

Universal Justice, Asymmetric Power: A TWAIL Analysis of ICC Selectivity from Al-Bashir to Netanyahu


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Abstract

This paper examines the underlying structural and functional crises of the International Criminal Court (ICC) from the perspective of Third World Approaches to International Law (TWAIL) and political realism. The Court was formed by the Rome Statute of 1998,[1] which gave it a global mandate to end impunity for the world's worst atrocities, but its historical focus and institutional design have shown major persistent biases. This research critically evaluates the referral mechanism of the United Nations Security Council (UNSC) under Article 13(b) by a qualitative legal-doctrinal and comparative case study approach. The analysis shows how the referral process operates as a political filter that shields non-member superpowers while brutally targeting weak countries in the Global South. The article addresses the textual tension between the Head-of-State immunity under Article 27 and the obligations of third parties under Article 98. It chronicles the arc of continental resistance, from African Union (AU) non-cooperation directives against former Sudanese President Omar Al-Bashir[2] to the statutory disobedience established in the 2014 Malabo Protocol.[3] The article ends by examining current enforcement deadlocks involving Russian President Vladimir Putin and Israeli Prime Minister Benjamin Netanyahu, to show how, whenever universal jurisdiction conflicts with the vital interests of powerful states, supranational criminal law is subordinated to Westphalian sovereignty and executive realism. The report concludes that we should not expect any major structural decoupling from geopolitical hierarchies and the ICC's pursuit of global justice will remain a flawed and selective exercise.

Keywords: International Criminal Court, TWAIL, Selectivity, Sovereignty, Head-of-State Immunity, Executive Realism

Introduction

The creation of the International Criminal Court (ICC) under the Rome Statute in 1998 was hailed as a revolutionary watershed in international governance, marking a new age in which no person, regardless of political stature or state power, would evade justice for genocide, war crimes and crimes against humanity.[4] The Court was created on a universalist human rights ethos, in order to break the customary veil of Westphalian state sovereignty in the service of global humanity.[5] But the institutional history of the ICC has strayed far from its egalitarian aim. During the first decade of the Office of the Prosecutor's operations, formal probes had been filed only in countries within the African continent, resulting in widespread accusations of racialised profiling and institutional bias.[6]

The legitimacy crisis resulted in a constitutional deadlock when the ICC issued arrest warrants in 2009[7] and 2010[8] against the incumbent Sudanese President Omar Al-Bashir following a strategic referral by the United Nations Security Council (UNSC).[9] The African Union (AU) reacted by condemning the warrants as an abusive weaponization of

international law[10] and issuing a continent-wide non-cooperation directive[11] that effectively neutralised the warrants' enforcement during Al-Bashir's subsequent state visits to member countries such as South Africa[12] and Kenya.[13] The regional backlash led in the drafting of the 2014 Malabo Protocol[14] which was obviously designed to create an alternative regional court that would grant total jurisdictional immunity to sitting African governments[15] in blatant violation to the core goals of the Rome Statute.[16]

Far from being a localised historical oddity, the enforcement vulnerabilities and selectivity concerns uncovered during the Al-Bashir crisis continue to shape the modern environment of global criminal justice. The deadlock on the 2023 arrest warrant for Russian President Vladimir Putin[17] and the strong geopolitical resistance against the 2024 warrants sought for Israeli Prime Minister Benjamin Netanyahu[18] reflect a systemic, perennial flaw in the global judicial order.[19] While these latest indictments of non-African, Western-aligned figures may appear to diverge from the usual narrative of Global South targeting, they actually point to a much deeper, underlying reality: international criminal law remains structurally incapable of enforcing its mandates against powerful actors.[20]

This research paper critically interrogates the legal architecture, systemic selectivity and institutional opposition that characterises the dispute between the ICC, post-colonial sovereign states and non-member superpowers.[21] It claims that the ICC's structural reliance on hegemonic political entities[22] and the strategic non-ratification of the Rome Statute by global superpowers have established an asymmetric system of justice.[23] This structure ultimately shields dominant governments from culpability while using universal jurisdiction to regulate and discipline weaker states, driving the ICC into a chronic crisis of institutional legitimacy.[24]

Literature Review

To further understand the institutional friction between the ICC and the Global South, the Court's activity needs to be unpacked through the critical lens of Third World Approaches to International Law (TWAIL). TWAIL critiques the claimed neutrality, universality and objective benevolence of the international legal order. It argues that modern international law is a historical continuation and sophisticated reconfiguration of colonial power structures that serve to legitimise the hegemony of Western states while systematically subordinating post-colonial societies.[25] Sen (2023) reads the international law of jurisdiction in this critical reading as not a neutral, technical or simply administrative boundary, but as a powerful mechanism of imperial control and spatial domination employed to regulate the boundaries of the international order. From a TWAIL perspective, the calculation of when, where and against whom international criminal law is triggered is a very political calculation. The structural design of the Rome Statute constructs a Eurocentric model of institutional stability, where Western legal apparatuses are cast as the ultimate arbiters of human rights and the judicial and political settings of post-colonial nations are seen as intrinsically defective. This hierarchical ordering of jurisdictions allows international judicial institutions to extend their punitive powers downwards to vulnerable sovereign states in the Global South under the moral banners of universal justice while excluding any military aggression committed by Western powers from the scope of judicial scrutiny.[26]

Following this macro-analysis, Xavier (2022) emphasises how the contemporary international criminal tribunals are directly inheriting and reproducing these highly asymmetrical power relations. Traced these trends to their roots in international adjudication, including the repression of non-Western dissenting voices such as Justice Radhabinod Pal in the Tokyo trials. Xavier (2022) points out that the institutional framework and funding for operations of current international courts actively stifle other judicial perspectives questioning the geopolitical status quo. International criminal prosecutions cannot, then, be divorced from the vagaries of power relations, and the current international legal apparatus continues to operate as a weapon to insulate hegemony while selectively punishing post-colonial subjects who lack structural protection.[27]

This operational reality is an expression of what Endoh (2020) calls a dual-track apparatus: absolute insulation of dominating world powers and aggressive targeted discipline of vulnerable states of the Global South. As Endoh (2020) shows, the ICC's initial institutional dependence on the UN Security Council steadily corrupted the court into an

instrument of selective prosecution. This structural marriage allows Western countries to conduct their strategic foreign policy aims in the name of international law, while having total protection from external judicial scrutiny of their military interventions.[28]

This systemic weakness was thrust into an open constitutional crisis with the indictment of incumbent Sudanese President Omar Al-Bashir. As Weldehaimanot (2011) highlights, this crisis revealed a significant textual inconsistency between the wording of the Rome Statute and established customary principles of sovereign immunity. This illustrates that the court's legitimacy and survival depend on strategic acts beyond objective rightness. As Weldehaimanot (2011) points out, the court's aggressive non-consensual approach in the post-colonial regions generated a deeply rooted resistance among regional actors who preferred domestic political stability and peace settlements to abstract retributive mandates imposed from outside. This indicates that a wise approach should at times diverge from a strict application of the law.[29]

Chakka (2018) builds on this legal deadlock and notes that the ensuing conflict over head of state immunity exposed a fundamental flaw in the supranational structure in which the culture of impunity still reigns since international legal structures do not have autonomous enforcement mechanisms. Chakka (2018) maintains that the international response to the Darfur situation was a futile exercise that severely undermined the credibility of global judicial institutions because it failed to resolve the tension between personal accountability under Article 27 and diplomatic protection under Article 98.[30]

This confrontation continues to impact contemporary international law through what Khamala (2025) refers to as the "ghost of the Malabo Protocol." Khamala (2025) indicates that the regional disobedience mechanisms post-colonial governments constructed during the Al-Bashir crisis continue to influence how domestic executives view modern international arrest orders. This persistent structural resistance shows how political contingencies deeply constrain and frustrate the Court's calls to all countries to join the struggle against impunity, demonstrating how the implementation of international criminal law remains structurally contingent on state calculations of political realism.[31]

Methodology

This qualitative, legal-doctrinal study examines structural friction between the ICC and post-colonial governments using a TWAIL paradigm. The doctrinal study uses core legal texts, UN resolutions, and the African Union's Malabo Protocol to dismantle the systemic contradictions in Rome Statute Articles 13(b), 27, and 98. Analysis of post-colonial sovereignty's resistance to supranational mandates is based on the Omar Al-Bashir non-cooperation issue. Finally, it compares this historical precedent to current enforcement stalemates between Vladimir Putin and Benjamin Netanyahu to show how global power asymmetry determines the court's legitimacy.

Results and Discussion: The Mechanics and Manifestations of Selectivity

The Structural Filter of Article 13(b)

The structural framework of the Rome Statute embeds selective enforcement into the very DNA of global criminal justice through the drafting of Article 13(b).[32] Under this provision, the ICC can exercise its judicial mandate over core international atrocities if a situation is formally referred to the Prosecutor by the United Nations Security Council acting under Chapter VII of the UN Charter.[33] By explicitly tying the initiation of international prosecutions to a highly politicized intergovernmental body, the Rome Statute systematically subordinates judicial objectivity to the geopolitical alignments and strategic interests of the world's most dominant military powers. This institutional integration establishes an insurmountable double standard in global accountability, transforming the Court into an instrument of selective prosecution that divides the international order into two distinct tiers.

According to Endoh (2020), this structural selectivity operates through two parallel tracks: the total insulation of dominant world powers and the aggressive, targeted discipline of vulnerable nations in the Global South.[34] The peak manifestation of this structural flaw lies in the unique position of the permanent, veto-wielding members of the Security Council (the

P5)—specifically nations like the United States, Russia, and China. These states have actively chosen not to ratify the Rome Statute, deliberately ensuring that their own nationals, military personnel, and state executives remain completely shielded from the Court's default territorial or personal jurisdiction.

Yet, despite refusing to bind themselves to the Court's accountability, these same non-signatory superpowers retain the legal authority under Article 13(b) to vote on, draft, and issue binding resolutions that refer other non-signatory nations to the ICC Prosecutor. This dynamic was clearly observed in the conceptualization of UN Security Council Resolution 1593, which referred the situation in Darfur, Sudan, to the ICC.[35] From a structural standpoint, this creates an untenable legal contradiction: a state that completely rejects the legitimacy of a court can still weaponize that very court's jurisdiction against its geopolitical adversaries. Consequently, the UNSC referral mechanism functions as a political filter. The P5 can use their absolute veto power to consistently block any judicial scrutiny into their own conduct or the actions of their close strategic allies, while simultaneously using the ICC to police, punish, and delegitimize weaker states that lack similar diplomatic shields (Endoh, 2020).[36]

By concentrating its early institutional focus almost entirely on African conflicts, the ICC's operational reality reflected this design, establishing a system where international criminal law is strictly enforced against politically isolated regimes but rendered entirely inert when encountering the actions of major global powers. This design flaw reveals that selectivity is not an accidental byproduct of administrative bias, but a deliberate feature of the court's structural mechanics.

The Al-Bashir Legal Chess Match

The ICC's issuance of arrest warrants for sitting Sudanese President Omar Al-Bashir in 2009[37] and 2010[38] exposed a fundamental, irreconcilable contradiction embedded directly within the text of the Rome Statute. This legal conflict primarily centers on the direct collision between Article 27 and Article 98—two competing provisions that represent entirely different philosophies of international order. Article 27(2) explicitly states that official capacity as a Head of State, Government, or parliament shall not exempt a person from criminal responsibility, nor shall it constitute a ground for reduction of sentence.[39] This provision embodies the court's core progressive mandate to eliminate personal immunity for individuals accused of international atrocities, advancing the principle that sovereign status cannot be used as a shield for egregious violations of human rights.

However, this progressive rule clashes directly with the conservative state-centric protections retained under Article 98(1) of the same statute.[40] This provision dictates that the ICC may not proceed with a request for surrender or assistance if it would require the requested state to act inconsistently with its obligations under international law regarding diplomatic immunity of a person or property of a third State, unless the court can first obtain the cooperation of that third State for the waiver of the immunity.[41] Because Sudan was a non-signatory state to the Rome Statute, the African Union forcefully argued that Al-Bashir retained his customary international law immunities as a sitting Head of State when traveling abroad. This textual ambiguity created a massive legal loophole: while Article 27[42] stripped Al-Bashir of his immunity before the ICC tribunal itself, Article 98[43] simultaneously barred the court from forcing transit member countries, like South Africa or Kenya, to violate their existing customary international law obligations toward third-party states by executing those arrests.

The African Union's collective decision to issue non-cooperation directives to its member states regarding Al-Bashir's extradition was not merely a political act of defiance; it was a deeply articulated critique of the ICC's institutional legitimacy and selective enforcement.[44] The AU argued that by pursuing a sitting Head of State of a non-party nation without a clear resolution of the conflict between Articles 27 and 98, the ICC was acting beyond its judicial boundaries and violating core tenets of State sovereignty. Weldehaimanot (2011) points out that the AU viewed the enforcement requests as a direct threat to continental peace and reconciliation efforts in Darfur, demonstrating how the ICC prioritized abstract retributive justice over the practical realities of regional diplomatic stability.[45]

Furthermore, the refusal to extradite Al-Bashir became the primary vehicle for the Global South's selectivity critique. African leaders argued that the ICC's legitimacy was compromised because the court was enforcing its mandates on a selective basis, targeting African leaders while remaining entirely inert regarding similar violations committed by major Western powers or their protected allies. According to Chakka (2018), this perceived double standard transformed the judicial process into a highly volatile political standoff.[46]

Because the Rome Statute lacks its own independent enforcement body, it relies entirely on domestic executive branches to execute warrants (Weldehaimanot, 2011).[47] When the United Nations Security Council referred the Darfur situation via Resolution 1593,[48] it failed to provide clear enforcement mechanisms or legally resolve the clash with customary immunity. By passing a complex, active geopolitical crisis down to the ICC as a purely legal problem, the Security Council turned the pursuit of justice into an unworkable mandate. This structural failure left the court powerless when African nations chose to prioritize regional diplomatic stability and continental peace processes over conflicting international court orders, demonstrating that treaty law cannot easily override the deep-seated customary rules governing sovereign interactions when the enforcement mechanism itself is perceived as structurally biased (Chakka, 2018).[49]

Continental and Global Executive Resistance

The institutional friction between the African Union and the International Criminal Court culminated in a formal, systemic legislative revolt through the adoption of the Malabo Protocol in 2014.[50] This treaty was deliberately engineered to expand the jurisdiction of the African Court of Justice and Human Rights, effectively aiming to establish an alternative, regional criminal tribunal capable of prosecuting international atrocities completely independent of the Hague-based ICC framework. However, the protocol introduced a highly controversial and fiercely debated provision under Article 46A bis.[51] This clause explicitly grants absolute immunity from criminal prosecution to any serving AU Head of State or Government, as well as senior state officials, during their tenure in office.[52]

While international human rights organizations and Western observers heavily criticized this clause as a regressive tool designed to shield corrupt political elites from accountability, Endoh (2020) argues that the Malabo Protocol fundamentally served as a direct structural pushback against what African leaders perceived as selective, Western-dominated judicial targeting that weaponized international law against the Global South.[53] This continental institutional resistance highlights the enduring relevance of "executive realism" in international relations, a framework where state actors consistently prioritize regional political survival, diplomatic stability, and territorial sovereignty over external, supranational judicial mandates.

According to Khamala (2025), even though the Malabo Protocol has faced slow ratification and political hurdles across the continent, its underlying logic of sovereignty and immunity actively dictates how states respond to international orders in practice.[54] Ultimately, the systemic fallout from the African Union's non-cooperation directives[55] regarding Omar Al-Bashir fundamentally altered the enforcement architecture of supranational criminal law. By exposing the reality that state compliance is largely contingent upon aligned geopolitical interests rather than binding statutory obligations, this precedent introduced a profound enforcement deficit. Because key transit member states faced no institutional sanctions or legal repercussions for permitting Al-Bashir's departure, the crisis provided an empirical blueprint for state resistance against supranational mandates. Lacking an independent enforcement apparatus, the Court's judicial authority remains entirely hostage to domestic executive branches (Khamala, 2025).[56]

This systemic vulnerability is by no means unique to African nations; rather, it governs the global execution of international criminal justice as a whole. This reality is further underscored by contemporary case studies. The profound enforcement deadlocks surrounding the ICC's 2023 arrest warrant for Russian President Vladimir Putin,[57] alongside the intense diplomatic gridlock and political resistance to the 2024 warrants issued for Israeli Prime Minister Benjamin Netanyahu and Yoav Gallant,[58] demonstrate that the actual execution of international criminal law remains completely hostage to state sovereignty and executive power.

The 2024 warrants serve as a critical litmus test for the TWAIL critique of systemic selectivity. While the prosecutor's actions initially appeared to disrupt the historical narrative of Global South targeting, the subsequent institutional backlash from Western non-signatory states—most notably the United States—reified the court's structural dependence on hegemony. The United States, despite remaining outside the jurisdiction of the Rome Statute,[59] actively threatened economic sanctions against ICC personnel and challenged the legal validity of the warrants, mirroring the exact executive realism deployed decades prior by the African Union. Furthermore, these warrants triggered an internal fracture among European member states, with some pledging execution under Article 27[60] and others signaling non-compliance by citing customary diplomatic protections closely tied to the logic of Article 98.[61] This division proves that the legal chess match first played during the Al-Bashir crisis is not a regional anomaly, but a permanent systemic vulnerability; when universal jurisdiction attempts to pierce the shield of Western alignment, the enforcement machinery fractures along lines of geopolitical convenience (Khamala, 2025).[62] When a court's mandates clash directly with the immediate strategic interests of sovereign states, domestic executives consistently choose diplomatic realism and state security over international compliance, reducing universal jurisdiction from an absolute legal standard to a highly selective, politically contingent exercise.

Conclusion

The structural friction between the International Criminal Court and the Global South reveals a fundamental tension at the heart of modern international criminal justice. What began as a hopeful, universal promise to end impunity for humanity's gravest atrocities has functioned in practice as a selective enforcement mechanism. This research finds that the global framework for criminal accountability remains deeply tied to historical power imbalances. By blending judicial authority with international political privileges embedded in mechanisms like Article 13(b),[63] the system allows dominant global powers to insulate themselves from liability while simultaneously weaponizing international justice against politically vulnerable nations. Consequently, the intense institutional resistance and legal pushback observed across the Global South culminating in the regional protections of the 2014 Malabo Protocol[64] represent a deliberate, necessary reaction to this asymmetrical design.

This defiance is not a random act of political lawlessness; rather, it reflects a broader global reality defined by executive realism. When international legal mandates clash directly with the survival interests of sovereign states, domestic leaders will consistently choose diplomatic stability and regional peace over compliance with a compromised court. This operational dynamic has been consistently mirrored from the historical non-cooperation decisions surrounding the Omar Al-Bashir warrants[65] to the contemporary diplomatic deadlocks over the 2023 Vladimir Putin warrant[66] and the 2024 warrants issued for Benjamin Netanyahu and Yoav Gallant.[67] Ultimately, this paper concludes that until global justice detaches its operations from selective geopolitical hierarchies, its pursuit of universal accountability will remain secondary to realpolitik and state sovereignty. The ongoing crisis of legitimacy proves that international law cannot survive as a trusted judicial system if it is perceived as an instrument of political selectivity, rendering its highest ideals of global justice permanently out of reach.

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