Chapter 6

ICC at 25: The Outer Rims of Jurisdiction

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Abstract

Since its establishment in 2002, the International Criminal Court (ICC) has clarified key jurisdictional issues arising from the Rome Statute and the UN Charter, emphasizing personal, territorial, and temporal jurisdiction. After twenty-five years, the ICC faces criticism for limited effectiveness and accusations of bias, yet it endures and has made significant progress. Its jurisprudence reflects a cautious adherence to international law, enhancing legal certainty despite challenges in a fragmented system. However, state withdrawals and lack of cooperation threaten investigations and prosecutions, complicating the Court's retributive function. Nonetheless, the ICC's patience and the political stigma of indictments serve preventive goals by deterring future crimes. Despite ongoing difficulties, the Court's experience offers cautious optimism for international criminal justice and accountability.

Keywords: International Criminal Court (ICC), jurisdiction, Rome Statute, international criminal justice, legal effectiveness

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Introduction

The International Criminal Court (ICC) has made numerous decisions regarding its competence in the approximately two dozen situations it has faced since its establishment in 2002. This case law forms a sufficient basis to clarify several issues left open in the basic documents – deliberately or otherwise – during the Rome Conference and the preceding preparatory work.

In any judicial proceeding, the question of jurisdiction is pivotal. Without such law-based authority, no judge can claim to have the competence to sit in a case's trial; therefore, jurisdiction must be observed throughout the procedure. The ICC is also an international court, where this authority is not simply a quasi-automatic derivative of the sovereign power of a competent State; however, it must be based on a binding international treaty. The Rome Statute and the United Nations Charter are such treaties for the ICC, if the United Nations Security Council (UNSC) refers a matter to the Court. In this case, jurisdiction is based on Articles 25 and 103 of the Charter, providing the binding force of certain UNSC resolutions, overcoming the relative scope of the Rome Statute expressed by the *pacta tertiis* rule of the law of treaties.[1]

This is, however, a rather special scenario. The ordinary way to create, observe, and exercise jurisdiction for the ICC is based on the Rome Statute. A brief summary of these rules would be that jurisdiction must exist in three aspects: there is a need for 1) a personal or territorial jurisdiction; 2) temporal jurisdiction; and 3) subject matter jurisdiction. As the last one would demand focusing more on the substantive issues than the procedural ones, only the first two are discussed in this chapter.

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1. Territorial jurisdiction

After many necessary compromises within the PrepCom and at the Rome Conference, many terminological uncertainties remained in the text of the Statute.[2] Issues regarding jurisdiction demand that a position be taken on problems that traditionally fall within the scope of public international law, such as the rules of the law of treaties or those on statehood. The ICC observed various situations emerging from disputed territories: where only one contestant State was a party to the Rome Statute; where elements of crimes occurred in more than one country; and where not all concerned States were States Parties. Somewhat overlapping with temporal jurisdiction, the ICC obtained jurisdiction in situations where a State Party's territory

1 Iyi, 2018, p. 35.

2 For some examples, see Sadat and Carden, 2017; Kirsch and Holmes, 1998; Benedetti and Washburn, 1999.

seceded or was *prima facie* transferred to a non-State Party. Even the very question of statehood and the competence to decide on that question emerged and was eventually answered by the ICC judges.

1.1. South Ossetia – disputed territory

The first question to be examined relates to disputed territories between States, where one of the contestants is not a State Party to the Rome Statute. This scenario emerged in the case of Georgia. In 1990, South Ossetia – a territory of less than 4,000 km^2 – made a declaration to obtain its sovereignty while maintaining its position within the then-existing Soviet Union.[3] This semi-independence was never recognised by Georgia; after a two-year-long conflict, there was an attempt to reintegrate the area to Georgia. However, from the late 1990s, there was a slow, but steady series of Russian foreign policy measures, such as issuing Russian passports (i.e. nationality to South Ossetian residents) that gradually eroded Georgia's control of the area. In 2006, without authorisation from Georgia, a referendum on independence was held in the region, which was contested by an alternative voting organised by ethnic Georgians from the region.[4] The slow but steady Russian takeover continued up until 2008, when Georgian forces attempted to re-establish their hold over the territory. In a matter of days, the Russian military defeated Georgian troops; in the meantime, crimes within the ICC jurisdiction had been committed.[5] On 16 April 2008, President Putin signed a decree authorising official ties and relations with Abkhazia and South Ossetia. Despite these developments, South Ossetia was not recognised by the international community, except for five UN Member States, including Russia.[6] To date, Georgia considers its breakaway regions (together with Abkhazia) occupied territories. According to recent independent reports, today, Georgia does not have access or control over this territory.[7]

Against this background, the Office of the Prosecutor (OTP) filed a request for authorisation of an investigation.[8] Consequently, on 27 January 2016, the ICC ruled on whether it had jurisdiction over the situation emerging from a contested territory. The relevant OTP request proposed a pragmatic approach that aimed at finding a conclusion to the *de facto* situation. The OTP described this region as the 'geographical area of today's de facto territory of South Ossetia corresponds with the historic boundaries of the former South Ossetian Autonomous District'.[9] Without

3 Segate and Dovgalyuk, 2017.
4 Mchedlishvili, 2006.
5 For examples, see Jeiranashvili, 2019.
6 Medvedev, 2008.
7 Reuters 2023.
8 "Request for authorisation of an investigation pursuant to article 15" ICC-01/15-4 13 October 2015 | Office of the Prosecutor | Request.
9 Decision on the "Prosecutor's request for authorization of an investigation" ICC-01/15-12 27 January 2016 | Pre-Trial Chamber I | Decision, para. 20.

sorting out the intricacies of a territorial dispute, the OTP opened a way for the ICC to follow a pragmatic approach, respecting the boundaries of the mandate of the Rome Statute: 'For the purposes of this Application, the Prosecution considers that South Ossetia was a part of Georgia at the time of commission of the alleged crimes and occupied by Russia at least until 10 October 2010'.[10]

Pre-Trial Chamber I agreed with this submission, and *in lieu* of a detailed reasoning, added that the area 'is generally not considered an independent State and is not a Member State of the United Nations'.

Therefore, it can be observed that the ICC is unwilling to be used as a mere tool in territorial disputes, and refrains, as much as possible, from making declarations in such matters beyond what is absolutely necessary. In its decisions regarding Georgia, it gave a much higher regard to legally relevant factual findings than to official declarations.

1.2. Palestine – disputed statehood

The issue of Palestinian statehood has been long discussed in practice, and consequently, it is a well-documented question in international legal literature. This discussion is not reviewed here, mainly because the sheer size of such an attempt would stretch the scope of the present examination too far. In addition, the two-state solution has again become a dually heated political question in the recent tragic escalation of the conflict started by the 7 October 2023 systematic and barbaric attack of a group of predominantly Israeli civilian victims by Hamas; and the subsequent wide scale humanitarian horrors occurring during the ongoing Israeli military operation in the Gaza Strip.

From a political perspective, these recent events convey an impression of the last time the ICC examined its jurisdiction over the situation in Palestine being in a previous epoch. However, from a legal standpoint, the jurisdictional findings and the respective methodology of the 2021 decision of the Pre-Trial Chamber remain relevant. The examination leading to that decision started in 2015, focusing on alleged war crimes committed by Palestinian and Israeli forces during Operation Cast Lead. The situation was acknowledged as 'unique and highly contested' from the outset,[11] which is also marked by the unusually high number and diverse *amicus curiae* briefs. Among the many legal and factual challenges of the situation, the Pre-Trial Chamber opted for a more careful approach and relied on the relevant previous decisions of other State-driven international organs, namely the UN General Assembly[12] and the ICC's Assembly of State Parties. Following this method, it was observed that:

10 Ibid., para. 54.

11 Bensouda, 2019.

12 The implications of these decisions have been subject to discussion even before the ICC acted on the situation. See: Holvoet and Mema, 2013; Dugard, 2013.

> *the General Assembly has accepted Palestine as a non-Member observer State in the United Nations, and […] as a result, Palestine would be able to become party to any treaties that are open to 'any State' or 'all States' deposited with the Secretary-General.*

The Pre-Trial Chamber lacked the authority to review – and consequently to differ from – the UNGA Resolution[13] admitting Palestine as a non-member observer State to the UN.[14]

> *This Resolution drastically changed the practice of the United Nations Secretary-General as regards its acceptance of Palestine's terms of accession to different treaties, including the Rome Statute, as he concluded that Palestine would now be able to deposit instruments of accession and become a party to any treaties deposited with the Secretary-General that are open to 'all States' or 'any State'.*[15]

In light of the above developments, the Assembly of State Parties allowed Palestinian accession to the Rome Statute, following the due process prescribed by the Statute itself. The Chamber thus concluded that '[it] has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be ultra vires as regards its authority under the Rome Statute'.

Basing statehood on legal declarations only would befit a Kelsenian normative mirage; however, it is not followed by contemporary practice or an academic mainstream,[16] and factual examination is excluded by the fact that the ICC has no statutory competence to oversee those factors that usually help other international judicial *fori,* such as the International Court of Justice, to decide on statehood. Therefore, the Court decided to continue the procedure; however, the cautious wording of the decision avoids formulating a direct declaration on Palestinian statehood.

1.3. Bangladesh/Myanmar – multiple locations

International crimes are typically large-scale atrocities. Such human rights violations often occur in a larger geographical area, or impact a larger territory by forcing mass migration of refugees or internally displaced persons. All crimes defined in Article 5 require an examination of several elements; in some instances, the circumstances of the atrocities define the classification of the crime, and not the heinous

13 A/RES/67/19 UNGA Resolution 67/19.

14 Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine." ICC-01/18-143, 5 February 2021 | Pre-Trial Chamber I | Decision, para. 99.

15 Ibid., para. 98

16 Akande, 2012.

conduct itself. For instance, rape and other forms of sexual violence can be part of genocide, crimes against humanity, or a war crime.[17]

Due to this complexity of the crimes and the usually large geographical area where certain elements of crimes occur, it was reasonable to believe that in some cases, these elements will result in a transboundary crime, where several elements may occur in a non-State Party while others occur within the territory of a State Party of the Rome Statute. Despite this, the Statute does not provide clear guidance for such scenarios.

The crimes committed against the Rohingya minority in Myanmar resulted in their mass exodus to neighbouring Bangladesh. The latter is a State Party to the Statute, whereas the former is not.

The subject matter in this examination was the crime against humanity through deportation, where one element of the crime occurred when the perpetrator forcibly displaced, 'without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts'. The slight difference between deportation and forcible transfer lies in the target location of the forced movement. Whereas in the case of deportation, this movement is transboundary, "forcibly displaced" highlights that the act remains punishable even if it occurs within the borders of a single country.[18]

The usually uncontroversial territorial principle embodied in Article 12(2)(a) of the Rome Statute refers to the 'State on the territory of which the conduct in question occurred'. When the ICC first dealt with a case where the location of various elements of the crime spread to several States, it first sought guidance from the respective practice of States regarding territorial jurisdiction. State practice on criminal jurisdiction comes as a natural model for territorial issues, as the ICC relies heavily upon the transferred powers of the States, of course, except for universal jurisdiction.[19] Reiterating the old findings on the merits of the Lotus case,[20] Pre-Trial Chamber I ruled that

> *the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.*

Pre-Trial Chamber III later followed the same approach when observing that customary 'international law does not prevent States from asserting jurisdiction over acts that took place outside their territory on the basis of the territoriality principle'.[21]

17 For a detailed case law of the ICTY on these issues, see https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases

18 Lee, 2003.

19 Varga, 2006.

20 Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute." ICC-RoC46(3)-01/18-37, 6 September 2018 | Pre-Trial Chamber I | Decision, para. 66.

21 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the

2. Temporal jurisdiction

The temporal dimension of jurisdiction was tested in the first 25 years of the ICC. The commencement date of a State's acceptance of jurisdiction is a relatively simple matter – it may be different in the case of certain crimes within the jurisdiction of the Court; however, it has not yet been contested in the courtroom.

The ICC was established by means of an international treaty, and its consent to be bound by its rules can be withdrawn, as generically regulated by the Vienna Convention on the Law of Treaties and, more importantly, by the specific rules of the Rome Statute itself.[22] Burundi and the Philippines both withdrew their consent after certain procedural steps were taken by the ICC regarding their territories. This withdrawal occurred at different stages of the procedure; however, both suggest that *ex post facto* opting out from the jurisdiction of the ICC does not prevent the Court from processing the situation. Nevertheless , lack of State cooperation may render serving justice even more difficult than in ordinary cases.

2.1. Burundi – withdrawal after the ICC took action

Burundi is a densely populated, multi-ethnic State that has witnessed numerous atrocities during its modern post-colonial history: a 2002 UN Commission of Inquiry identified two genocides in the four decades that had passed after the restoration of independence; and a bloody civil war raged on from 1993 to 2005, although, from the turn of the millennium, many international efforts were made to reconcile the situation. Burundi ratified the Rome Statute on 21 September 2004. Still, extreme poverty remained a problem in the mostly rural country, and the reconciliation efforts failed, resulting in a 2015 unrest. Hundreds of thousands of people had to seek refuge in neighbouring countries.

An independent UN investigation was launched by the Human Rights Council in December 2015.[23] The OTP announced a preliminary examination of the situation in April 2016.[24] Burundi refused cooperation with the independent investigators and withdrew from the Rome Statute in October 2016. The consequences of the latter are regulated in detail by Article 127 of the Statute, which makes it clear that the withdrawal takes effect after one year,[25] and during that period, any and all obligations of the State under Statute are sustained. There is a somewhat cryptic closing reference in Section (2) of the Article, which sets out the consequences of such a withdrawal, stating that the withdrawal shall be without 'prejudice in any way the continued

Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar. ICC-01/19-27, 14 November 2019 | Pre-Trial Chamber III | Decision, para. 56.

22 See Rome Statute Article 127.

23 A/HRC/RES/S-24/1

24 Bensouda, 2016.

25 A later date may be specified.

consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective'.

A narrow interpretation of this text would limit continued court operations to matters that were already under consideration prior to the withdrawal, nevertheless, the nature of any judicial procedure is that a certain procedural step necessarily leads to another in a way prescribed by the relevant regulations, in the case of the ICC, mostly by the Rome Statute and the Rule of Procedure and Evidence. When withdrawal happens early on in a procedure, such a narrow interpretation would mean that the Court cannot continue its proceedings, even if it finds that it has jurisdiction over the matter. Such a narrow interpretation would be contrary to the object and purpose of the treaty because it would provide a free "get-out-of-jail" card to any powerful State leader committing international crimes, so that even the principle of effectiveness might be raised.

Therefore, it is not surprising that Pre-Trial Chamber III ruled differently when it had to decide whether to authorise the request of the OTP to investigate cases. Investigation takes place after the Court satisfies itself that it has jurisdiction over the case. The Chamber ruled,

> *if authorized, an investigation into the situation in Burundi would commence prior to the date on which the withdrawal became effective. Therefore, subsequent to the entry into force of its withdrawal, Burundi's obligation to cooperate with the Court in relation to such an investigation, if authorized, remains in effect for as long as the investigation lasts and encompasses any proceedings resulting from the investigation.*[26]

2.2. Philippines – ICC action after withdrawal

The situation in the Philippines revolved around the government's harsh "war on drugs" policy that was tantamount to crimes against humanity according to the submissions of the OTP. The Philippines became a State Party to the Rome Statute on 1 November 2011, long before the commencement of the contested policy. On 30 June 2016, Rodrigo Duterte was inaugurated as the president of the Philippines and promised originally to rid the country of illicit drug trafficking within six months. This turned out to be impossible, as the anti-drug campaign resulted in mass human rights violations and several extra-judicial killings. A few months later, in October 2016, Fatou Bensouda, then ICC Chief Prosecutor, issued the following statement:

26 Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi." ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017 | Pre-Trial Chamber III | Decision pp. 14-15, para. 26.

I am deeply concerned about these alleged killings and the fact that public statements of high officials of the Republic of the Philippines seem to condone such killings and further seem to encourage State forces and civilians alike to continue targeting these individuals with lethal force.

Extra-judicial killings may fall under the jurisdiction of the International Criminal Court ("ICC" or "Court") if they are committed as part of a widespread or systematic attack against a civilian population pursuant to a State policy to commit such an attack.

The Republic of the Philippines is a State Party to the ICC, and as such, the Court has jurisdiction over genocide, crimes against humanity, and war crimes committed on the territory or by nationals of the Philippines since 1 November 2011, the date when the Statute entered into force in the Philippines.
Let me be clear: any person in the Philippines who incites or engages in acts of mass violence including by ordering, requesting, encouraging or contributing, in any other manner, to the commission of crimes within the jurisdiction of the ICC is potentially liable to prosecution before the Court.

As the ICC examination continued, the OTP opened a preliminary examination into the situation in February 2018. A few days later, Duterte's government deposited a written notification of withdrawal from the Statute on 17 March 2018, which took effect on 17 March 2019. However, the preliminary examination into the situation could continue based on the last sentence of Article 127(2), and on 14 June 2021, Ms. Bensouda announced that her office requested judicial authorisation to continue with an investigation.

This authorisation was granted on 15 September 2021, when Pre-Trial Chamber I authorised the Prosecutor to commence an investigation of crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called "war on drugs" campaign.

This authorisation followed the Prosecutor's request to open an investigation, initially submitted on 24 May 2021 and filed in a public redacted version on 14 June 2021. The Chamber also received views on this request submitted by or on behalf of victims. In November of the same year, the Philippines submitted a motion to defer the investigation under Article 18(2) of the Statute. This tool is designed for States that are able and willing to genuinely prosecute crimes within the jurisdiction of both the ICC and the State concerned. A successful application would result in the investigation and subsequent trial of the case to return to the competence of the State, and the ICC moving to the background, observing the quality of the procedure. By 22 June 2022, the OTP considered that the conditions of such deferral had not been met, and therefore requested authorisation to resume its own investigation. On 26 January 2023, following a careful analysis of the materials provided by the

Philippines, Pre-Trial Chamber I granted the Prosecutor's request to resume investigation into the Situation of the Republic of the Philippines.

The first Pre-Trial Chamber ruling on the Philippines did not treat jurisdiction *ratione temporis* as a complex or central issue. In a short and straightforward manner, the Chamber based its findings simply – and correctly – on the long-standing customary rules of the law of treaties embodied in the 1969 Vienna Convention. Based on Article 70 thereof, the Chamber found that 'a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination'.[27] As an important clarification, the judges closed their relevant findings by highlighting that the 'exercise of such jurisdiction is not subject to any time limit'. Effectively, this statement reiterates that the lapse of time does not procedurally hinder the enforceability of the rights and obligations of a State that substantively existed at a certain time. The withdrawal is nonetheless effective in the sense that the Court has no jurisdiction – even in the same procedure – over the crimes committed after such withdrawal took effect.

The second ruling, which permitted the OTP to resume the investigation, did not change this perspective and upheld the issue as a matter of treaty law against the Philippines's argument that ICC actions were tantamount to an interference in its domestic affairs. In that regard, Pre-Trial Chamber III noted:

> *The Court's jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which the Philippines was a party at the time of the alleged crimes for which the investigation was authorised. By ratifying the Statute, the Philippines explicitly accepted the jurisdiction of the Court, within the limits mandated by the treaty, and pursuant to how the system of complementarity functions.*[28]

2.3. Darfur, Sudan – an ostensible withdrawal

The situation in Darfur, Sudan, is different from all the situations discussed above because jurisdiction here was not triggered by a State Party referral, but by a UNSC Resolution. With the correct application of the *nemo plus iuris* principle, it seems unequivocal that no State can withdraw a consent it never expressed. It was not even Sudan, but the Defence in jurisdiction in the Ali Abd-Al-Rahman (Ali Kushayb) case that contested the continued existence of the Court's competence.[29]

The jurisdiction of the Court in this situation is based on UNSC Resolution 1593; however, this was far from the last Security Council Resolution on Sudan. The

27 Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute. ICC-01/21-12, 15 September 2021 | Pre-Trial Chamber I | Decision, para. 111.

28 Public Redacted Version of "Authorisation pursuant to article 18(2) of the Statute to resume the investigation." ICC-01/21-56-Red, 26 January 2023 | Pre-Trial Chamber I | Decision, para. 26.

29 Pre-Trial Chamber II, Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302), 17 May 2021, ICC-02/05-01/20-391, para. 33.

Defence in the Ali Kushayb case challenged the jurisdiction *inter alia* based on the argument that the subsequent UNSC Resolution 2559 overruled Resolution 1593; thus, the jurisdiction of the ICC ceased to exist. The Chamber could have found compelling arguments for the falsity of these statements. First, at a general level, Resolution 2559 reaffirms all previous resolutions, but its provisions terminate certain institutions established by previous resolutions. However, it does not contain any specific reference to the ICC procedure. Pre-Trial Chamber II followed a different approach and did not even address the above issues. Instead, the judges outrightly rejected the examination of the merits of the argument and, instead, focused on the impact of such contentions. They noted that

> *the very idea that the effect of an act triggering the jurisdiction of the Court could be simply taken away by a subsequent act – and one not even relating to the same subject matter – runs counter to fundamental and critical features of the system governing the exercise of the Court's jurisdiction, as enshrined in the Statute as a whole.*[30]

More importantly, from the perspective of the current examination, the Chamber also observed that the

> *withdrawal of a State Party from the Statute, whilst provided for under article 127 and therefore possible, has no effect on the previously established jurisdiction of the Court and takes effect only one year after the date of its receipt at the earliest; also, it has no impact either on already ongoing proceedings or on duties of cooperation with the Court in connection with investigations and proceedings having commenced prior to the date on which the withdrawal became effective, nor does it otherwise prejudice 'the continued consideration of any matter which was already under consideration by the Court' prior to that date.*[31]

3. Conclusion

Twenty-five years after its establishment, the "end of the beginning" is over for the ICC. It faces many criticisms regarding its effectiveness. It seems to overcome charges of being biased against African leaders; however, it is condemned to inaction in several shocking humanitarian catastrophes.[32] Against all odds, the Court

30 Ibid.
31 Ibid.
32 Geneuss and Mariniello, 2019.

still exists, and has made considerable progress, and despite all the contemporary difficulties faced by the international criminal justice and the rules-based world in general, the lessons learned from the above disputes at the fringes of the jurisdictional rules of the Rome Statute outline a picture that warrants some optimism.

The decisions cited above show that the ICC closely follows a sense of legality derived from the general public international law framework. In the contemporary fragmented system of international law, the reluctance of the judges to develop new interpretations of existing rules and institutions on territorial sovereignty, jurisdiction, or the law of treaties is unfortunate. This tendency may surely increase legal security and the overall credibility of the international criminal justice system.

Naturally, a deeper look leads the beholder to a far more pessimistic, even sinister undertone. As withdrawal from the jurisdiction of the Court is a clear sign that – at the very least – the government of that State does not wish to continue cooperating with ICC organs, one should be concerned about what can happen to cases emerging from such situations. The lack of cooperation makes it difficult, if not impossible, to continue the investigations with any hope of finding sufficient evidence to prove the guilt of an individual beyond a reasonable doubt at the trial phase.

To address this problem, a distinction should be made between the retributive and preventive functions of any criminal legal system.

From a retributive perspective, the world has yet to learn about the patience of the international criminal justice system. The lapse of time – even if measured in decades – does not hinder or terminate future criminal prosecutions. Watching the legislative developments leading to the acceptance of the text of the Statute, one would not have bet large amounts that the ICC would issue an arrest warrant against the reigning leader of a UNSC permanent Member State. The arrest warrant against Russian President Vladimir Putin may lead to further conclusions. Omar Hassan al-Bashir toured the world in the limelight, even after an arrest warrant had been issued against him. In his diplomatic visits, he also entered the Republic of South Africa once. In comparison, a few years later, even President Putin, having also become a wanted person by the ICC, opted to send only a video message to the politically significant BRICS summit.

In terms of the preventive function, the effects of proclaiming an investigation are two-fold: the perpetrators could actively seek to destroy evidence, including tampering with witnesses, which, in turn, may lead to a direct threat to the lives of those involved. Furthermore, powerful persons of interest may be in a position to effectively thwart criminal proceedings. In comparison, the stigma of an ICC arrest warrant may not be powerful, as it does not necessarily result in a global manhunt for the alleged perpetrator. However, it makes making friends and relying on old friendships more difficult for those pariah leaders and even their political systems. It separates wanted persons from other world leaders and makes it politically more costly to support them openly. The Augusto Pinochets of the future cannot be certain that after their crimes and days in power are over, they will receive only nice celebratory gifts during their peaceful retirement from their former colleagues. Noting,

finally, that so far in human history, no political system has lasted forever, and domestic politics, particularly in violent or conflict-ridden societies, may abruptly lead to rapid changes, the preventive function of the jurisdictional regime of the ICC may result in adding merit to the old wisdom of “no sleep for the wicked”.

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