.

arrest warrants against Russia and Israel impossible due to Israel's close ties to the U.S. and Russia's unwillingness to impose any measures against itself, the Council remains empowered to adopt such resolutions for Myanmar and other states harboring ICC fugitives.

The ASP and ICC should work towards fostering an ongoing conversation with the UNSC, requiring explicit language in UNSC resolutions that makes cooperation with the Court binding on all states, as well as passing resolutions using more travel bans, asset freezes, and sanctions as pressure points for non-cooperating states. The UNSC had previously established a U.N. Sanctions Committee that imposed a range of sanctions—including travel bans and asset freezes—on other Sudanese actors, but none on ICC indictees.[181] It is imperative that the ASP request similar prohibitive measures imposed on cases referred by the UNSC. Moreover, in cases referred to the ICC by the UNSC, the Council should provide additional financial resources, as these often place significant strain on the Court's limited budget.[182] Establishing a trust fund within the U.N. system to support ICC activities could help address resource constraints. Not only will such measures facilitate the Court's operations in gaining custody of the indictees, but it will also generate political will amongst other UNSC and ICC States Parties to cooperate with such measures if the cost is borne by the UNSC.[183]

c. Reforming Global Cooperation

Furthermore, the ICC must reinvigorate its efforts to use regional police forces as another source of cooperation. Pursuant to an agreement between the International Criminal Police Organization

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181. *Id.*; *see also Sanctions List Material*, UN, https://main.un.org/securitycouncil/en/sanctions/1591/materials [https://perma.cc/E5EJ-VVQ6] (noting that while sanctions such as travel bans and asset freezes were imposed on obstructive actors, none have targeted ICC indictees).

182. INT'L PEACE INST., *supra* note 104, at 4.

183. *See generally In for a Penny, In for a Pound: The Lack of ICC Funding for Situations Referred by the Security Council***,** LEIDEN L. BLOG (Apr. 20, 2021), https://www.leidenlawblog.nl/articles/in-for-a-penny-in-for-a-pound-the-lack-of-icc-funding-for-situations-referred-by-the-security-council [https://perma.cc/374H-38DQ] (explaining the financial burdens that restrict the Court's efficiency and the willingness of states to cooperate). The article proposes that the U.N. should be obliged to provide funding for the situations the UNSC refers: "[w]here the UNSC seeks to collaborate with the ICC to obtain international justice, it must provide the means to do so." *Id.*

(INTERPOL) and the ICC, INTERPOL has issued red notices against a significant number of individuals subject to ICC arrest warrants.[184] But since 2006, few notices have been issued in connection with the ICC, and the ICC's relationship with INTERPOL has been somewhat dormant.[185] Although INTERPOL members are not obligated to execute red notices, the notices can provide a separate basis for effectuating a provisional arrest.[186] This may also generate political will for many EU states to refrain from inviting individuals subject to such red notices. This will stop the prevalent impunity of individuals subject to ICC arrest warrants travelling across borders. This would also engage non-member states that otherwise have no treaty obligations to arrest individuals in their territory, should they wish to execute the red notice.

Another push for generating political will regionally must be a greater emphasis on extradition treaties between member states and non-member states. While non-member states are under no obligation to cooperate with ICC arrest warrants, they can extradite individuals to states where a live arrest warrant from the ICC is pending. This will allow states that are apprehensive about the Court's jurisdiction, but want to nonetheless contribute to regional stability, to do so through another state party willing to execute an arrest warrant. Not only would this enhance diplomatic relations between nations, but it can also help build states' reputations for supporting international peace and security. Under Article 14 of the Ljubljana-The Hague Convention adopted at the MLA Diplomatic Conference in Ljubljana on May 2023, States Parties are obligated to prosecute the individuals domestically or "extradite or surrender the person to another State or a competent international criminal court

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184. Co-operation Agreement Between the International Criminal Police Organization-INTERPOL and the International Criminal Court, Dec. 22, 2004, https://www.interpol.int/content/download/11060/file/4-%20ICC.pdf [https://perma.cc/68WK-5SMR]; *INTERPOL Issues First Red Notices on Behalf of International Criminal Court*, INTERPOL (June 1, 2006), https://www.interpol.int/en/News-and-Events/News/2006/INTERPOL-issues-first-Red-Notices-on-behalf-of-International-Criminal-Court [https://perma.cc/D6A6-5SE7].

185. Sandeep Prasanna, *Can the International Criminal Court (ICC) Rely on the International Criminal Police Organization (ICPO/Interpol) for Effective Assistance in Securing the Arrest of ICC Indictees?*, ICC FORUM (Mar. 3, 2014), https://iccforum.com/forum/permalink/93/4081 [https://perma.cc/23Q8-DBSS].

186. *Red Notices*, INTERPOL, https://www.interpol.int/How-we-work/Notices/Red-Notices [https://perma.cc/DFR5-ECMM]; *see also* International Criminal Court Assembly of States Parties [ASP], *supra* note 62 (addressing the possibility of using police force and INTERPOL).

or tribunal."[187] Such multilateral agreements would also allow states to withhold invitations to such individuals, and fugitives will have to reconsider cross-border travels or risk capture when such extradition treaties are executed. While universal jurisdiction allows many states to exercise jurisdiction in cases of violations of *jus cogens* norms—torture, genocide, crimes against humanity—the international norm usually requires the state contemplating the exercise of such power to offer the extradition of the offender to the state where the offense was committed.[188] The United States, while not obligated to do so as a non-party to the Rome Statute, could also prosecute individuals domestically without extraditing them.[189] However, such extradition treaties allow for a diplomatic avenue to both consider extraditing individuals to ICC member states willing to execute live arrest warrants and to refuse to extend invitations for international travel on the basis of such treaties. To date, no such extraditions have taken place to comply with an ICC arrest warrant.[190]

Moreover, the ASP must endeavor to engage member states in passing legislation that explicitly allows for cooperation with the ICC based on the crimes recognized by the Rome Statute. As envisioned by Article 90 of the Rome Statute, and respecting the principle of complementarity, if a state is required to extradite an individual, and if the requesting state is a State Party to the ICC, and provided that no issues of admissibility arise, the requesting state must pass implementing legislation, giving priority to the ICC

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187. Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes, art. 14, Feb. 14, 2024 [hereinafter Ljubljana-The Hague Convention].

188. Att'y Gen. of the State of Israel v. Adolf Eichmann, 36 I.L.R. 277 (1962) ("This is the place to discuss the limitation imposed by most of those who support this principle upon the exercise of universal jurisdiction, namely, that the state which has apprehended the offender must first offer his extradition to the state in which the offence was committed . . . .").

189. *See* United States v. Alvarez-Machain, 504 U.S. 655, 655 (1992) (holding that while crossing another state's border to abduct someone might constitute a violation of international law, it was not a violation of the U.S.-Mexico extradition treaty and that Alvarez-Machain's forcible abduction did not prohibit his trial in a United States court.)

190. As of the date of this Note, no country has extradited an indictee of the ICC to another state party to the Rome Statute willing to execute an ICC arrest warrant. While beyond the scope of this Note, this could be a violation of states' obligations under Ljubljana-The Hague Convention, to which many non-ICC members, such as the United States, are parties.

request to surrender the individual.[191] While many States Parties already have broad implementing legislation for the Rome Statute, it is also crucial to have specific laws dedicated to cooperation with the ICC.[192]

The States Parties—and non-States Parties in some instances—should also endeavor to create incentives that may not be readily available now, but may emerge as the geopolitical environments of different regions shift. While the NATO membership contingency for the ICTY and Nigeria's international ambitions in the Special Court for Sierra Leone's bid for custody of Charles Taylor were both already existing leverages, such opportunities can also be crafted by states strategically. In the case of Mongolia's refusal to execute the ICC's arrest warrant against Putin, given the country's concern over losing energy imports from Russia, member states could offer support to Mongolia in the form of energy imports to incentivize Mongolia's cooperation with the ICC.[193] In the Middle East, the League of Arab Nations—including States Parties such as Jordan, signatories such as Iran and Kuwait, and the UAE—eager to put an end to the conflict in Gaza, could create regional trade agreements or investment opportunities contingent on executing the arrest warrants

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191. Rome Statute, *supra* note 11, arts. 17, 88, 90.

192. For instance, the UK's International Criminal Court Act has sections dedicated to arrest warrants, surrender procedures, and providing assistance to the ICC. Canada's Crimes Against Humanity and War Crimes Act similarly details how Canadian authorities will cooperate with the ICC. International Criminal Court Act 2001, c.17, pts. 2, 3 (U.K.); Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).

193. *See* Jack Aylmer, *Mongolia to Up Coal Exports to China by 20% in 2025, Expand Energy Sector*, STRAIGHT ARROW NEWS (Feb. 17, 2025), https://san.com/cc/mongolia-to-up-coal-exports-to-china-by-20-in-2025-expand-energy-sector [https://perma.cc/L9E4-TJ5M] (Mongolia is moving towards expanding its energy sector by collaborating with Asian and Middle Eastern countries aside from Russia); *Mongolia's Critical Mineral Diplomacy: Strategic Balancing between Neighbours*, ITALIAN INST. FOR INT'L POL. STUD. (June 26, 2025), https://www.ispionline.it/en/publication/mongolias-critical-mineral-diplomacy-strategic-balancing-between-neighbours-211699 [https://perma.cc/3VGP-TT6B] (noting Mongolia's vulnerability to geopolitical pressures due to its reliance on Russian energy imports); Marwa Rashad, *Mongolia Says Close to Signing Major Green Energy Deals with Saudi Arabia,* REUTERS (Jan. 24, 2025), https://www.reuters.com/sustainability/climate-energy/mongolia-says-close-signing-major-green-energy-deals-with-saudi-arabia-2025-01-24 [https://perma.cc/5S9K-D2H2] (Mongolia expects to sign energy agreements with Saudi Arabia and is in talks with UAE).

against Israeli and Hamas leaders.[194] A coalition of ICC member states, Arab League members or other regional players could collectively pledge financial, diplomatic or security support to any country that arrests and transfers Netanyahu to the ICC. Countries in the region could frame cooperation with the ICC as part of a larger regional push for justice and the rule of law.[195] Offering targeted development programs (e.g., infrastructure, healthcare, or education), lifting or easing sanctions (e.g., for Syria and Iran), and support in resolving internal or regional disputes could be tied to ICC cooperation to create further incentives for states involved. This cooperation would allow the region to regain stability while improving the relationship between states and generating will to support the ICC.

Similarly, the cooperation of African states could also be secured by emphasizing the need to administer the rule of law equally. Given their previous statements accusing the ICC of targeting African states exclusively, this is an opportunity to change the narrative and support the ICC in pursuing its mandates more independently of geopolitical factors.[196] Following South Africa's

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194. Although only three Middle Eastern states—Tunisia, Jordan, and Palestine—are States Parties to the ICC, non-ICC member states could be offered special agreements with the ICC for temporary cooperation without requiring full ratification of the Rome Statute. Rome Statute, *supra* note 11, art. 87(5). States who are signatories to the Rome Statute, such as Egypt or Iran, although under no legal obligations as non-States Parties, may choose to cooperate with the ICC voluntarily.

195. *See* Ibrahim Khazen, *Arab League Urges Punitive Measures against Israel in Response to Gaza Genocide*, ANADOLU AGENCY (Oct. 22, 2024), https://www.aa.com.tr/en/middle-east/arab-league-urges-punitive-measures-against-israel-in-response-to-gaza-genocide/3370891 [https://perma.cc/QEQ5-NQHC] (pushing for an end to impunity for war crimes in Palestine)*; see also* Urooba Jamal, *Israel's War on Gaza Means Arab Normalisation is 'Off the Table': Experts,* AL JAZEERA (Dec. 11, 2023), https://www.aljazeera.com/features/2023/12/11/israels-war-on-gaza-means-arab-normalisation-is-off-the-table-experts [https://perma.cc/G2RU-5RUQ] (indicating that "the region has been emotionally, politically, and socially involved").

196. James E. Archibong, *The ICC: A Global Court to Fight Impunity or a Court Targeting Africans*, 6 INT'L J. HUM. SOC. SCI. & EDUC. 22, 25 (2019); *see also* Sascha-Dominik Bachmann & Naa Ayorkor Sowatey-Adjei, *The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice*, 29 WASH. INT'L L. J. 247, 257–59 (2020) (discussing the origins of the rift between the African Union and the ICC and the path forward).

support of the recent ICC arrest warrants,[197] the Court must generate political will by engaging African states in the efforts of the Court to encourage more cooperation. With South Africa's support—and hopefully more engagement of regional organizations such as the African Union along with it—the Court can use African nations' desire for impartial operation of the Court to engage them in cooperating with the Court's decisions and arrest warrants.[198]

d. Reforming ASP's prohibitive and incentivizing measures

Finally, the Court's resolutions and reports, and the ASP's toolkit on non-cooperation procedures, despite effectively engaging the States Parties and non-States Parties and fostering their relationship with the Court, fail to introduce concrete prohibitive measures to stop the reoccurrence of non-cooperation.[199] While the formal response procedure states that the ASP will convene "to decide what further action would be required" following an instance of non-cooperation,[200] it leaves open the possibility that the requested state's non-cooperation may continue and any opportunity to enforce cooperation may lapse. When a state fails to cooperate, the ASP should formally acknowledge and publicize the non-cooperation, drawing international attention to the issue. However, it must also take internal measures to further decry the non-cooperation, such as fines, suspension of voting rights within the ASP, or exclusion from ICC-related benefits. Furthermore, during meetings where the ASP is allowing a non-complying state to provide reasons why it has failed to

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197. *SA Welcomes Decision to Apply for Hamas, Israel Leaders' Arrest Warrant*, CHANNEL AFR. (May 21, 2024), bit.ly/4a361Vr (on file with the *Columbia Human Rights Law Review*).

198. *See* S. AFR. DEP'T INT'L RELS. & COOP. (DIRCO)**,** *South Africa, Along with Like-Minded States, Submits Joint Referral of the Situation in Palestine to the ICC* (Nov. 17, 2023), https://dirco.gov.za/south-africa-along-with-like-minded-states-submits-joint-referral-of-the-situation-in-palestine-to-the-icc [https://perma.cc/BVV8-3G24] (demonstrating South Africa's push for other likeminded states to engage with the ICC). South Africa has been eager to support the ICC in its recent investigations, and the Court can utilize South Africa's change of course, given their previous tensions, to mobilize support from the rest of the African Union.

199. *See* International Criminal Court Assembly of States Parties [ASP], *supra* note 51, at 5 (describing the ICC's repeated efforts to invite countries to arrest Sudanese President Omar Al-Bashir when he visited their countries and the limited cooperation received in return).

200. *Id.* at 11.

comply, other member states must threaten immediate repercussions in an attempt to bring about cooperation. The cooperation of states must be encouraged by the toolkit and other resolutions passed by the Assembly to extend beyond just provision of travel information to focal points.[201]

The ASP toolkits and resolutions should also introduce dedicated teams, which may include assistance from the focal points, to help track the movements of fugitives and act as a dedicated police force in executing arrest warrants. The ICTY's use of tracking teams was a successful tool in bringing fugitives before the Court.[202] Within the existing structure of the ICC, and pursuant to Article 112 of the Rome Statute, the ASP is authorized to create subsidiary bodies as necessary.[203] Leveraging the public pressure around the pursuit of global justice and using pre-existing incentives such as the United States War Crimes Rewards Program, the Court can create tracking units that can operate with member states' consent and cooperation or under *ad hoc* agreements with non-member states.[204] Beyond being

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201. While much of the current literature has addressed the role of the ASP in enhancing the ICC's enforcement using its current frameworks, this Note focuses entirely on revamping the ASP's system. In contrast to other scholarly research, this Note aims to suggest that the ASP's role as a mere legislative body needs to be expanded to allow for more direct action to enhance the Court's enforcement and cooperation mechanisms. *See, e.g.*, PARLIAMENTARIANS FOR GLOB. ACTION, MODERNISING THE INTERNATIONAL CRIMINAL COURT 2 (2023), https://www.pgaction.org/pdf/2022/report-expanding-the-jurisdiction-of-the-icc.pdf [https://perma.cc/X474-KW5N] (suggesting a hybrid chamber system for the ICC that would involve a national judge, as selected by the ASP and its frameworks); *see also* Dapo Akande & Talita de Souza Dias**,** *How the UNSC and ASP can Enhance Cooperation with the ICC*, INST. FOR SEC. STUD. 1 (Mar. 26, 2019), https://issafrica.org/research/policy-brief/how-the-unsc-and-asp-can-enhance-cooperation-with-the-icc [https://perma.cc/4TS6-3LA6] (suggesting that during the course of investigations and/or prosecutions, both the UNSC and the ASP "can promote cooperation or address non-cooperation by states," without suggesting new roles for the ASP). Similarly, Abtahi and Koh's analysis of the Court's enforcement regime and its involvement only regards the ASP in its capacity as is and does not propose any new responsibilities for the Assembly. Abtahi & Koh, *supra* note 42, at 2.

202. Although criticisms have been made of the methods used by some of these groups, such as extraterritorial kidnappings and irregular renditions, the ICTY denied any association with such actions. JEFFREY DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH, 31, 296 (5th ed. 2020); *see* Vaan Schaak, *supra* note 66, for a more in-depth discussion of ICC tracking teams.

203. Rome Statute, *supra* note 11, art. 112.

204. U.S. DEP'T. OF STATE, *supra* note 89; Van Schaack, *supra* note 66 and accompanying text.

merely a police force, the units would negotiate access to sensitive information and operational permissions with states and address legal barriers like extradition laws or immunity claims. The units would be able to integrate advanced technology—such as AI tracking and facial recognition technology—as well as investigational resources from regional law enforcement agencies like INTERPOL, Europol, AFRIPOL, or the Gulf Cooperation Council Police. Such a unit would enhance the ICC's ability to enforce its warrants and strengthen its credibility as an enforcer of international justice.

3. Media and Information

The role of social media in generating political will for international criminal investigations is undeniable and rapidly growing.[205] International media can shape public opinion and government priorities by highlighting crises, injustices, or natural disasters.[206] Social media platforms amplify voices globally, creating awareness and urgency. When an issue of international concern, including a crime under the jurisdiction of the ICC, receives attention on social media platforms, it pushes international decision-makers to agree on viable solutions or face the criticism of their constituents.[207] This can generate political will and help the ICC strengthen cooperation among States Parties and non-members by leveraging the momentum and urgency created by users. Thus, platforms act as an added layer of accountability. The immediate backlash that a state defying a live arrest warrant from the Court can receive can be

205. *See* Rebecca J. Hamilton, *Social Media Platforms in International Criminal Investigations*, 52 CASE W. RSRV. J. INT'L L. 213 (2020) (explaining the role of social media companies in monitoring content that could be used in international criminal investigations). *See also* Emma Irving, *And So It Begins: Social Media Evidence in an ICC Arrest Warrant*, OPINIO JURIS (Aug. 17, 2017), https://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant [https://perma.cc/M9TL-SRMG] (discussing how social media evidence led to an ICC arrest warrant).

206. Sekarsari Sugihartono, *The Power of Social Media to Influence Political Views and Geopolitical Issues: TikTok, X and Instagram,* MOD. DIPL. (Sept. 19, 2024), https://moderndiplomacy.eu/2024/09/19/the-power-of-social-media-to-influence-political-views-and-geopolitical-issues-tiktok-x-and-instagram [https://perma.cc/QHL6-8L6P].

207. *See generally* Rosine Faucher, *Social Media and Change in International Humanitarian Law Dynamics*, 2 INTER GENTES 48, 68 (2019) (highlighting how social media can enhance the "monitoring and prevention" of international humanitarian law violations and noting that by disseminating information rapidly and widely, it can mobilize public pressure on decision-makers to address these issues).

utilized strategically by the Court to bring non-cooperating states in line with the Court's agendas.[208] Publicly exposing states or leaders for inaction or violations of norms can further compel action.[209]

Moreover, social media provides a platform for the ICC to engage directly with global audiences, fostering transparency and trust. Targeted messaging in specific regions or languages can address local concerns and encourage cooperation from affected communities or governments. Not only can social media be used to gather evidence, collect testimonies for ICC investigations, and foster active citizen participation, but hashtags, viral videos, and infographics can also simplify complex legal issues and rally global support.[210] By highlighting ongoing atrocities and linking them to ICC investigations, the ASP can create a moral imperative for cooperation. Furthermore, publicizing the non-cooperation of specific states or individuals can generate diplomatic consequences and push them to comply. Media can encourage NGOs, human rights organizations, and advocacy groups to amplify demands for state cooperation.

The ICC must also employ advanced technology such as Artificial Intelligence (AI)[211] to identify patterns in fugitive behavior

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208. *See* Matthew Krain, J'accuse! *Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?*, 56 INT'L STUD. Q. 574, 585–86 (Sept. 2012) (examining how "naming and shaming" can "lead to changes" in cases of "genocide or politicide").

209. *Id.*

210. Alys Davies & BBC Arabic, *All Eyes on Rafah: The Post That's Been Shared by More Than 47m People,* BBC NEWS (May 30, 2024), https://www.bbc.com/news/articles/cjkkj5jejleo [perma.cc/69U7-ZCLY] (discussing how an AI generated image that says "All Eyes on Rafah" was shared by millions of people and spread a political message). *See also* Clothilde Goujard, *Digital Detectives Scour Ukraine Social Media for Evidence of Russian War Crimes*, POLITICO (Mar. 4, 2022), https://www.politico.eu/article/activists-ukraine-social-media-evidence-russia-war-crimes/ [https://perma.cc/YYE8-BWZU] (highlighting the role of social media in gathering information as well as fostering social activism).

211. Artificial intelligence remains an evolving tool and must be used with caution and restraint. The potential for bias and human error in many current programmed AI systems render it susceptible to much criticism in the human rights field. Here, I suggest that AI should be used to sufficiently process data, such as travel and movement patterns of fugitives, financial transactions, and records. However, no ultimate prosecutorial decisions or legal outcomes should be made based on AI-assisted investigations and findings alone. *See* Theresa Adie, *Harnessing Technology to Safeguard Human Rights: AI, Big Data, and Accountability*, HUM. RTS. RSCH. CTR. (Apr. 8, 2025), https://www.humanrights research.org/post/harnessing-technology-to-safeguard-human-rights-ai-big-data-

or financial transactions while encouraging cooperation. Sharing this data among state members and publicizing the information to both garner the public's attention and encourage their political participation can further incentivize the states to respond to requests for cooperation.[212] The Court can also use or make available Open-Source Intelligence (OSINT), such as social media, satellite imagery, and publicly available data, to requested states to encourage cooperation and track fugitives.[213] Using Data Sharing Platforms (DSP) to create a secure digital platform to exchange information with member states and international partners can also foster a spirit of cooperation and collaboration, further facilitating this process through technology.[214]

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and-accountability [https://perma.cc/FJ86-9C38] (explaining that while AI and big data can be used to advance human rights protections, they also have ethical and legal risks including algorithmic bias and misinformation).

212. *See, e.g.*, Homero Gil de Zúñiga, et al., *Social Media, Political Expression, and Political Participation: Panel Analysis of Lagged and Concurrent Relationships*, 64 J. COMMC'N 612, 612, 620 (2014) (finding a causal relationship between using social media to consume news and both offline and online political participation); s*ee also* Sienna Lam, *Nobel Peace Prize Recipient Discusses War Crimes in the AI Era*, U.C. BERKELEY SUTARDJA CTR. FOR ENTREPRENEURSHIP & TECH. (May 13, 2024), https://scet.berkeley.edu/nobel-peace-prize-recipient-discusses-war-crimes-in-the-ai-era [https://perma.cc/M9HG-B4QG] (emphasizing how AI can equip leaders with better tools to fight for victims' rights, while also increasing the "accessibility and reliability" of war crime data); *c.f.* Shaun Waterman, *Technology Helps Ensure There's No Safe Harbor for War Criminals*, SIGNAL MAG. (Aug. 24, 2021), https://www.afcea.org/signal-media/technology-helps-ensure-theres-no-safe-harbor-war-criminals (on file with the *Columbia Human Rights Law Review*) (explaining how cross-governmental agencies share photos and videos of human rights violators to feed a software tool that can isolate facial images to help identify suspects). The use of AI and other technology to make both investigation and cross-governmental cooperation easier can incentivize state cooperation.

213. *Cf.* Monica Ellena, *Integrating OSINT Into Justice Processes,* INST. FOR WAR & PEACE REPORTING (Dec. 5, 2023), https://iwpr.net/global-voices/integrating-osint-justice-processes [https://perma.cc/W5ME-X92B] (exploring the admissibility and weight of open source intelligence in the prosecution of war crimes.); *cf.* Nikita Mehandru & Alexa Koenig, *Open Source Evidence and the International Criminal Court*, HARV. HUM. RTS. J. (Apr. 15, 2019), https://journals.law.harvard.edu/hrj/2019/04/open-source-evidence-and-the-international-criminal-court [https://perma.cc/UX5G-H7SP] (discussing how open-source information can contribute to international criminal legal processes).

214. *See* Andrew Chen, *What Is a Data Sharing Platform?*, EXPLO BLOG (July 8, 2025), https://www.explo.co/blog/what-is-data-sharing-platform [https://perma.cc/M4LC-82X9] (explaining how data sharing platforms allow information to flow freely while also supporting access control limits that protect sensitive data).

Generating political will on the international level is a complex process involving the interplay of various actors, mechanisms, and strategies. To achieve this, the ICC requires a combination of moral persuasion, strategic incentives, institutional frameworks, and civil society advocacy. It is often a gradual process that relies on aligning diverse interests and fostering trust among global actors.

IV. AMENDMENTS TO THE ROME STATUTE

As the ICC remains constrained by its founding treaty, the Rome Statute, amendments to the Statute are a legal pathway to empowering the ICC to enhance its enforcement and cooperation schemes. Pursuant to Article 121 of the Rome Statute, after seven years from the entry into force of the Statute, any State Party may make a proposal for an amendment as submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.[215] The proposed amendment must be adopted by a two-thirds majority of the ASP or by a Review Conference.[216] After adoption, the amendment requires ratification or acceptance by seven-eighths of the States Parties to enter into force for all members.[217] One year after the seven-eighths threshold is met, the amendment becomes binding on all States Parties.[218] As of October 2024, there are 125 States Parties to the Rome Statute.[219] Therefore, an amendment would require ratification by at least 110 States Parties to enter into force for all members. It is important to note that if a State Party does not accept the amendment, it may withdraw from the Statute with immediate effect by giving notice no later than one year after the amendment's entry into force.[220] This process ensures that amendments to the Rome Statute reflect a broad consensus among the international community, maintaining the integrity and legitimacy of the ICC. What is more, this stringent process makes amendments to the Statute a high-stakes process that may cost the already challenged Court membership of states.

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215. Rome Statute, *supra* note 11, art. 121.
216. *Id.*
217. *Id.*
218. *Id.*
219. *The States Parties to the Rome Statute*, ICC, https://asp.icc-cpi.int/states-parties# [https://perma.cc/U7XG-WL9A].
220. Rome Statute, *supra* note 11, art. 121(6).

The ASP's Working Group on Amendments reviews proposals and provides reports on the status of proposed amendments to the ASP for its consideration.[221] After the so-called Kampala Amendments to the Statute in 2010,[222] which introduced the crime of aggression and the conditions for the Court to exercise jurisdiction over that crime, the Court has seen very few proposed amendments.[223] Most proposed amendments focus on the definitions of crimes and details in the war crimes acts (i.e. Article 8).[224] Given the complexity of improving cooperation with the Court through political will alone, this Note proposes the following amendments to enhance state cooperation.

A. Trial In the Absence of The Accused

Given the constraints on an enforcement regime that is entirely dependent on state cooperation, holding trials *in absentia* may help prevent the defendants from evading justice indefinitely and delegitimizing the Court as the only international criminal tribunal. Trial *in absentia*, anathema to modern criminal law, is a proceeding in a court of law in which the person being tried is not present.[225] This principle is deeply rooted in the concept of natural justice, particularly the maxim *audi alteram partem* ("hear the other party"), which mandates that an accused individual must have the opportunity to participate in their defense.[226] Conducting a trial without the defendant's presence is generally considered a breach of this right, as it denies them the chance to confront witnesses, present

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221. International Criminal Court Assembly of States Parties [ASP], *Strengthening the International Criminal Court and the Assembly of States Parties*, Res. ICC-ASP/19/Res.6 (Dec. 16, 2020).

222. The amendment was adopted in 2010 at the Review Conference of the Rome Statute in Kampala, Uganda. *The Crime of Aggression*, COAL. FOR INT'L CRIM. CT., https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression [https://perma.cc/T4TS-LPEQ]

223. International Criminal Court Assembly of States Parties [ASP], *Report of the Working Group on Amendments*, *VI. Amendments to the Rome Statute*, ICC-ASP/19/28 (2020), https://asp.icc-cpi.int/WGA [https://perma.cc/YQ5K-GHST].

224. *Id.*

225. *in absentia*, LEGAL INFO. INST., CORN. L. SCH., https://www.law.cornell.edu/wex/in_absentia [https://perma.cc/5F6U-WNGP].

226. Frederick F. Schauer, *English Natural Justice and American Due Process: An Analytical Comparison*, 18 WM. & MARY L. REV. 47, 49 (1976).

evidence, and engage with the judicial process.[227] The right itself is somewhat malleable, however, and while notice of the proceedings and some opportunity to make a presentation are usually required, the right to be heard is not in all instances the right to be heard *orally*.[228] Cross-examinations are also not a strict requirement.[229] The procedural requirements vary depending on the type of case and the expected sanctions.[230]

Trial *in absentia* is in fact more commonly conducted than it may be believed. In immigration removal proceedings in the United States, in limited circumstances set forth in 8 U.S.C. § 1229a(b)(5)(A), an immigration judge may issue an *in absentia* order against an individual who fails to appear for their hearing, provided they received proper notice.[231] In the Special Tribunal for Lebanon (STL), trials *in absentia* are allowed under specific conditions if the accused: (a) has been notified of the charges and proceedings, and (b) has intentionally avoided appearing before the court.[232] One of many examples is Martin Bormann, a Nazi official and Hitler's private secretary, who was convicted of war crimes and crimes against humanity; he was sentenced to death by hanging at the Nuremberg

227. Neil P. Cohen, *Trial in Absentia Re-Examined,* 40 TENN. L. REV. 155, 167 (1973).

228. Schauer*, supra* note 226, at 57–58.

229. *Id.*

230. *Id.*

231. 8 U.S.C. § 1229a(b)(5)(A) (2024); *see In Absentia Orders Practice Advisory*, NAT'L IMMIGR. LITIG. ALL., at 1 (June 21, 2024), https://immigrationlitigation.org/wp-content/uploads/2024/06/24.06.21-In-Absentia-PA-updated-FINAL.pdf [https://perma.cc/HMU2-CM8Z]. It must be noted that in the United States being undocumented is not a criminal offense, but rather a civil one. 8 U.S.C. §1326. Entering or attempting to enter the country without proper authorization can result in deportation proceedings. For the purposes of this Note, *in absentia* proceedings in this civil context alone are considered to explore the reasons behind allowing such proceedings. The legislative intent behind 8 U.S.C. § 1229a(b)(5)(A) was rooted in the desire to enhance the efficiency and effectiveness of immigration enforcement, as well as to deter individuals from evading immigration proceedings. H.R. REP. NO. 104-828, at 1 (1985) (Conf. Rep.). While aiming to expedite removal proceedings, Congress also incorporated safeguards to protect due process rights. The statute requires that proper notice be provided to the noncitizen, and it allows for motions to reopen cases if the individual can demonstrate a lack of notice or exceptional circumstances for their absence. 8 U.S.C. § 1229a(b)(5)(A) (2024).

232. Statute of the Special Tribunal for Lebanon, art. 22, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

war crimes trials *in absentia*.[233] Given the seriousness of the offenses and the need for the administration of justice in each of the cases, due process was made secondary to bringing perpetrators to justice.

As such, Article 63 of the Rome Statute should be amended to include a trial *in absentia* provision. The proposed amendment would allow the Court, under extraordinary circumstances and based on the gravity of the crimes committed, to decide to issue a verdict *in absentia*. Under Article 61(2), the Pre-Trial Chamber may confirm charges before the trial in the absence of the accused.[234] The accused would remain free to participate in the proceedings and may provide a defense and evidence for their case. The extraordinary circumstances under which the Court may conduct an *in absentia* hearing may include situations where, despite all exhaustive measures, the perpetrator evades capture, such as in Al-Bashir's case.[235] If the accused has been given adequate notice of the

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233. *Fact Sheet: Martin Bormann*, TRIAL INT'L (Dec. 22, 2019), https://web.archive.org/web/20191222215945/https://trialinternational.org/latest-post/martin-bormann [https://perma.cc/YU6S-DUM4].

234. Rome Statute, *supra* note 11, art. 61(2). This provision has been used by the Court in only five instances, with the case of Joseph Kony, Uganda's former alleged Commander-in-Chief of the Lord's Resistance Army (LRA), being the latest iteration. Kony, who has evaded the Court for almost twenty years, is still at large, but unlike many other indictees, such as Putin, al-Bashir, or Netanyahu, Kony's whereabouts remain unknown. Pursuant to a request from the OTP, on October 29, 2024, Pre-Trial Chamber III issued a decision concluding that all the requirements to hold a confirmation of charges hearing in the absence of the suspect Joseph Kony were met. *See* Prosecutor v. Kony, ICC-02/04-01/05-532, Decision on the Criteria for Holding Confirmation of Charges Proceedings in Absentia, ¶105 (Oct. 29, 2024).

235. Under Article 61(2) of the Statute there are two exceptional situations in which a Pre-Trial Chamber has the discretion to hold the confirmation hearing in the absence of the suspect: when the person has either (a) "waived his or her right to be present" (Article 61(2)(a)); or (b) "fled or cannot be found, and all reasonable steps have been taken to secure his or her appearance before the Court and to inform him or her of the charges" as well as the upcoming hearing to confirm those charges (Article 61(2)(b)). Rome Statute, *supra* note 11, art. 61(2). The Pre-Trial Chamber III confirmed the findings of the Pre-Trial Chamber II that in the situation where a person "'cannot be found,' 'an initial appearance is […] not a requirement to hold a confirmation hearing pursuant to article 61(2)(b) of the Statute' and that '[t]he phrase "cannot be found" refers to the situation where: (i) the concerned person has never been available to the Court, because he or she has not been arrested, surrendered, or voluntarily appeared before the Court and (ii) all efforts made to locate and arrest the person failed since his or her precise whereabouts were and remain unknown.'" *Kony*, ICC-02/04-01/05-532, ¶¶ 23–24. The Chambers also confirmed that to "'hold a confirmation hearing in the absence of a person who "cannot be found," the Chamber does not need to be

proceedings and, despite being given the opportunity and the means to attend, they nonetheless explicitly refuse to appear in Court or participate in their defense, the refusal can be treated as a waiver of their right to be present. The amendment would empower the ASP to certify a trial *in absentia*, taking into account all the efforts made to ensure the presence of the accused. The ASP, the OTP, and the Court must ensure that all adequate protections of due process for *in absentia* trials, such as proper notice and the ability to reopen cases, are afforded to the accused.

In absentia trials could be seen as politically motivated or lacking credibility, especially if verdicts were issued against high-profile figures who were not present to defend themselves. It is possible that the ICC chose not to adopt *in absentia* trials to ensure the highest standards of justice, protect due process rights, and maintain legitimacy. The critics of the Court could see such proceedings as undermining the ICC's legitimacy as an impartial judicial body.[236] However, given that the ICC's legitimacy has now

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satisfied that he or she has actual knowledge of the proceedings at the Court' but only that 'all reasonable steps have been taken to inform the person of the charges and of the fact that a confirmation hearing will take place.'" *Id.* This decision underscores the stringent process by which a confirmation of charges hearing in the absence of the accused is ever allowed at the ICC. It must also be noted that the Pre-Trial Chamber III had originally postponed the commencement of the confirmation hearing scheduled for October 15, 2024, following Defense, Prosecution, and Office of the Public Counsel for Victims observations to allow the defense more time to respond and to allow for the best due process practices to be followed. Prosecutor v. Kony, ICC-02/04-01/05-526, Decision Postponing the Confirmation of Charges Hearing, ¶ 13 (Sept. 12, 2024). And more importantly, unlike the proposed amendment in this Note, the *in absentia* hearing allowed under Article 61(2) is only for confirmation of charges, and the Court has never held a trial in the absence of the accused. Rome Statute, *supra* note 11, art. 61(2); *Kony Case: Confirmation of charges hearing to commence in absentia on 9 September 2025*, INT'L CRIM. CT. (Dec. 12, 2024), https://www.icc-cpi.int/news/kony-case-confirmation-charges-hearing-commence-absentia-9-september-2025 (on file with the *Columbia Human Rights Law Review*).

236. Several competing views on trials *in absentia* were discussed at the Rome Conference. KAI AMBOS & OTTO TRIFFTERER, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1563–70 (3d ed. 2016). Some delegations advocated for a total prohibition on *in absentia* hearings, believing they would discredit the ICC by devolving into mere trials for show. This view only allowed an exception for instances where the accused disrupted the trial. Another view was that trials *in absentia* held little practical value due to the right of the accused to demand a new trial upon appearance before the Court. A third view was that *in absentia* trials were necessary because it would often be impossible to compel the appearance of the accused in cases that fall under the jurisdiction of the Court. These hearings would therefore be necessary to

been compromised due to repeated instances of non-cooperation, *in absentia* trials could give the Court some credence.

Allowing *in absentia* proceedings would thus allow the victims to see the Court as a legitimate forum for pursuing justice for the crimes the Court has been mandated to prosecute. It would also allow the Court to conclude proceedings that have lingered on its docket without progress due to states harboring fugitives or fugitives themselves evading justice. Given the time-sensitive nature of the crimes the Court is entrusted to prosecute, concluding proceedings when the evidence and the witnesses can be accessed and preserved is in the interest of global justice. Such an amendment would also bolster state cooperation, as the non-cooperating states would know that they could not shield the accused and that the accused may nonetheless face conviction despite avoiding capture. However, even after conviction *in absentia*, the accused and the non-cooperating states may escape liability; this mechanism would therefore prove most effective when used in conjunction with other measures such as levying sanctions.

B. ASP Referrals and Prohibitory Measures

As discussed, under Article 87(7) of the Rome Statute, instances of non-cooperation can be referred to the ASP and, where the Security Council originally referred the matter to the Court, to the UNSC.[237] However, the statute does not elaborate on what measures the ASP or UNSC should or may take to bring about cooperation or prevent recurrence. Likewise, ASP's toolkit on cooperation relies on diplomatic conversations, documentation, and reporting without any means to prevent or penalize the violators.[238] The ASP's administrative and oversight role should be amended to allow for more institutionalized enforcement mechanisms.

Amending the Rome Statute to invigorate the ASP would allow the Assembly to strengthen legal obligations.[239] The Rome

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effectively pursue the Court's goals of peace, justice, and reconciliation. *Id.* The first view prevailed.

237. Rome Statute, *supra* note 11, art. 87(7).

238. International Criminal Court Assembly of States Parties [ASP], *Report of the Bureau on Non-Cooperation*, *supra* note 11, annex III.

239. Scholarly discussions have examined the ASP's influence over the ICC's operations, analyzing instances where the ASP's decisions have impacted the Prosecutor's independence and suggesting a need for clearer boundaries to preserve the Court's impartiality or the role of the ASP in suggested changes to

Statute should be amended to authorize the ASP to impose explicit penalties on states for non-cooperation, such as fines, suspension of voting rights within the ASP, or exclusion from ICC-related benefits. Furthermore, in cases of repeated non-cooperation, following a referral to the ASP and in the case of failure of the state to comply with ASP recommendations and requests, the ASP must be allowed to use mechanisms for automatic escalation to the UNSC, ensuring consistent action and avoiding political delays. Currently, only the cases referred by the UNSC to the ICC can be reported to the UNSC for non-cooperation.[240] Allowing such referrals for all cases of non-cooperation through an amendment would further incentivize the states to comply or face the Council and its possible sanctions.

While some states could ignore penalties or withdraw from the Rome Statute rather than comply, a formalized penalty system would provide clear guidelines for responding to non-cooperation, rather than relying on political negotiations or Security Council referrals. Additionally, if penalties are applied fairly, the ICC could enhance its credibility as a global judicial institution.

Furthermore, an amendment to Article 13 would make it possible for the ASP to request that when the UNSC refers situations to the ICC under its Chapter VII powers, granting the ICC jurisdiction over non-member states, the referrals be accompanied by specific timelines and follow-up obligations to ensure consistent cooperation and enforcement. In instances of non-cooperation in UNSC-referred cases, the ASP must provide recommendations for retaliatory measures such as sanctions, travel bans, and asset freezes. These recommendations would follow formal hearings for the non-complying states to provide their legal justifications, and the UNSC would remain empowered to make a final determination to impose any measures. The states would remain free to appeal the findings of non-cooperation by the ASP before any referrals to the UNSC are made.

The ASP must also take a more aggressive approach in publicizing instances of non-cooperation as a prohibitive measure.[241]

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the ICC's framework in general. However, to the knowledge of the author there is no literature that suggests amendments to the Rome Statute specifically directed at the ASP. *See* Hannah Woolaver & Emma Palmer, *Challenges to the Independence of the International Criminal Court from the Assembly of States Parties*, 15 J. INT'L CRIM. JUST. 641, 645–46, 659–64 (2017); *see supra* note 201 and accompanying text.

240. Rome Statute, *supra* note 11, art. 87(7).

241. *See supra* Part III.A.3.

Public broadcasts of emergency sessions where the non-complying states are provided an opportunity to explain the reasoning for their inaction would keep the public informed, in turn pressuring the respective governments to be more accountable to their citizens. By publicizing reports of non-cooperation on social media platforms, the ASP would also allow the information to reach a wider demographic and generate the political will to further prevent the reoccurrence of instances of non-cooperation. The ASP's role as an active monitor and enforcer of mechanisms that ensure and prevent non-cooperation, as reflected by the above amendments, can further legitimize the Court and facilitate the pursuit of its mandate.

C. Restraint Against Veto Power

The political dynamics of the UNSC often result in vetoes that block ICC action, particularly in cases involving powerful states or their allies. This veto power has, at times, been exercised to block ICC investigations.[242] Following the UNSC's inaction in Syria, France proposed a "'code of conduct' for the use of the veto in the [UNSC] in situations of genocide, war crimes, crimes against humanity, and ethnic cleansing"—all "'mass atrocity crimes' covered by the Responsibility to Protect (R2P) principle as endorsed at the 2005 World Summit."[243] By 2013, a group of twenty-one U.N. member states launched the Accountability, Coherence and Transparency (ACT) Group, "focusing on a wide variety of issues related to improving the working methods of the [UNSC]," including the code of conduct.[244] The French initiative garnered international recognition and support, and in a historic 2022 resolution (76/262), the General Assembly decided that, following a UNSC veto, the General Assembly would hold a formal debate to consider the veto decision.[245] At the

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242. UNSC, 7180th mtg., SC/11407 (May 22, 2014) (summary of meeting where UNSC failed to refer the situation in Syria to the ICC despite near unanimous support because of two vetoes); UNSC, 5619th mtg., SC/8939 (summary of meeting where UNSC failed to adopt draft resolution on Myanmar partly because of vetoes).

243. U.N. ASS'N – UK, U.N. SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT 1 (2015), https://una.org.uk/sites/default/files/Briefing%20-%20Veto%20code%20of%20conduct.pdf [https://perma.cc/VDU5-FD9W]; *The Responsibility to Protect: A Background Briefing*, GLOBAL CTR. FOR THE RESP. TO PROTECT (Jan. 14, 2021), https://www.globalr2p.org/publications/the-responsibility-to-protect-a-background-briefing [https://perma.cc/FNR7-CHKT].

244. *Id.* at 2.

245. G.A. Res. 76/262, Standing Mandate for a General Assembly Debate When a Veto Is Cast in the Security Council, ¶ 1 (Apr. 26, 2022).

General Assembly's seventy-seventh session, France again proposed that all five permanent members voluntarily and collectively suspend the use of the veto in cases of mass atrocities.[246]

Many delegates and representatives "voiced their support for the France-Mexico initiative addressing veto restraint in cases of mass atrocities and highlighted the importance of Article 27(3) of the Charter, which stipulates that a party to a dispute shall abstain from voting."[247] Emphasizing that the veto has not necessarily led us to a safer world, many member states believed that the eroding public trust in the UNSC must be remedied and that the veto is a relic of the past, no longer serving the needs of modern society.[248] The ICC must use this momentum to side with supporters of this movement, such as France, Mexico, New Zealand, Costa Rica, and others, to push for restraints on the UNSC's veto use in cases of mass atrocities.[249] Greater UNSC action on mass atrocity situations could lead to increased cooperation with the ICC by states, as they may be more willing to assist in investigations and prosecutions when there is a strong international consensus. However, the veto power is a significant privilege for the permanent members, and they are reluctant to give it up, even in limited circumstances.[250]

The ICC's support for the ACT Group's Code of Conduct and similar initiatives could help limit veto use in cases of international crimes under the ICC's mandate. As discussed above, the ICC must continue to engage civil society and NGOs to garner greater support for a reformed relationship with the UNSC that will further legitimize the Court and foster cooperation with its agendas and operations. By mobilizing states, civil society, and international organizations to pressure the permanent members to adopt veto restraint when dealing with ICC referrals, the ICC can promote transparency around veto decisions to hold UNSC members accountable for obstructing justice. These institutional reforms can

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246. UNGA, 77th Sess., 68th & 69th mtg., GA/12500 (Apr. 26, 2023).

247. *Id.*

248. *Id.* ("The Council should reflect the reality of today's world . . . but this does not mean extending privileges to others in perpetuity based on the relationships of power in today's world. Rather, it refers to the ethical model of the times—namely, democracy based on the principles of rotation and accountability").

249. *Id.*

250. Anjali Dayal & Caroline Dunton, *The U.N. Security Council Was Designed for Deadlock—Can it Change?*, U.S. INST. OF PEACE (Mar. 1, 2023), https://www.usip.org/publications/2023/03/un-security-council-was-designed-deadlock-can-it-change [https://perma.cc/5P6G-7ZJM].

create a more predictable and supportive relationship between the UNSC and ICC that will lead to more cooperation globally for the ICC's mandates.

CONCLUSION

The challenges faced by the ICC in enforcing its mandate highlight the pressing need for systemic reform to bolster compliance and cooperation. Central to the solutions proposed in this article is an expanded role for the ASP, transforming it from a predominantly legislative body into an active enforcement mechanism for the ICC. This shift would empower the ASP to implement more robust measures, such as imposing diplomatic consequences for non-cooperation, leveraging regional and international partnerships, and fostering stronger collaboration with the UNSC. These steps would help close the gap between the ICC's judicial mandate and its reliance on state cooperation, ensuring that justice is not undermined by political inertia or selective compliance.

Equally critical is the role of political will in overcoming the geopolitical hurdles that have historically constrained the ICC's effectiveness. Drawing lessons from the successes of the ICTY, the ICC must engage with states, NGOs, and civil society to generate the political will needed to address non-cooperation. This includes mobilizing grassroots advocacy, creating incentives for compliance, and using diplomatic pressures to deter states from harboring fugitives. By aligning its efforts with broader international norms and leveraging existing partnerships, the ICC can reinforce its legitimacy and create pathways for more consistent enforcement.

Furthermore, integrating enforcement mechanisms such as regional policing collaborations, robust extradition treaties among States Parties as well as between States Parties and non-members, and the strategic use of advanced technology could enhance the ICC's operational capacity. These measures would not only strengthen the ICC's ability to apprehend suspects but also demonstrate its commitment to accountability, even in politically sensitive contexts. Amendments to the Rome Statute can further formalize the obligations of States Parties and create concrete frameworks for prohibitive measures in instances of noncompliance to prevent reoccurrence.

Ultimately, the ICC's mission to deliver justice for the gravest crimes demands a framework that addresses both its operational

limitations and the broader political dynamics of international law. By empowering the ASP, leveraging international partnerships, and fostering political will, the ICC can better navigate the complexities of state cooperation and emerge as the "court worth having" [251] envisioned by the framers of the Rome Statute.

251. Axworthy, *supra* note 4.