

INTERDEPENDENCE AT THE INTERNATIONAL CRIMINAL COURT: RECONCEPTUALIZING OUR UNDERSTANDING OF THE COURT AND ITS FAILURES

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ABSTRACT

The International Criminal Court is at an inflection point. The ICC remains the centerpiece of a fragile system of international justice and is needed more today than it was at the conclusion of the Rome Conference in 1998. Yet, the Court faces significant challenges and needs to step up its performance to deliver justice more effectively to communities affected by crimes under the Statute, particularly in today's world where geopolitics are characterized more by polarization than cooperation. A 2020 Independent Expert Review (IER) made a series of recommendations to improve the Court's functioning, however, this article suggests that the IER is looking for solutions in the wrong places because of a fundamental, yet common, misunderstanding of the way the Court is structured.

This Article argues that, rather than being a fully independent Court, the Rome Statute created a series of interdependencies between actors in the ICC system. These interdependencies manifest internally, between different branches of the Court, and externally, between the Court and states and the Court and the United Nations Security

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Council. Through relationships of interdependence, the Rome Statute constructs balances between different actors in the system, making one actor reliant on another fulfilling its obligations to ensure the Court can function effectively. When understood as an institution underpinned by a network of interdependencies, we need to look at and evaluate the Court in a new light. After twenty years of practice, we can now see that many of the interdependencies have failed and the carefully designed balance between actors envisaged in the Statute have been thrown out of alignment.

Many of the criticisms against the Court stem from its failure to bring cases in situations where mass atrocities are being committed, from the way in which cases are constructed and have fallen apart at trial or on appeal for lack of evidence, and from selective prosecutions. Yet, rather than these being failings of the Court as an institution, many of these criticisms actually flow from failings of the systems of interdependence and particularly the failure of states and the Security Council to satisfy their Rome Statute commitments.

This Article analyzes how these systems of interdependence were created at the Rome negotiations, further solidified by subsequent supporting architecture to the Rome Statute, and ultimately have failed in a myriad of ways. The Article concludes with a range of proposals for restoring the balance between the Court and external actors to better ensure that the Court can fight off criticism and satisfy its mandate of ending impunity for atrocity crimes.

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INTRODUCTION

The International Criminal Court (ICC) is at an inflection point. The Court faces significant criticisms and challenges, and it needs to step up its performance to deliver justice more effectively to communities affected by the crimes under the Statute. Under a new generation of leadership—six new judges and a new Prosecutor were appointed in March 2021—the time is ripe for the Court to make changes to strengthen its operations. In December 2019, the Assembly of States Parties (ASP) convened a group of independent experts to review the work of the Court and to propose ways to strengthen the Court and Rome Statute system.¹ The findings of the Independent Expert Review (IER) were delivered to the ASP on September 30, 2020 and made several concrete recommendations directed at the Court itself, focusing on the governance, the judiciary, and the work of the Office of the Prosecutor (OTP).² All of these recommendations are focused on internal reforms and do not address the failure of external actors integral to the Court’s functioning, namely, states and the United Nations Security Council. Consequently, this Article argues that the IER is looking for solutions

1. Int’l Criminal Court, Assembly of States Parties, *Review of the ICC and the Rome Statute System*, ICC-ASP/18/Res.7 (Dec. 6, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf [<https://perma.cc/8F4H-68E6>] [hereinafter ICCASP].

2. *Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report* (Sept. 30, 2020), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf [<https://perma.cc/3VA9-RPGN>] [hereinafter IER Final Report].

in the wrong places because of a fundamental, yet common, misunderstanding of the way the Court is structured.

While the Rome Conference to establish the ICC was framed around the goal of creating an independent court, this Article argues that, instead, the Rome Statute created a network of internal and external *interdependencies* between actors in the Court system, including branches of the Court, states, and the Security Council. When considering ways to combat criticisms and solve the perceived problems of the Court, it is necessary to look at the whole *interdependence* picture, rather than focus solely on the Court as an independent institution devoid of external input, because it is not. This is what the IER misses. The IER lays all blame for failures at the doors of the Court and the vast majority of its reform proposals depend on internal modifications to processes and procedures. These actions entirely ignore the role of external actors, namely states and the Security Council, and the failure of both to fulfill their duties and obligations as contained in the Statute. If we instead take a step back and appraise the Court through the lens of *interdependencies*, we see that the genesis of much of the criticism levied at the Court belongs with external actors.

This Article argues that *interdependence* is not inherently ineffective or normatively problematic to a successful court system. However, when an *interdependent* relationship is disturbed by an actor not behaving in the way envisaged under the Statute, the carefully crafted equilibrium is thrown out of balance, resulting in tension or failures at the Court.

To unpack the *interdependence* systems created at Rome, Part I of this Article develops a nuanced understanding of independence in domestic court systems. First, it examines how independence is achieved domestically through the system of separation of powers and checks and balances. Next, it conceptualizes our understanding of independence in the context of international courts, drawing on some of the primary debates that have swirled around the nature and value of independence in international court systems. Finally, it frames how independence was debated at the Rome Conference to establish the ICC and how, ultimately, a delicate web of *interdependence* was created. Part II analyzes a series of case studies from the practice of the Court in which we can see that the *interdependence* equilibrium of the Rome Statute is not working as it was intended. Part III concludes with a range of proposals, from radical to modest, for restoring the balance between the Court and external actors—states and the Security Council.

I. A NUANCED UNDERSTANDING OF INDEPENDENCE

Independence is considered as the cornerstone of a legal system, yet it is not a normative value in and of itself, rather it is one that informs other values of a legal system, such as ensuring the legitimacy of that system. There is considerable debate about what independence means, and what level of independence is desirable in a judicial system—both domestic and international. These debates are intimately intertwined with debates related to the purpose of courts as a whole.³ Without engaging with the “purpose of courts” question here, as a starting point for this Article, independence is interpreted as an individual or entity’s ability to make decisions and take actions without interference.⁴ This Article argues that *interdependence* manifests when an individual or entity is unable to fulfill their function without relying on someone else.

It is important to clarify the specific terminology around independence in the context of courts, as it tends to be a catch-all term used for many things. In fact, different categories of independence exist that concern different actors within a court structure: (i) institutional independence is concerned with the overarching structure of a court as a whole and its independence from external actors; (ii) judicial independence refers specifically to the judicial branch of a court; (iii) prosecutorial independence is concerned with the *independence* of the prosecutorial branch, or prosecutor’s office, specifically. Within these categories, there are two different layers of independence. The first layer is the independence of the branch as a whole, e.g., the independence of the judiciary from other branches of a court and from external actors; this Article will refer to this layer as branch independence. Below that, there is the personal independence of individual office holders, for instance, individual judges and the Chief Prosecutor. This Article will refer to this layer as personal independence.

A. Independence in Domestic Courts

In the domestic context, at the institutional level, independence is sought from improper influence or interference by the other branches of government. The independence of the judicial branch is vital to

3. See, e.g., Eric Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005); Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L. J. 271 (2003); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899 (2005).

4. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999).

ensuring that a court system is perceived as legitimate and accepted by the community in which it operates. This is often achieved through the separation of powers doctrine, which ensures that the neither the legislative, executive, nor judiciary can exercise the core functions of another branch, nor can any branch wield too much power in the system of government as each branch acts as a check and balance on the actions of the others.⁵

With regard to the personal independence of judges, across different legal systems a central means of achieving the separation of powers is through the judicial appointment system. In France and Germany, the judiciary is a career position, held until retirement, so judges are never required to face elections.⁶ In the United States, independence is achieved through lifetime appointments at the federal level.⁷ It differs at the individual state level: in some US states appointments are made by the governor or state legislature, whereas in others, judges are elected and subject to reelection. The difference between the federal system and individual states in the United States is instructive of the way we understand different approaches to independence and underscores the differing interpretations of the role of judges: States with lifetime judicial appointments may tend to prioritize appearances of judicial independence. Conversely, in those states that require judicial reelection, the paramount goal may be responsiveness or accountability to the electorate and the broader community. Of course, this does not imply that these judges are not independent, however, subjecting a judge to reelection can certainly affect the independence of their actions as they are mindful of their reelection prospects in every decision they make.⁸

Prosecutorial independence is operationalized differently across domestic legal systems, taking into account their particular structural contexts. In the United States, independence is manifested through prosecutorial discretion, which underpins the entire justice system at

5. For example, in the United States, separation of powers is enshrined in the Constitution, which has a system of checks and balances to ensure the separation of powers between the three branches. In the French system, the separation of powers between the executive, legislature and judiciary is enshrined in the Constitution of the Fifth Republic, 1958. The German system derives its structure from the Basic Law for the Federal Republic of Germany and subdivides the three branches of government into six main bodies, ensuring their separation.

6. See, e.g., John P. Richert, *Recruiting and Training Judges in France*, 57 JUDICATURE 145 (1973); Johannes Riedel, *Training and Recruitment of Judges in Germany*, 5 INT'L J. FOR CT. ADMIN. 42 (2013).

7. U.S. CONST. art. III, para. 2.

8. See, e.g., Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133 (1998).

both the state and local levels. Prosecutors have very broad discretion to select and bring charges against accused,⁹ or to engage in plea bargaining, making them very powerful actors in the American justice system.¹⁰ At the federal level, the President delegates his prosecutorial authority to each district through political appointments, nominating a US Attorney who is subject to Senate confirmation.¹¹ At the State level, there are more than 2,300 elected state prosecutors.¹² Each of these elected officers are held accountable by the voters at election time, raising concerns about the political influence of the electorate and donors in being able to sway prosecutorial decision making.¹³ Contrast this with the French legal system, where prosecutors are a branch of the civil service and prosecutorial strategy is set at a national level by the Minister of Justice to ensure uniformity of application.¹⁴ To ensure independence, the capacity of the Minister to intervene in individual prosecutorial decisions is limited,¹⁵ and prosecutors are empowered to determine whether or not to prosecute and what charges to bring, as well as *composition penale* (a range of alternatives to prosecution). Prosecutors play an investigatory role tasked with uncovering the truth of the matter at hand and are required to investigate both inculpatory and exculpatory evidence.¹⁶ Similarly, in Germany, career prosecutorial civil service members are expected to be objective and investigate both inculpatory and exculpatory evidence.¹⁷

9. The Supreme Court has said that “Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.” *United States v. Batchelder*, 442 U.S. 114, 124 (1979).

10. See, e.g., David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016).

11. The prosecutorial power of the President is part of his executive power derived from Art II, section 3, of the US Constitution: the President “shall take care that the laws be faithfully executed.” U.S. CONST. art. II, § 3.

12. *Innovation in Criminal Justice*, INST. FOR INNOVATION IN PROSECUTION AT JOHN JAY COLL., <https://www.prosecution.org/mission#:~:text=Innovation%20in%20criminal%20justice,that%20impact%20all%20of%20us> [<https://perma.cc/HR6V-R3G4>] (last visited Feb. 12, 2022).

13. See, e.g., Sklansky, *supra* note 10.

14. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 35 (Fr.); see, e.g., Mathilde Cohen, *The French Prosecutor as Judge. The Carpenter’s Mistake? in PROSECUTORS AND DEMOCRACY* 109 (Máximo Langer & David Alan Sklansky eds., 2017).

15. See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 30 (Fr.). Another controversial reform created a new prosecutorial office to tackle complex white-collar crimes.

16. See, e.g., GWLADYS GILLIÉRON, *PUBLIC PROSECUTORS IN THE UNITED STATES AND EUROPE: A COMPARATIVE ANALYSIS WITH SPECIAL FOCUS ON SWITZERLAND, FRANCE AND GERMANY* (Springer 2014).

17. See e.g. Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. LEGAL EDUC. 433, 438 (2006).

Despite variety in form, this brief overview across domestic legal systems shows that independence is the sought-after goal, achieved through the separation of powers of different branches of government. Although there is no single model for how states achieve separation of powers, each system is characterized by the same independence ambitions. Each state aims to define the boundaries of interaction, overlap and oversight between different branches within the system to ensure that the tension between the branches is maintained, thus securing the system, and allowing it to function. A domestic structure is working as intended when each branch can operate independently, without interference from other branches. The overarching rationale for independence is to uphold the legitimacy of the overall court system and its component parts; legitimacy that is attained by ensuring independence from political interference by separating the courts from the different branches of government.

Concerns about independence from political interference are only heightened in the context of international courts. The concept of a tripartite separation of powers does not map neatly onto the international system, where there is no single executive and legislature from which to be independent. Instead, at the international level, there are many different unique interests to balance: between states and courts as an institution, between states and different branches of courts, between different branches within courts themselves, and between individual actors in a court system vis-à-vis their relationship with states. At each level, there is the potential for political interference from states, which has the capacity to impact the independence—and, thus, the legitimacy—of the international institutions.

International courts are the creation of states and states will often act in their own self-interest in designing court systems. Indeed, while “the project of international law has, for more than a century, sought to construct a zone of autonomous decision-making, immune from political considerations . . . international adjudication is, almost by definition, an intensely political one.”¹⁸ International courts do not operate in a vacuum; to entirely divorce their operation from political realities is likely unattainable. And, in some instances, independence from those realities is not desirable. In the international context, solutions to the independence conundrum run into the challenges posed by creating a system that draws upon the practice of different domestic systems,

18. Tom Ginsburg, *Political Constraints on International Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 484 (Cesare P. R. Romano, Karen J. Alter, & Yuval Shany eds., 2013).

which take diverse, context-dependent, approaches to the independence question. This challenge is particularly acute in the ICC system, from the interpretation of institutional, judicial, and prosecutorial independence at the Rome Conference incorporated into the Statute, to the failures of some of those conceptions evident after 20 years of practice of the Court.

B. Conceptualizing Independence in the Context of International Courts

There have been significant and heated debates about the role of independence in international courts. These debates reveal different perspectives on the meaning and desirability of independence at the international level. Unpacking these deliberations illuminates how different versions of these perspectives may have influenced negotiators at the Rome Conference. At stake is the overall desirability of independence from state interference and how legitimacy and credibility of international courts is constructed.

At one extreme, Professors Eric Posner and John Yoo are highly critical of judicial independence at international tribunals. They suggest that an independent international court neglects the interests of state parties and bases its decision making on moral ideals, which “prevents international tribunals from being effective.”¹⁹ They define independence as occurring when “members [of the court] are institutionally separated from the state parties,” including through fixed term appointments, salary protection, and compulsory jurisdiction.²⁰ Yet Posner and Yoo see this type of independent international courts as a threat to sovereignty which seeks to undermine the political will of the very states that established the court in the first place. They suggest that the only effective international courts are those that are *dependent* on the states that create them.²¹ This approach underscores an extreme interpretation of the purpose of international courts: to serve the sovereigns that create them, by ensuring favorable decisions in matters brought before international tribunals.

On the other hand, Professors Ruth Mackenzie and Philippe Sands suggest that judicial independence is a “significant factor in maintaining the credibility and legitimacy of international courts and tribunals.”²² They recognize, however, that “it is less apparent what the meaning

19. Posner & Yoo, *supra* note 3, at 7.

20. *Id.* at 7.

21. *Id.* at 6.

22. Mackenzie & Sands, *supra* note 3, at 271.

of independence and impartiality in the context of international courts should be . . . [given that] the ideal of judicial independence is culture specific.”²³ They flag several dimensions of judicial independence that may give rise to *independence* challenges: first, they recognize the nomination, selection and tenure of judges as politicized processes, particularly because a state is unlikely to put forward a candidate who does not “share (in general terms) the value systems of the nominating state.”²⁴ Second, they recognize the challenges of actual or appearance of bias that can occur when a judge has had prior involvement with the parties or an issue before the tribunal.²⁵ Finally, they raise concerns about the relationship between judicial organs and political organs, particularly “the degree of control exercised by political organs over judicial bodies through financial and procedural mechanisms [which] may be significant.”²⁶ Despite all these challenges, Mackenzie and Sands see independence as a desirable, if difficult to achieve, goal. From this perspective, the purpose of courts is to be an independent arbiter of disputes that has credibility within the international community.

Responding directly to Posner and Yoo, and falling somewhere in between them and Mackenzie and Sands, Professors Laurence Helfer and Anne-Marie Slaughter point to a theory of the “constrained independence” of international courts.²⁷ “Constrained independence” means that states voluntarily form independent international courts to “enhance the credibility” of their legal commitments to the international community. From this perspective, the role of courts is to encourage states to comply with obligations they have agreed to. States then design the institution and its relationship to the states to ensure that judges are “operating within a set of legal and political constraints,”²⁸ whereby independent tribunals can “hold states to the precisely defined international obligations to which they had initially agreed.”²⁹ The flaw to this logic is that “international law is rarely so clear.” Instead, tribunals can fall somewhere on what Helfer and Slaughter call a “spectrum of judicial expansiveness,” depending on the type of dispute the tribunal is designed to solve—those that may require amendments to domestic

23. *Id.* at 275.

24. *Id.* at 277.

25. *Id.* at 280.

26. *Id.* at 285.

27. Helfer & Slaughter, *supra* note 3, at 902.

28. *Id.* at 902.

29. *Id.* at 937.

law, those that regulate common goods or problems, and those that create rights.³⁰

Each pair of authors conflates institutional and judicial independence, using the latter as a proxy for the former, and focuses solely on independence from external actors, i.e., states. In doing so, each duo has failed to fully unpack the nature of independence relationships between different actors within court systems and the challenges of independence faced by international courts trying to achieve balance. By failing to address the nuances, the authors have missed part of the story of independence in international court systems, as their analyses obscure the complex relationships between different categories of independence, and entirely ignores the question of independence of internal actors from one another. This Article adds a deeper understanding of the challenges of independence faced by the ICC. It analyzes three different categories of independence—institutional, judicial, and prosecutorial—and at two layers—branch and personal. And it examines both external and internal relationships and how the Statute constructs a balance between different actors. This analysis shows that, when accounting for these different categories of independence, full independence across all branches was not what the ICC system was set up to achieve.

C. Framing Independence at the Rome Conference to Establish the International Criminal Court

Prior to the Rome negotiations to establish a statute for the ICC, Louise Arbour, then Chief-Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, stated: “The greatest threat . . . to the legitimacy of the Court would be the credible suggestion of political manipulation of the Office of the Prosecutor, or of the Court itself, for political expedience”³¹ Cognizant of this threat, the independence of the Court consumed significant debate time at the Rome Conference.

There were opposing visions for what degree of independence was desirable for the new Court and how different kinds of institutional, judicial, and prosecutorial independence could be achieved. Those states that ascribe to a similar view of independence as a threat to sovereignty, sought to negotiate political constraints into structure of the Court in order to skew the balance in favor of states to ensure the new

30. *Id.* at 937–40.

31. Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS TO JUST. 207, 213 (1999).

institution would be accountable to the states creating it.³² Other states fought for independence from external political influence of states as the means by which the Court would be legitimate and effective in its operation.³³ To deal with the tension between these competing visions of the future Court, trade-offs between independence and accountability of different actors in the system were required in order to achieve a system that would meet with broad enough support from the international community that the statute would be accepted and adopted by states.³⁴

Ultimately, the competing goals of states were reconciled in a Rome Statute that represents a compromise. The drafters needed to achieve a balance in a very different environment to domestic courts, and the compromise eventually adopted did not establish a fully independent institution, nor branches of the Court that are fully independent from one another. Instead, the Rome Statute created a series of *interdependencies* between different actors in the system. *Interdependent* relationships manifest both externally, between the Court and states, and internally, between different branches of the Court. The *interdependent* relationships represent a delicate balancing act under which the Court as an institution as well as different branches of the Court are unable to fulfill their functions without reliance upon other actors in the system. This carefully crafted equilibrium requires each actor in the system to operate exactly in the way prescribed by the Statute to maintain the balance and ensure the successful operation of the Court, which has proved more difficult in practice than in theory.

32. See, e.g., U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *30th Meeting* ¶ 105, U.N. Doc. A/CONF.183/C.1/SR.30 (Vol. II) (July 9, 1998) [hereinafter Establishment of an ICC, *30th Meeting*]; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *10th Meeting*, ¶ 13, U.N. Doc. A/CONF.183/C.1/SR.10 (Vol. II) (June 22, 1998) [hereinafter Establishment of an ICC, *10th Meeting*]; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *35th Meeting*, ¶ 6, U.N. Doc. A/CONF.183/C.1/SR.35 (Vol. II) (July 13, 1998) [hereinafter Establishment of an ICC, *35th Meeting*].

33. See, e.g., U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *3rd Plenary Meeting*, ¶ 52, U.N. Doc. A/CONF.183/SR.3 (June 16, 1998) [hereinafter Establishment of an ICC, *3rd Plenary Meeting*]; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *5th Plenary Meeting*, ¶ 2, U.N. Doc. A/CONF.183/SR.5 (June 17, 1998) [hereinafter Establishment of an ICC, *5th Plenary Meeting*].

34. Professors Jeffrey Dunnoff and Mark Pollack have written about trade-offs in international courts as a “judicial trilemma.” They argue that, while institutional design can center on (i) judicial independence, (ii) judicial accountability, and (iii) judicial transparency, it is only possible to achieve two out of three of these. See Jeffrey L. Dunnoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT’L L. 225, 226 (2017).

1. Institutional *Interdependence* at the ICC

The ICC was born out of cooperation between states, and there was recognition amongst the Rome delegates that cooperation could not begin and end with the Conference. “[C]lose, genuine and effective cooperation” between the states and the ad hoc tribunals had been essential,³⁵ and cooperation between states and the new Court would be no less vital to its effective functioning. Indeed, “the true test of success would ultimately depend upon the cooperation of the international community in making the Court work effectively in practice.”³⁶ There was recognition that the “firm political commitment [that states had] demonstrated throughout the Conference must be further strengthened to secure the future of the Court.”³⁷

There was some disagreement as to how this cooperation could be achieved. Some states sought a flexible system of voluntary cooperation on a contractual basis,³⁸ while others believed that cooperation would be enhanced if mandated by the Statute.³⁹ Still others suggested that states “must be obliged to comply with court orders.”⁴⁰ Whether there should be any exception to State cooperation was also a contested issue.⁴¹

The Rome delegates ultimately adopted a cooperation regime under part IX of the Statute which mandates external *interdependence* between the Court and states. Under Article 86, there is a general obligation for States Parties to “cooperate fully” with the Court.⁴² The

35. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *2nd Plenary Meeting*, ¶ 93, U.N. Doc. A/CONF.183/SR.2 (June 15, 1998) [hereinafter Establishment of an ICC, *2nd Plenary Meeting*].

36. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *9th Plenary Meeting*, ¶ 83, U.N. Doc. A/CONF.183/SR.9 (July 17, 1998) [hereinafter Establishment of an ICC, *9th Plenary Meeting*].

37. *Id.*

38. *Id.* ¶ 81.

39. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *4th Plenary Meeting*, ¶ 40, U.N. Doc. A/CONF.183/SR.4 (June 17, 1998) [hereinafter Establishment of an ICC, *4th Plenary Meeting*].

40. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *3rd Plenary Meeting*, ¶ 87, U.N. Doc. A/CONF.183/SR.3 (June 16, 1998) [hereinafter Establishment of an ICC, *3rd Plenary Meeting*].

41. In favor of no exceptions, *see, e.g.*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *6th Plenary Meeting*, ¶ 57, U.N. Doc. A/CONF.183/SR.6 (June 17, 1998) [hereinafter Establishment of an ICC, *6th Plenary Meeting*]; in favor of limited exceptions, *see* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *2nd Plenary Meeting*, ¶ 42, U.N. Doc. A/CONF.183/SR.2 (June 15, 1998); Establishment of an ICC, *4th Plenary Meeting*, *supra* note 39, ¶ 40.

42. Rome Statute of the International Criminal Court art. 86, July 17, 1998, 2187

Statute further provides, in Article 87(5), that the Court can “invite” cooperation and assistance from non-State Parties by means of an “*ad hoc* arrangement, an agreement with such State or any other appropriate basis.”⁴³ This creates a delicate balance between state cooperation on the one hand and the Court’s ability to carry out investigations and effect arrests on the other, making the Court reliant on states for their cooperation in collecting evidence, conducting searches and seizures, and questioning any person being investigated or prosecuted,⁴⁴ as well as the arrest and surrender of persons.⁴⁵ If states do not cooperate, the Court is unable to proceed with investigations into situations and cases. The Rome Statute provides few means of redress the Court can impose on external actors for their failure to act.

Another protracted debate stemmed from whether there should be a relationship between or independence from the new Court and the United Nations.⁴⁶ During the debates, one faction of states heavily favored the involvement of the Security Council to grant the Court jurisdiction,⁴⁷ while a second faction maintained there must be independence between the two.⁴⁸ Both groups argued that the approach they favored would best uphold the independence and legitimacy of the Court. Ultimately, the compromise achieved at Rome vis-à-vis the Court and the Security Council is a mechanism of external *interdependence* by which the Security Council can refer a matter to the Court in “a situation in which one or more of such crimes [in article 5] appears to have been committed,” per Article 13(b).⁴⁹ The Statute does provide for the Security Council to veto investigations, but there is a deferral mechanism under Article 16 whereby the Security Council can adopt a

U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (“States parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”).

43. *Id.* art. 87, ¶ 5.

44. *See id.* art. 87, 93, 99.

45. *See id.* art. 89–92.

46. *See, e.g.*, Establishment of an ICC, *5th Plenary Meeting*, *supra* note 33, ¶ 63; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *7th Plenary Meeting*, ¶ 44, U.N. Doc. A/CONF.183/C.1/SR.7 (Vol. II) (June 18, 1998) [hereinafter Establishment of an ICC, *7th Plenary Meeting*].

47. *See, e.g.*, Establishment of an ICC, *30th Meeting*, *supra* note 32, ¶ 105.

48. *See, e.g.*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *10th Plenary Meeting*, ¶ 80, U.N. Doc. A/CONF.183/C.1/SR.10 (Vol. II) (June 22, 1998); Establishment of an ICC, *6th Plenary Meeting*, *supra* note 41, ¶ 63; Establishment of an ICC, *4th Plenary Meeting*, *supra* note 39, ¶ 67; Establishment of an ICC, *7th Plenary Meeting*, *supra* note 46, ¶ 106.

49. *See* Rome Statute, *supra* note 42, art. 13(b).

resolution under Chapter VII of the UN Charter to defer an investigation or prosecution for a renewable 12-month term.⁵⁰

Finally, the Court is funded by state contributions, creating a deep external *interdependence* relationship with states. The financing of the Court is dealt with in Part XII of the Rome Statute, and provides that the primary funds for the Court come from assessed contributions made by States Parties and funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.⁵¹ The Rome Statute does not provide any guidance related to a state's inability or refusal to pay. This *interdependency* has the potential to severely disrupt the balance envisaged in the Statute, which requires state contributions on one hand, balanced against the Court's ability to function: for example, to pay staff, to conduct investigations and prosecutions, to maintain a court premises, to house accused persons, and to carry out outreach activities. If states refuse or are unable to pay, particularly in significant numbers, the whole Court system is in jeopardy as it cannot function without sufficient financing.⁵²

In each of these *interdependence* relationships, the Court is put at a power disadvantage: it is reliant on external actors (states and/or the Security Council) to act in the way prescribed in the Statute but is powerless to do anything to ensure states fulfill their obligations and maintain the equilibrium envisaged under the Statute to enable the Court to conduct its work.

2. Judicial *Interdependence* at the ICC

Much has been written specifically about judicial *independence* at international tribunals. For example, Theodor Meron identifies several necessary elements of an independent international judiciary. These include public respect for the Court, a transparent judicial process, reasoned decision making, a mechanism for review, and a judge's self-perception as independent and impartial.⁵³ Several of these are

50. *See id.* art. 16.

51. *Id.* art. 115.

52. The precarity of this arrangement became apparent recently in the near collapse of the Special Tribunal for Lebanon as a result of states withdrawing their financial support. *See e.g.*, David Enders, *Lebanon's Economic Woes Threaten Terrorism Tribunal*, FOREIGN POL'Y (June 9, 2021), <https://foreignpolicy.com/2021/06/09/lebanon-economy-terrorism-tribunal-closing> [<https://perma.cc/6A9U-53K2>]; Atticus Blick, *The Special Tribunal for Lebanon: How did it Survive for so long?*, EJIL:TALK! (Sept. 20, 2021), <https://www.ejiltalk.org/the-special-tribunal-for-lebanon-how-did-it-survive-for-so-long> [<https://perma.cc/9KF7-MTC6>].

53. Ferejohn, *supra* note 4, at 353.

applicable at both the branch and personal level. In particular, the personal independence of judges must be counterbalanced through individual accountability for decision making, achieved through appeals processes, and limited term appointments.

There was never any suggestion that states would not be central to nominating and electing judges to the Court during the Rome negotiations. The Statute ultimately incorporated an external *interdependence* mechanism whereby states select the candidates and elect eighteen judges for non-renewable nine-year terms,⁵⁴ drawing from “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices,”⁵⁵ with competence in both criminal law and procedure, and international law.⁵⁶ Nominations are made by any State Party, who may put forward one candidate for any given election.⁵⁷ Judges are elected by secret ballot at a meeting of the ASP.⁵⁸ There cannot be more than one judge of the same nationality on the bench,⁵⁹ and the States Parties are required to take into account “(i) the representation of the principal legal systems of the world; (ii) equitable geographic representation; and (iii) a fair representation of female and male judges.”⁶⁰ This system creates *interdependence* between states and the judiciary, both at the branch level and in terms of individual judges, who are nominated and elected by the ASP. This *interdependence* balances state action in electing qualified, competent candidates against the ability of the Court to fulfill its mandate. Without qualified judges, the Court is unlikely to be able to manage complex trials or achieve convictions that will be upheld on appeal: both failures that can be interpreted as an indictment of the Court as an international justice mechanism.

The judges at the ICC are divided into Pre-Trial, Trial and Appeals Chambers,⁶¹ and judges are assigned to various chambers based on the functions performed by each division and the qualifications and experience of individual judges, while ensuring “an appropriate combination of expertise in criminal law and procedure and in international law.”⁶² The PTC plays a significant and *sui generis* role in international courts

54. Rome Statute, *supra* note 42, art. 36, ¶¶ 1, 9(a).

55. *Id.* art. 36, ¶ 3(a).

56. *Id.* art. 36, ¶ 3(b).

57. *Id.* art. 36, ¶ 4(b), (c).

58. *Id.* art. 36, ¶ 6(a).

59. *Id.* art. 36, ¶ 7.

60. *Id.* art. 36, ¶ 8(a).

61. *Id.* art. 34(b).

62. *Id.* art. 39, ¶ 1.

of overseeing the work of the Prosecutor, particular with regard to *proprio motu* investigations initiated by the Prosecutor under Article 13(c), which require PTC approval to proceed,⁶³ creating an internal interdependence.⁶⁴

3. Prosecutorial *Interdependence* at the ICC

What level of independence should be granted to the Prosecutor was one of the most contentious issues debated during the Rome Conference.⁶⁵ Independent prosecutorial decision making has been a “critical component of . . . international criminal justice since Nuremberg.”⁶⁶ At those trials, prosecutors exercised discretion in selecting the accused and issuing indictments, “without any real judicial oversight.”⁶⁷ At the *ad hoc* tribunals established in the 1990s, the independent prosecutors were “free to select cases for prosecution, albeit within the tight jurisdictional framework of the *ad hoc* institution,”⁶⁸ with broad discretion in relation to investigations and indictments. Whether the ICC Prosecutor would have similar independent powers to trigger the jurisdiction of the Court in situations where it appeared as though one of the crimes under the jurisdiction of the Statute had been committed consumed significant debate time at Rome.

Many states’ delegates underscored that it was imperative that the Rome Conference “create an institution independent of the political power of states or other bodies and able to adopt fair and impartial decisions.”⁶⁹ Many states sought a “strong, effective, highly qualified Prosecutor independent of Governments.”⁷⁰ To that end, several states supported the Prosecutor having *proprio motu*,⁷¹ or *ex officio*,⁷²

63. *Id.* art. 15, ¶¶ 3, 4.

64. See discussion *infra* of this internal interdependence see section Part I.C.3 below.

65. Morten Bergsmo & Jelena Pejic, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 360 (Otto Triffterer ed., 1999).

66. James A. Goldston, *More Candor about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT’L CRIM. JUST. 383, 390 (2010).

67. William A. Schabas, *Prosecutorial Discretion v Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731, 732 (2008).

68. *Id.* at 733.

69. See, e.g., Establishment of an ICC, *3rd Plenary Meeting*, *supra* note 33, ¶ 52. In order to ensure these standards would be upheld, it was particularly important that the “court be devoid of partisan pressure, [and be] independent, impartial.” Establishment of an ICC, *5th Plenary Meeting*, *supra* note 33, ¶ 2.

70. Establishment of an ICC, *3rd Plenary Meeting*, *supra* note 33, ¶ 115.

71. See, e.g., U. N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *8th Plenary Meeting*, ¶¶ 14, 42 U.N. Doc. A/CONF.183/SR.8, (Vol. II) (Aug. 18, 1998) [hereinafter Establishment of an ICC, *8th Plenary Meeting*]; Establishment of an ICC, *9th Plenary Meeting*, *supra* note 36, ¶ 79.

72. See, e.g., Establishment of an ICC, *4th Plenary Meeting*, *supra* note 39, ¶ 16;

powers to enable the Prosecutor to initiate investigations. States in favor of this approach believed it would ensure both the institutional independence of the Court and the branch and personal independence of the Prosecutor,⁷³ removing that office and individual from political pressure.⁷⁴ Several states delegates had “serious reservations” to,⁷⁵ or firmly opposed,⁷⁶ *proprio motu* powers, and considered that “conferral of *proprio motu* powers on the Prosecutor would be detrimental to the [institutional] independence” of the Court.⁷⁷

To counter the concerns of those opposed to *proprio motu* powers, a *de novo* control mechanism was proposed as a check and balance on the Prosecutor’s exercise of that competence. This built in a very significant relationship of *interdependence* between two branches of the Court; a review procedure, whereby the PTC would review the decision making of the Prosecutor before an investigation could proceed.

The inclusion of the provision of *proprio motu* powers for the Prosecutor under Article 15(1), which can trigger jurisdiction under Article 13(c), allows the independent Prosecutor⁷⁸ to be able to initiate investigations even in the absence of state or Security Council referral.⁷⁹ Yet, the use of this power by the Prosecutor is dependent on a review process by the judicial branch under Articles 15(3)–(5).⁸⁰ The inclusion of this review process resulted from the compromise agreed to by states; a delicate balance under which it was assumed the independence of the Prosecutor could be ensured, while at the same time safeguarding

Establishment of an ICC, *5th Plenary Meeting, supra* note 33; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *9th Meeting*, ¶¶ 101, 108, 89, U.N. Doc. A/CONF.183/C.1/SR.9, (Vol. II) (July 17, 1998) [hereinafter Establishment of an ICC, *9th Meeting*]; Establishment of an ICC, *8th Plenary Meeting, supra* note 71, ¶¶ 7, 89; Establishment of an ICC, *10th Meeting, supra* note 32, ¶¶ 17, 22.

73. Establishment of an ICC, *30th Meeting, supra* note 32, ¶ 38.

74. “Before a case was referred to the Court, a state would have to make a complaint. That would make it possible to remove any political pressure from the Prosecutor.” *Id.* ¶ 114.

75. Establishment of an ICC, *35th Meeting, supra* note 32, ¶ 6.

76. *See, e.g.*, Establishment of an ICC, *30th Meeting, supra* note 32, ¶ 105; Establishment of an ICC, *10th Meeting, supra* note 32, ¶ 13; Establishment of an ICC, *35th Meeting, supra* note 32, ¶ 6.

77. Establishment of an ICC, *35th Meeting, supra* note 32, ¶¶ 6, 63.

78. Broadly, the principle of prosecutorial independence is reflected in Article 42(1) of the Rome Statute, manifested through the power of the Prosecutor to use his discretion: (i) when determining whether or not to open an investigation *proprio motu* on the basis of communications received; (ii) following an investigation, in the determination of which cases and charges to pursue, and (iii) considering whether a case is of sufficient gravity when determining admissibility. Rome Statute, *supra* note 42, art. 42, ¶ 1.

79. Rome Statute, *supra* note 42, art. 15, ¶ 1.

80. *See id.* art. 15, ¶¶ 3–5.

against the exercise of his unfettered discretion.⁸¹ But as discussed later, subsequent practice of the Court has shown that this *interdependence* between the Prosecutor's office and the PTC has proven to be a significant point of friction.

Another area in which there is a strong relationship of *interdependence* stems from state cooperation between the Prosecutor's Office and individual states.⁸² States recognized that state cooperation would be paramount to the Court's future success on a variety of fronts, from getting access to alleged perpetrators⁸³ to the protection of victims and witnesses,⁸⁴ and from gathering evidence to the enforcement of sentences.⁸⁵ In particular, ensuring the OTP would be able to conduct an effective investigation would "depend on the full cooperation of states, especially those which had a direct interest in the case."⁸⁶ In fact, the new Court "could effectively fulfill its mandate only through effective cooperation with the states in which the crimes had been committed or the states of nationality of the offenders or the victims,"⁸⁷ or with the states "with custody of the person who had committed the crime."⁸⁸

During the Rome negotiations, states argued for different mechanisms and relationships to ensure independence and the legitimacy of the new institution in the international community. Ultimately, in seeking to ensure that independence, the Rome Statute created a complex web of *interdependencies*, evident both externally—in the Court's relationship with states and the Security Council—and internally—in the relationship of branches of the Court with one another.

Interdependence is not inherently ineffective or normatively problematic but can become so when the equilibrium of the delicately achieved balance of powers and functions between different actors within the Rome Statute system are disturbed. The 1998 Statute does

81. See, e.g., Establishment of an ICC, *4th Plenary Meeting*, *supra* note 39, ¶ 16 (Vol. II) (June 17, 1998); Establishment of an ICC, *2nd Plenary Meeting*, *supra* note 41, ¶ 56; Establishment of an ICC, *5th Plenary Meeting*, *supra* note 33, ¶ 19; Establishment of an ICC, *30th Meeting*, *supra* note 32, ¶ 5555, (Vol. II) (July 9, 1998); Establishment of an ICC, *9th Meeting*, *supra* note 72, ¶ 108; Establishment of an ICC, *10th Meeting*, *supra* note 32, ¶ 13; Establishment of an ICC, *7th Plenary Meeting*, *supra* note 46, ¶ 63.

82. See also SubPart I.C.1, *supra*.

83. Establishment of an ICC, *30th Meeting*, *supra* note 32, ¶ 100.

84. Establishment of an ICC, *3rd Plenary Meeting*, *supra* note 40, ¶ 87.

85. Establishment of an ICC, *4th Plenary Meeting*, *supra* note 39, ¶ 40.

86. Establishment of an ICC, *7th Plenary Meeting*, *supra* note 46, ¶ 50.

87. *Id.* at ¶ 83.

88. Establishment of an ICC, *30th Meeting*, *supra* note 32, ¶ 100.

not operate in isolation in guiding the practice of the Court: accompanying supporting architecture has been scaffolded around the Statute through rules, committees, policy papers, and resolutions, all aimed at strengthening the *interdependence* regimes enshrined in the Statute. Nevertheless, the Rome Statute is the baseline for determining whether the Court is in the state of equilibrium envisaged by the drafters. It is only by understanding the deviations of different actors from the Statute that we can begin to think about what needs to change to restore the balance.

II. DISTURBING THE EQUILIBRIUM OF THE ROME STATUTE IN THE PRACTICE OF THE COURT

The world in which the Rome Statute was drafted and adopted in 1998 is significantly different to the world of 2022. Today, states interact with each other and with international institutions in ways unforeseen in the late 1990s. The 1990s saw the close of the Cold War and a thawing of political tensions between global powers. That decade was also characterized by cooperation between states in establishing international institutions and addressing atrocities committed around the world, particularly in the aftermath of inaction on the Rwandan genocide in 1994. Contrast that with the present, where states are increasingly polarized and isolated, and are more willing to ignore atrocities being committed at home or within the territory of their allies and to deliberately attempt to weaken institutions.

The external *interdependencies* put in place during the Rome Conference are less appropriate now, as states have become less willing to cooperate, and consequently the promise of the ICC has dimmed in the face of its inaction in atrocity situations and external criticism of its performance. Moreover, internal *interdependencies* have been beset with power struggles between actors exposing tensions between different branches of the Court. After two decades of operation of the Court, we know that the system created at Rome is flawed, has given rise to significant challenges in the pursuit of international justice, and has created several instances in which the Court has struggled in balancing its *interdependence* relationships. Through a series of case studies, the next three subsections will address the imbalances seen in the *interdependence* relationships externally between (1) states and the Court, (2) the Court and the United Nations Security Council, and (3) internally between the OTP and the PTC.

A. External Interdependence Failure: Imbalance between States and the Court

The Rome Statute created several relationships of *interdependence* between the Court and states. Yet, through the past twenty years, we see numerous instances in which the equilibrium between them has been disturbed because actors have failed to fulfill the role envisaged for them during the Rome negotiations. In practice, states are able to exert more power and influence over the practice of the Court than was envisaged in the Statute, which creates a range of problems for the successful functioning of the Court. This is particularly relevant in relation to the election of court officials and the lack of state cooperation in the arrest and surrender of suspects and the collection of evidence.

1. Election of Judges

The Court needs qualified judges to preside over complex criminal trials. At stake is the legitimacy and functioning of the Court. If states fail to uphold their obligations to elect qualified judges, the balance envisaged in the Rome Statute falls into disarray and increases the potential for failure of the institution. Without jurists who are deemed qualified and trust-worthy, the Court becomes increasingly open to criticism, which ultimately leads to the erosion of trust in the system.

The procedure for nominating and electing judges prescribed in Article 36⁸⁹ is fleshed out in Resolutions adopted by the ASP,⁹⁰ which underscore the need for states to nominate and elect qualified candidates. In 2011, the ASP appointed an Advisory Committee on the Nominations of Judges (ACN), aimed at introducing “an independent organism in the very structure of the Assembly in order to facilitate the process of the election of judges.”⁹¹ The mandate of ACN is to “facilitate that the highest-qualified individuals are appointed as judges of the [ICC],” using a transparent evaluation procedure and resulting

89. Rome Statute, *supra* note 42, art. 36.

90. ICC, Assembly of States Parties, *Procedure for the Nomination and Election of Judges of the International Criminal Court*, Res. ICC-ASP/3/Res.6 (Sept. 10, 2004); ICC, Assembly of States Parties, *Report of the Bureau on the Establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court*, ICC-ASP/10/36 (Nov. 30, 2011); ICC, Assembly of States Parties, *Resolution on the Review of the Procedure for the Nomination and Election of Judges*, ICC-ASP/18/Res.4 (Dec. 6, 2019).

91. ICC, Assembly of States Parties, *Terms of Reference for the Establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court*, ¶ 2, 3, ICC-ASP/10/36 Annex (Nov. 30, 2011). The ACN is composed of “nine members, nationals of States Parties, . . . reflecting the principal legal systems of the world and an equitable geographical representation . . . of high moral character, who have established competence and experience in criminal or international law.”

in an analysis of the suitability of the candidates, made available to States Parties.⁹²

In 2019, the Open Society Justice Initiative identified a range of problems with the nomination and election of judges in a report entitled *Raising the Bar*.⁹³ They took particular issue with the List B judges,⁹⁴ identifying occasions when candidates included in this list and subsequently elected have lacked the expertise in criminal law, including a judge that “did not have any kind of legal training, and did not possess a law degree.”⁹⁵ The Open Society also highlighted problems with judges from List A, who were “nominated and subsequently elected . . . with limited experience as a judge, which is arguably insufficient given the scale and complexity of the ICC’s cases.”⁹⁶ The Open Society also found fault with the criteria under Article 36(4)(1)(i) through which a State Party may nominate a candidate “by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question,” arguing that this “does not per se guarantee that a judicial candidate will possess necessary competence in criminal law and procedure” or that “an individual is able to manage complex litigation at the ICC.”⁹⁷ The report highlights a number of findings and challenges to the nomination process, finding that: only a small—and diminishing number—of ICC states have nominated candidates; vacancies are rarely publicly announced or circulated; states infrequently use the domestic nomination procedures that the Rome Statute requires; many states lack a legal framework for nominating judicial candidates to the ICC; states rarely conduct interviews or adequately assess candidate qualifications, and that states have nominated a large number of candidates who previously served as government officials.⁹⁸

Beyond these procedural deficits by states, there are significant political considerations that come into play during the election process that further disturb the balance between state involvement on the one hand and ensuring qualified officials are elected to the Court on the other, as envisaged in the Rome Statute. The *Raising the Bar* report

92. *Id.* ¶ 5, 10, 11.

93. *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, OPEN SOC’Y JUST. INITIATIVE (2019), <https://www.justiceinitiative.org/uploads/a43771ed-8c93-424f-ac83-b0317feb23b7/raising-the-bar-20191112.pdf> [hereinafter *Raising the Bar Report*].

94. Rome Statute, *supra* note 42, art. 36(5).

95. *Raising the Bar Report*, *supra* note 93, at 21.

96. *Id.* at 23.

97. *Id.*

98. *Id.* at 30–35.

identifies three buckets of concerns: “election campaigns, vote trading and regional endorsements.”⁹⁹

In particular, the Open Society highlights that campaigning for judicial elections is “expensive and lengthy. They require a high degree of financial and logistical support from the nominating state, which is often a deterrent for states (typically smaller ones) that cannot justify the cost-to-opportunity ratio . . . regardless of the merit of their candidates.”¹⁰⁰ Reciprocal vote trading has also been a perpetual challenge in ICC elections, with states “over[looking] candidates’ qualifications or merit and focus[ing] instead on the political and diplomatic capital that their vote may generate.”¹⁰¹ The Open Society concludes that states “have not been consistently good stewards of their duty to responsibly nominate and elect ICC judges.”¹⁰² They make recommendations that States Parties and the ASP could take, including strengthening the role of the ACN and increasing the information required from candidates and the states nominating them about individuals’ qualifications for the role, to ensure that jurists of the highest quality are being considered for the Court.¹⁰³

In a 2019 Resolution passed during the 18th session, the ASP “encourage[d] States Parties to refrain from the trading of votes” and “recall[ed] that States Parties should exercise their votes in accordance with article 36.”¹⁰⁴ In the same Resolution, the ASP amended the terms of reference for the ACN, attempting to lead to more transparency and access to the candidates ahead of elections. Under paragraph 12 *bis*, “all nominated candidates shall be available for interviews” before the ACN, and the nominating states should “endeavor to ensure that candidates make themselves available” for those interviews.¹⁰⁵ In addition, under a new paragraph 12 *ter*, once the ACN “has made its assessments of candidates, and as early as possible prior to elections, the Bureau [of the ASP] will facilitate public roundtable discussions to be held with all candidates” and open to States Parties and other relevant stakeholders.¹⁰⁶ A new, more detailed questionnaire element was added to the Terms of Reference of the ACN under a new paragraph 5 *bis*, which

99. *Id.* at 36.

100. *Id.* at 37.

101. *Id.* at 38.

102. *Id.* at 50.

103. *Id.* at 48–50.

104. *Resolution on the Review of the Procedure for the Nomination and Election of Judges*, *supra* note 90, ¶ 10.

105. *Id.* ¶ C.

106. *Id.* ¶ D.

requires candidates to unpack their experience relevant to the Court, demonstrate their relevant legal knowledge, and “document the national-level nomination processes in the nominating State Parties,” among other things.¹⁰⁷

The election of six new judges took place at the 19th ASP in December 2020 and resulted in the appointment of jurists from Costa Rica, Georgia, Mexico, Sierra Leone, Trinidad and Tobago, and the United Kingdom. These elections were a test of the new terms enacted at the 18th ASP in December 2019 and, while some progress has been made, there is still a long way to go in restoring the equilibrium envisaged under the Rome Statute, where states discharge their obligations to the Court through ensuring that qualified candidates are nominated and elected to adjudicate cases. The International Justice Monitor of the Open Society Justice Initiative highlighted three areas of continued criticism—a continuing toxic campaign culture, the continued prioritization of electing diplomat and other governmental officials, and some irregular and opaque domestic nominating procedures.¹⁰⁸ The Monitor noted some improvements made to the ACN process, “which required in a more thorough and nuanced report, and state-led judicial roundtables with all the candidates,” but pointed out that this still resulted in the election of one candidate “considered to be only “qualified,” due to his lack of in-depth knowledge on a number of areas concerning the Court’s functioning.”¹⁰⁹

That amendments and modifications have been made by the ASP is a step in the right direction towards restoring the equilibrium between state involvement and ensuring that qualified candidates are nominated and elected to the ICC, thus restoring the balance sought in the Rome Statute. From the assessment of civil society, the system in this round of elections still wasn’t perfect and resulted in the appointment of at least one judge whose credentials and experience are a questionable fit for this role. Whether the amendments are successful moving forward depends on the individual willingness of States Parties and their nominees to engage with the new process. Because of this uncertainty, it would be premature to come to conclusions about whether this process will fully restore the balance envisaged under the Statute.

107. *Id.* ¶ B.

108. Marina Pena, *ICC Judicial Elections Reform: Some Progress but Still a Long Way to Go*, INT’L JUST. MONITOR (Jan. 15, 2021), <https://www.ijmonitor.org/2021/01/icc-judicial-elections-reform-some-progress-but-still-a-long-way-to-go/> [<https://perma.cc/K57W-RLRP>].

109. *Id.*

2. External *Interdependence* Failure: Lack of State Cooperation in Arrest and Surrender

The *interdependence* relationship requiring that state parties cooperate with the arrest and surrender of those for whom an arrest warrant is issued¹¹⁰ is crucial to the successful progression of cases. The balance here weighs the cooperation of states on the one hand, against the ability of the Prosecutor to discharge his obligations on the other: the Prosecutor is reliant on states fulfilling their obligations in order for him to get physical custody over indictees and to enable him to proceed with a case. If states fail to act, the equilibrium of the system is disturbed to such an extent that cases are unable to move forward. In order to achieve this balance, Article 89(1) provides that states parties “shall . . . comply with requests for arrest and surrender.”¹¹¹ The Statute includes provisions in situations where an accused person challenges the arrest warrant on the basis of *ne bis in idem*,¹¹² or if there are competing requests for extradition with other states.¹¹³

Despite fairly detailed provisions on arrest and surrender, the Statute does not proscribe the exact efforts that must be made by states in effecting a request from the Court to an individual within its territory, i.e. the question remains: what does “cooperation” require? The lack of arrest and surrender of former President Omar Al Bashir of Sudan exemplifies the challenges that arise when states fail to discharge their obligations under the Statute, which throws this particular *interdependence* relationship out of balance and frustrates the Court in fulfilling its mandate.

The situation in Darfur, Sudan, had been referred to the ICC Prosecutor by Security Council Resolution 1593 on March 31, 2005,¹¹⁴ following a finding by the Security Council established International Commission of Inquiry on Darfur¹¹⁵ that there was reason to believe that crimes against humanity and war crimes had been committed in

110. Rome Statute, *supra* note 42, art. 89: “the Court may transmit a request for the arrest and surrender of a person . . . to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person.” Part 9 also deals with state cooperation with regard to investigation and collection of evidence including, for example, Article 93 ¶ 1(b) “taking of evidence, including testimony under oath, and the production of evidence;” (g) “the examination of places or sites, including the exhumation and examination of grave sites,” and (j) “protection of victims and witnesses and the preservation of evidence,” among others.

111. *Id.* art. 89(1).

112. *Id.* art. 89(2).

113. *Id.* art. 90.

114. S.C. Res. 1593 (Mar. 31, 2005).

115. S.C. Res. 1564 (Sept. 18, 2004).

Darfur. On March 4, 2009, PTC I of the ICC issued an arrest warrant for then-President of the Republic of Sudan Omar Al Bashir for charges of war crimes and crimes against humanity as an indirect co-perpetrator.¹¹⁶ Following an appeal by the Prosecutor,¹¹⁷ PTC I issued a second arrest warrant on July 12, 2010 including charges of genocide.¹¹⁸ The arrest warrants were transmitted to Sudan but, as a non-state party, Sudan refused to recognize either the warrants or the Court, just as it had done for two prior arrest warrants issued against Sudanese leaders.¹¹⁹ The warrant was also opposed by several states and regional groups, including the African Union¹²⁰ and the Arab League,¹²¹ with calls from some states and the African Union for the UN Security Council to defer the proceedings under Article 16,¹²² due to the then-ongoing peace process.¹²³ The Court ignored these requests: subsequently, the African Union issued a Decision instructing AU member states not to cooperate with the Court in this matter.¹²⁴

As the first sitting head of state indicted by the ICC,¹²⁵ the arrest warrant for Al Bashir raised many interesting legal questions around

116. Prosecutor v. Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

117. Prosecutor v. Bashir, ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 12, 2010).

118. Prosecutor v. Bashir, ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010).

119. See, e.g., *Warrant Issued for Sudan's Leader*, BBC NEWS (Mar. 4, 2009), <http://news.bbc.co.uk/2/hi/africa/7923102.stm> [<https://perma.cc/T9AT-8J4U>] (Sudan has also refused to hand over Sudanese Humanitarian Affairs Minister Ahmed Haroun and militia leader Ali Abd-All-Rahman. Abd-All-Rahman surrendered himself to the Court on June 9, 2020. Haroun remains at large.)

120. See, e.g., *Arab Leaders back 'Wanted' Bashir*, BBC NEWS (Mar. 30, 2009), <http://news.bbc.co.uk/2/hi/7971624.stm> [<https://perma.cc/U6YA-PRBZ>].

121. See, e.g., *Arab Leaders snub al-Bashir Warrant*, AL JAZEERA (Mar. 31, 2009), <https://www.aljazeera.com/news/2009/03/31/arab-leaders-snob-al-bashir-warrant-2/> [<https://perma.cc/H6UC-DE8W>].

122. See, e.g., *Uproar in Sudan over Bashir war Crimes Warrant*, GUARDIAN (Mar. 4, 2009), <https://www.theguardian.com/world/2009/mar/04/sudan-demonstrators-support-bashir> [<https://perma.cc/8XDP-QA4F>].

123. African Union Assembly, *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan*, Assembly/AU/Dec.221(XII) (Feb. 1–3, 2009).

124. African Union Assembly, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) - Doc. Assembly/AU/13 (XIII)*, Assembly/AU/Dec.245(XIII) Rev.1 (July 1–3, 2009) (The African Union has reiterated its decision at subsequent meetings.)

125. It should be noted that Al Bashir is not the only sitting head of state to be indicted by the ICC. The ICC issued an arrest warrant for Muammar Gaddafi while he was head of state of Libya, which is not a party to the ICC. The Court also issued a warrant for Uhuru Kenyatta just prior to him become head of state in Kenya, which is party to the ICC, but has repeatedly threatened to withdraw.

head of state immunity under international law.¹²⁶ A deep dive into the controversies spanning from this arrest warrant is beyond the scope of this Article, but some context is necessary to assess whether multiple states parties' failures to cooperate in the arrest of Al Bashir are an evident failure of the balance of *interdependences* woven into Part 9 of the Statute. The refusal of states to arrest stems from a dispute between the applicability of head of state immunity under the Rome Statute due to perceived tension between two provisions: Articles 27 and 98(1). Article 27 of the Rome Statute makes clear that head of state immunity is not a bar to the Court exercising its jurisdiction.¹²⁷ Yet, that has not prevented states from raising it as a reason for their non-cooperation with the Court in the arrest of Al Bashir, and Article 98(1) has given African Union states some wiggle room in making this argument as it provides that "the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or 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 immunity."¹²⁸

In the thirteen years since the issuance of the first arrest warrant for Al Bashir, many state parties to the Court have failed to arrest him when he was on their territory.¹²⁹ The African Union's instruction to member states to refuse to cooperate with the arrest request from the Court is based on the assertion of the continuing immunity of Al Bashir, as Sudan is a non-state party to the statute and therefore has not waived immunity under Article 98,¹³⁰ consequently, Al Bashir is thus immune from arrest under customary international law. The Court has reject-

126. Legal scholars and court observers have been divided on their analysis of the immunities question. See e.g., Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315 (2009); Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333 (2009); Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407 (2004).

127. Rome Statute, *supra* note 42, art. 27.

128. *Id.* art. 98 ¶ 1.

129. Those states include Chad, the Democratic Republic of Congo, Djibouti, Jordan, Kenya, Malawi, Nigeria, South Africa, and Uganda. Al Bashir has also travelled to several non-state parties including China, Egypt, Ethiopia, Qatar, Saudi Arabia, and the United Arab Emirates.

130. *Id.* art. 97.

ed this position but has confusingly relied on different rationales to find states parties in violation of their cooperation obligations under the Statute in their failure to arrest Al Bashir. In the first pair of decisions against Malawi and Chad, PTC I found that “customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes” and consequently there was “no conflict between Malawi’s obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.”¹³¹ In a decision against the Democratic Republic of Congo in 2014, PTC II determined that the immunities granted to Omar Al Bashir under international law were “implicitly waived” by virtue of the Security Council referral of the situation.¹³² In a 2017 decision against South Africa, PTC II determined that as a result of the United Nations Security Council referral and corresponding obligations on Sudan to accept the decisions of the Security Council under the UN Charter, Sudan was no longer entitled to rely on Article 98(1) of the Statute.¹³³ On May 6, 2019, the Appeals Chamber confirmed a decision¹³⁴ of the ICC PTC II,¹³⁵ that Jordan, a State Party to the Rome Statute, had failed to comply with its obligations under the Statute when it neglected to arrest Al Bashir when he travelled to the country for a League of Arab States summit on March 29, 2017 because “there [was] no Head of State immunity under customary international law vis-à-vis an international court.”¹³⁶ Which

131. Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by 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, ¶ 43 (Dec. 12, 2011).

132. Prosecutor v. Al Bashir, ICC-02/05-01/09-195, Pre-Trial Chamber II Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ¶¶ 30–31 (Apr. 9, 2014).

133. 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 by the Court for the Arrest and Surrender of Omar Al-Bashir (July 6, 2017).

134. Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (Dec. 11, 2017).

135. Prosecutor v. Al Bashir, ICC-02/05–01/09, The Hashemite Kingdom of Jordan’s Appeal Against the “Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir, (Mar. 12, 2018).

136. Prosecutor v. Al Bashir, “Judgment in the Jordan Referral re Al-Bashir Appeal,” CC-02/05–01/09–397-Corr. (May 6, 2019). This decision prompted some strong reactions in the blogosphere. See e.g., Dov Jacobs, *You have just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir case*, SPREADING THE JAM (May 6, 2019), <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/> [https://

of these rationales put forward by the Court is correct is a matter of academic debate outside the scope of this article.

Whatever conclusion is drawn, there are two competing interpretations of the failure of states to cooperate in the arrest of Al Bashir. The kinder of the two is that this failure of state cooperation is not *per se* a result of a failure of the balance of *interdependence* negotiated at the Rome Conference, rather it is more of a failure to foresee problems arising from the contradicting provisions of Article 27 and 98(1), which give rise to an internal inconsistency in the Statute. The harsher interpretation could analyze the failure of state cooperation as just that, a stark failure of the *interdependence* mechanism created by the Rome Statute, with states using the shield of head of state immunity to protect themselves from criticism from the international community. The outcome of these two are the same: the Court has been thrown off balance—states have failed to cooperate, which has stymied the Prosecutor’s efforts to bring an alleged perpetrator to justice.¹³⁷

In the later instances of Al Bashir’s presence in states parties and their failure to arrest, the Court has failed to use a means of redress available to it. Under Article 87(7), when a state “fails to comply with a request to cooperate by the Court contrary to the provisions of [the] Statute . . . the Court may . . . refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court,

perma.cc/U5H3-7B7L]; Ben Batros, *A Confusing ICC Appeals Judgment on Head-of-State Immunity*, JUST SEC. (May 7, 2019) <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/> [<https://perma.cc/5BJ5-S6QQ>]; Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL:TALK! (May 6, 2019), <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> [<https://perma.cc/6L2V-BBSP>]; Leila Sadat, *Why the ICC’s Judgment in the al-Bashir Case Wasn’t So Surprising*, JUST SEC. (July 12, 2019), <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/> [<https://perma.cc/6QW8-4YG9>]. On this decision *see also* Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, TORTEL OPSAHL ACADEMIC EPUBLISHER (May 31, 2019) <https://www.toaep.org/ops-pdf/8-kress> [<https://perma.cc/35HC-G3NU>].

¹³⁷ Al Bashir was ousted as the head of state of Sudan and arrested on April 11, 2019, following months of protests. *Omar al-Bashir Ousted: How Sudan Got Here*, BBC NEWS (Apr. 11, 2019) <https://www.bbc.com/news/world-africa-47892742> [<https://perma.cc/EDQ3-8DB8>]. If Al Bashir were to travel to a state party of the ICC, they would be obligated to hand him over as his head of state immunity expired when out of office. Although Sudan remains a non-state party to the Rome Statute and so under no obligation to cooperate, in February 2020, Sudanese authorities agreed to hand over the ex-President to the ICC, yet he remains at large. *Omar al-Bashir: Sudan Agrees Ex-president must Face ICC*, BBC NEWS (Feb. 11, 2020), <https://www.bbc.com/news/world-africa-51462613#:~:text=Sudan's%20rulers%20have%20agreed%20to,to%20the%20deaths%20of%20300%2C000> [<https://perma.cc/8H9Q-XD42>].

to the Security Council,¹³⁸ yet the PTC and Appeals Chambers have declined to make such a referral against South African and Jordan.¹³⁹ This language suggests that a violation of the statute by a state has no consequences, and may encourage other states to shirk their cooperation obligations further undermining the *interdependence* relationship created in the Statute. This referral process could also be considered an *interdependence* relationship, both between the Chambers and the ASP and between the Chambers and the Security Council.

The failure to arrest Al Bashir indicates a wider problem with the *interdependence* structure incorporated in the Statute between states and the Court vis-à-vis cooperation. The Rome Statute envisioned cooperation as a fundamental pillar of the operation of the Court so that the Court could get access to accused persons in order to fulfill its mandate. When states exert their power to not comply with their arrest and surrender obligations, the Court's functioning is severely hampered, and the balance sought by the Statute is disturbed. It is easy to envisage states failing to cooperate in other future situations of indicted individuals and if the Court is unable to get access to those for whom arrest warrants are issued and to take physical custody of those individuals, the Court is unable to proceed with cases and is unable to fulfill its mandate. The institutional equilibrium must be restored in order for the Court to be able to fulfill its mandate.

B. External *Interdependence* Failure: Imbalance between the UN Security Council and the Court

During the time of Rome negotiations, the drafters were hopeful that there would be wide acceptance and adoption of the Rome Statute by states, including that all the Security Council Permanent Five (P5) members would become a State Party. These negotiations took place in an environment where, only a few years prior, the Security Council had authorized the establishment of two *ad hoc* tribunals to address atrocity crimes committed in the Former Yugoslavia¹⁴⁰ and Rwanda,¹⁴¹ instances in which the Security Council had found consensus and none of the P5 had intervened to veto. Against this backdrop, it was thought that the Security Council's referral power under Article 13(b) would be an important jurisdictional trigger, particularly over situations in non-States

138. Rome Statute, *supra* note 42, art. 87 ¶ 7.

139. The Court did make such referrals in the situation of Malawi, Chad and the DRC, as well as referrals of Djibouti and Uganda for failing to comply with obligations to arrest Gadaffi.

140. See S.C. Res. 827 (May 25, 1993).

141. See S.C. Res. 955 (Nov. 8, 1994).

Parties to the Court.¹⁴² Unfortunately, at the conclusion of the Rome Conference the United States, Russia, and China did not become state parties, and remain non-members today. What we have seen instead is that the non-State Party P5 states have been able to wield their veto power to prevent Security Council referrals of situations in which atrocity crimes have been or are being committed, to protect themselves and their allies from being the subject of investigation by the Court.

During the past two decades, the Security Council has referred only two situations to the ICC: the situation in Darfur, Sudan in 2005,¹⁴³ and the situation in Libya in 2011.¹⁴⁴ More notable than the referrals are the failures of the Security Council to refer many grave situations. This lack of referrals is emblematic of a significant failure of the *interdependence* structure created in the Rome Statute, which has ensured that severe atrocity situations have not come before the Court, tipping the balance in favor of impunity in those situations. There are none more emblematic of this than the failure to refer the situation in Syria, a non-State Party to the Court.¹⁴⁵

The Syrian conflict began during the “Arab Spring” in 2011 and in the intervening decade there have been fourteen vetoes of resolutions in the Security Council that attempted to deal with different facets of the conflict. All of the resolutions concerning Syria have been vetoed by either Russia or China or both,¹⁴⁶ including a resolution that would

142. See Rome Statute, *supra* note 42, art. 13(b).

143. S.C. Res. 1593 (Mar. 31, 2005).

144. S.C. Res. 1970 (Feb. 26, 2011).

145. It should be noted that this is just one example and there are other examples of atrocity crimes where the Security Council has failed to refer the situation. Some examples include in the cases of crimes committed against the Rohingya in Myanmar, the Uighurs in China, the situation in Israel and Palestine, amongst others.

146. See U.N. Sec. Council, France et. al.: Draft resolution, U.N. Doc. No. S/2011/612 (Oct. 4, 2011) (vetoed by Russia and China); U.N. Sec. Council, Bahrain et. al.: Draft resolution, U.N. Doc. No. S/2012/77 (Feb. 4, 2012) (vetoed by Russia and China); U.N. Sec. Council, France et. al.: Draft resolution, U.N. Doc. No. S/2012/538 (July 19, 2012) (vetoed by Russia and China); U.N. Sec. Council, Andorra et. al.: Draft resolution, U.N. Doc. No. S/2016/846 (Oct. 8, 2016) (vetoed by Russia); U.N. Sec. Council, Egypt et. al.: Draft resolution, U.N. Doc. No. S/2016/1026 (Dec. 5, 2016) (vetoed by Russia and China); U.N. Sec. Council, Albania et. al.: Draft resolution, U.N. Doc. No. S/2017/172 (Feb. 28, 2017) (vetoed by Russia and China); U.N. Sec. Council, France et. al.: Draft resolution, U.N. Doc. No. S/2017/315 (Apr. 12, 2017) (vetoed by Russia); U.N. Sec. Council, Albania et. al.: Draft resolution, U.N. Doc. No. S/2017/884, (Oct. 24, 2017) (vetoed by Russia); U.N. Sec. Council, France et. al.: Draft resolution, U.N. Doc. No. S/2017/962 (Nov. 16, 2017) (vetoed by Russia); U.N. Sec. Council, Japan: Draft resolution, U.N. Doc. No. S/2017/970 (Nov. 17, 2017) (vetoed by Russia); U.N. Sec. Council, Albania et. al.: Draft resolution, U.N. Doc. No. S/2018/321 (Apr. 10, 2018) (vetoed by Russia); U.N. Sec. Council, Belgium et. al.: Draft resolution, U.N. Doc. No. S/2019/756 (Sept. 19, 2019) (vetoed by Russia and China); U.N. Sec. Council, Belgium et. al.: Draft resolution, U.N. Doc. No. S/2019/961 (Dec. 20, 2019) (vetoed by Russia and China).

have referred the situation in Syria to the ICC that was supported by sixty-five states as co-sponsors.¹⁴⁷ Many of these failed attempts at securing condemnation of the horrors fall outside of the scope of the *interdependence* relationship between the Court and the Security Council in Article 13(b) of the Rome Statute. Yet, each are indicative of a significant challenge not addressed in the Rome negotiations: what to do when a P5 member repeatedly vetoes measures aimed at ensuring international peace and security and/or accountability, which was unanticipated at Rome.

Recalling that the balance struck in this *interdependence* relationship empowered the Council to trigger the Court's jurisdiction on one hand against the Prosecutor's ability to proceed with investigations, particularly in the absence of state party referral or *proprio motu* investigation on the other, this failure has disturbed the balance of the Court in a number of ways:

First, the Security Council referral method was intended to ensure that situations in any state in which grave atrocity crimes were being committed could be referred under a Chapter VII resolution of the Council, regardless of whether a state was a party to the Statute or not. The Article 13(b) referral mechanism thus created a way of obligating states not a party to the Statute as, in accordance with Article 25 of the UN Charter, Chapter VII resolutions are binding upon states, under which "members of the United Nations agree to accept and carry out the decisions of the Security Council."¹⁴⁸ The lack of use of Security Council referral means that the balance between the Court and the Security Council is frustrated, as the failure to make referrals insulates some situations from the jurisdiction of the Court, obstructing the goals behind establishing the Court in the first place: to "exercise its jurisdiction over persons for the most serious crimes of international concern."¹⁴⁹ This is a deliberate disturbance of the equilibrium envisaged under the Rome Statute by members of the P5, where they have privileged their veto power and the protection of allies over the pursuit of international justice and makes the Court subservient to the whims of those five states.

147. U.N. Sec. Council, Albania et. al.: Draft resolution, U.N. Doc. No. S/2014/348 (May 22, 2014). In response, the General Assembly stepped into the void left by the veto, creating a new mechanism empowered to "collect, consolidate, perverse and analyze evidence of violations of international humanitarian law and human rights violations and abuses" in Syria (see G.A. Res. 71/248, ¶ 4, (Dec. 21, 2016)). While this was a positive development in ensuring the collection of evidence, the IIIM is not an accountability mechanism and does not supplant the role of ICC.

148. U.N. Charter, art. 25.

149. Rome Statute, *supra* note 42, art. 1.

Second, the lack of Security Council referral cuts off an avenue for pursuing broader cooperation between the Court and states. Under Article 87(5)(b) and (7) where a state fails to comply with a request for cooperation by the Court, the Court may refer the matter to the Security Council.¹⁵⁰ In instances where these referrals have been made, the Security Council has not acted.

Third, there is an additional Security Council mechanism that was included in the Rome Statute that was intended to act as a check and balance against the OTP: the procedure for Security Council deferral of an investigation or prosecution under Article 16.¹⁵¹ This provision was designed to ensure that the Security Council could act to defer an investigation if doing so would impact international peace and security, for example if it had the potential of derailing a peace agreement in an ongoing conflict. The Security Council has never used this provision.

The lack of Security Council action under any of the three avenues available to it in its interactions with the Court indicate that the *interdependence* systems that the drafters at Rome believed would function have not worked in practice due to changing geopolitics and increased hostility between the P5 members and the Court. The Security Council is not, in general, failing in to uphold all of its peace and security mandate. But even in instances dealing with atrocity crimes, particularly when being committed in a state that is an ally of a P5 member, the Council has failed to act. It is not a coincidence that three of the P5 members are not a state party to the Court and in many instances are actively hostile towards the work of the Court.¹⁵² Consequently, perhaps we should not be surprised that this *interdependence* relationship has failed.

C. Internal *Interdependence* Failure: Imbalance between the Office of the Prosecutor and the Pre-Trial Chamber

The *interdependence* between the Prosecutor and the PTC is one of the Rome Statute's *sui generis* creations. It creates a relationship of *interdependence* between these two branches of the Court, placing the PTC a position to judicially review and approve the Prosecutor's exercise of discretion to proceed with an investigation on the one hand, balanced against the ability of the Prosecutor to proceed with *proprio*

150. *Id.* art. 87, ¶¶ 5(b), 7.

151. *Id.* art. 16.

152. See e.g. *Full Text of John Bolton's Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> [<https://perma.cc/QT77-KF8L>].

motu investigations on the other, thus enabling the Prosecutor to utilize one of the jurisdictional triggers available to him under Article 13.¹⁵³ The PTC review arrangement was the only means by which some states would consent to the Prosecutor exercising *proprio motu* powers at all: without the review procedure, any reference to *proprio motu* powers would have been omitted from the Statute.¹⁵⁴

A series of recent decisions related to the situation in Afghanistan has shone a particularly harsh spotlight on the challenges emanating from this *interdependence* relationship, exposing a disturbed internal balance, characterized by a power struggle between the two branches over which has the institutional competence to exercise discretion around interests of justice considerations in determining whether to proceed with an investigation; a dispute which emanates from conflicting interpretations of the language of the Rome Statute. Though the power struggle was ultimately resolved by the Appeals Chamber, this tussle between the Prosecutor and the PTC exposes deeper tensions between these two branches of the Court that need to be resolved to restore the equilibrium to ensure that the Prosecutor can exercise his *proprio motu* jurisdictional trigger as envisaged by the drafters.

The situation in Afghanistan had been under a preliminary examination by OTP since 2007. In determining to open an investigation into the situation on the basis of *proprio motu* powers under Article 15(1) Rome Statute, the Prosecutor exercised that power for the fifth time.¹⁵⁵ Under the procedure established in the Statute, the Prosecutor submitted a request to the PTC for authorization to open an investigation into the situation in Afghanistan on November 20, 2017, seeking PTC permission¹⁵⁶ to examine possible crimes committed not only by Afghan government¹⁵⁷ and Taliban forces, but also by “US armed forces and by members of the CIA in secret detention facilities in Afghanistan,

153. *Id.* art. 13.

154. *See, e.g.*, Establishment of an ICC, *4th Plenary Meeting*, *supra* note 39, ¶¶ 16, 58 (Vol. II) (June 17, 1995); Establishment of an ICC, *2nd Plenary Meeting*, *supra* note 41, ¶ 56; Establishment of an ICC, *5th Plenary Meeting*, *supra* note 46, ¶ 19; Establishment of an ICC, *30th Meeting*, *supra* note 32, ¶ 55; *Establishment of an ICC, 9th Plenary Meeting*, *supra* note 36, at ¶ 108; Establishment of an ICC, *10th Meeting*, *supra* note 32, ¶ 13; Establishment of an ICC, *7th Plenary Meeting*, *supra* note 46, ¶ 63 (June 19, 1998).

155. The other four *proprio motu* referrals have occurred in the situations of Burundi, Cote d'Ivoire, Georgia, and Kenya.

156. This is a procedural safeguard incorporated into Article 15 of the Rome Statute, which requires the OTP to seek PTC authorization in cases where the Prosecutor wishes to open an investigation *proprio motu*, i.e., not resulting from either Security Council or State referral.

157. Including the Afghan National Security Forces (ANSF), members of the National Directorate for Security (NDS) and the Afghan National Police (ANP).

and on the territory of other States Parties, namely Poland, Romania and Lithuania, since 1 July 2002, principally focusing on the period of 2003–2004.¹⁵⁸ In doing so, the Prosecutor had determined that (1) there exists reasonable basis to believe that international crimes within the Court’s jurisdiction have occurred since May 2003; (2) that the case meets the gravity and interests of justice tests and; (3) that there are no other genuine investigations and prosecutions for these crimes currently being carried out, thus satisfying the requirement of complementarity.

Generally, OTP requests for authorization to open an investigation have been issued relatively quickly.¹⁵⁹ In the Afghanistan situation it took the PTC sixteen and a half months to issue its decision. A particularly contentious element was the request to look into crimes committed by United States nationals, a non-State Party.¹⁶⁰ The PTC finally issued its decision on April 12, 2019, rejecting the Prosecutor’s request.¹⁶¹ The PTC held that, despite the fact that jurisdiction and admissibility were established,¹⁶² an investigation would not be in the interests of justice.¹⁶³

158. Public Redacted Version of Request for Authorization of an Investigation Pursuant to Article 15, ICC-02/17/7-Conf-Exp (Nov. 20, 2017) [hereinafter OTP Request for Authorization].

159. 50 days for Burundi; 102 days for Cote d’Ivoire; 106 for Georgia; 125 for Kenya.

160. The United States has a complicated relationship with the ICC. Although it participated in the drafting of the Rome Statute to establish the Court, and U.S. President Bill Clinton signed the Statute in 2000, it was never submitted to the Senate for ratification. In the Bush era, the administration was vocal about its opposition to the Court. During the Obama presidency, the administration had more interaction with the Court, participating as an observer. Throughout, the United States has been adamant that US citizens should never be a subject of the Court’s jurisdiction. The Afghanistan request occurred during the Trump administration and sought to do exactly that: to bring US citizens before the Court to answer for their alleged crimes. In the period between the OTP request for authorization to open an investigation and the PTC decision on the matter, John Bolton, then-President Trump’s US National Security Advisor reignited his decades-old criticism of the ICC in a speech to the US Federalist Society. In that speech, he deeply criticized the court on a variety of grounds, claiming that the ICC threatened American sovereignty and US national security interests due to the Court’s unfettered discretion to investigate, charge and prosecute. Bolton contended that the ICC is claiming jurisdiction over crimes that have disputed and ambiguous definitions—particularly over the crime of aggression—which, he argued, could become a pretext for politically motivated prosecutions. Bolton also misstated the jurisdictional capabilities of the court, saying that it has “automatic jurisdiction” and claiming “all of you sitting in this room today are purportedly subject to the court’s prosecution.” According to Bolton, “the ICC is dead to us.” For the full transcript, see *Full Text of John Bolton’s Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> [<https://perma.cc/QT77-KF8L>].

161. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Article 15 of the Rome Statute on the Authorisation of Investigation (Apr. 12, 2019) [hereinafter PTC Afghanistan Decision].

162. *Id.* ¶ 96.

163. *Id.* ¶ 87.

The PTC used the interests of justice to stifle the Prosecutor's exercise of discretion in this situation, concluding that it did not appear that the investigation would be effective or that prosecution could take place within a reasonable time,¹⁶⁴ so the "investigation [was] not feasible and inevitably doomed to failure,"¹⁶⁵ and should not proceed.

Some of these issues were resolved on Appeal, delivered on March 5, 2020.¹⁶⁶ The Prosecutor appealed the PTC decision on two grounds:¹⁶⁷ "whether there exists a necessity or possibility for a PTC to carry out an assessment of the "interests of justice" and, in the event that there is such a necessity or possibility, what are the "proper and relevant factors a PTC must or may consider for the purposes of such assessment."¹⁶⁸ The Prosecutor sought to reestablish the balance of the Rome Statute, putting the discretionary consideration of interests of justice firmly back in the grip of the Prosecutor, as envisaged in the Statute.

In its decision, the Appeals Chamber actually went further than what was requested by the Prosecutor and found that the PTC "erred in its interpretation of Article 15(4) of the Statute when it found itself bound to assess the factors under Article 53(1) of the Statute."¹⁶⁹ The Appeals Chamber determined that the Article 53(1) criteria was only applicable for situations referred to the Prosecutor by a State Party or the Security Council, and that it is Article 15 that governs the process for situations *proprio motu*.¹⁷⁰ Article 15 does not refer to the interests of justice, and so "for the purposes of exercising judicial control at this early stage of the proceedings, the PTC need only consider whether there is a reasonable factual basis to proceed with an investigation . . . and whether potential case(s) arising from such investigation appear to fall within the Court's jurisdiction."¹⁷¹ Consequently, the PTC should have constrained itself to determining whether the Prosecutor's determination that there was a reasonable basis to proceed and whether the case appears to fall within the jurisdiction of the Court were correct. In

164. *Id.* ¶ 89.

165. *Id.* ¶ 90.

166. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision on the Prosecutor and Victim's Request for Leave to Appeal Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of Investigation (Sept. 17, 2019).

167. *Id.*

168. *Id.* ¶ 36. The Appeals Chamber found in the affirmative on the first ground and so did not deal with the second ground of appeal.

169. Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 25 (Mar. 5, 2020).

170. *Id.* at 34.

171. *Id.*

making this determination, the Appeals Chamber actually narrowed the PTC's scope of review of the discretion of the Prosecutor from what had previously been understood under Article 53(1).¹⁷² The Chamber concluded by amending the Impugned Decision and directly authorizing the investigation into Afghanistan.¹⁷³

Despite the fact that the issue was resolved by the Appeals Chamber, the situation exposes many tensions in the *interdependence* relationship between the two branches. This equilibrium was designed to balance the ability of the Prosecutor to carry out *proprio motu* investigations against the concerns of states involved in the drafting of the Rome Statute that this would lead to an unrestrained prosecutor. Consequently, the Statute creates an internal *interdependence* between these two branches of the Court, which allows the OTP to conduct preliminary *proprio motu* investigations but requires PTC approval for those investigations to proceed. At the same time, the Statute contains tightly prescribed criteria for that PTC review, limiting what the PTC can take into consideration in making their determination. In the Trial Chamber decision, it overstepped the review limits baked into the Statute, leading to swift and unrelenting criticism from the international community.¹⁷⁴

Had the PTC's interpretation been allowed to stand, it would have exemplified an *interdependence* failure and significantly disturbed the equilibrium achieved in the statute between the competencies of the Prosecutor and the PTC in advancing investigations *proprio motu*. This unilateral power grab by the Chamber would have expanded the scope of the PTC review powers and fundamentally changed the authority for making interest of justice determinations. Outside of disturbing the *interdependence* relationship between those two branches, such a decision would also impact the overall independence of the Prosecutor if

172. Rome Statute, *supra* note 42, art. 53, ¶ 1.

173. Situation in the Islamic Republic of Afghanistan, ICC 02/17 OAA, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 54 (Mar. 5, 2020).

174. Some commentators considered that the Chamber's reliance on interests of justice as a basis for its decision was *ultra vires* because the language of Article 53(1) (c) is abundantly clear in granting the competence to make that determination to the Prosecutor alone. See, e.g., Dov Jacobs, *ICC Pre-Trial Chamber Rejects OTP Request to open an Investigation in Afghanistan: some Preliminary Thoughts on an Ultra vires Decision*, SPREADING THE JAM (Apr. 12, 2019), <https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/#comments> [<https://perma.cc/FA3U-9WGU>]. Other commentators called it a *de novo* approach, but one that was grounded in the Statute. See Kevin Jon Heller, *One Word for the PTC on the Interests of Justice: Taliban*, OPINIOJURIS (Apr. 13, 2019), <https://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/> [<https://perma.cc/2AET-FGBD>].

the PTC were able to undercut discretionary investigative determinations in contravention of the system conceived of by states at the Rome Conference. It remains to be seen whether this is a one-time error by the PTC or whether the quest for more review power will be recurrent as it reviews more *proprio motu* authorization requests from the Prosecutor. The Appeals Chamber needs to remain vigilant over future similar attempts.

Finally on this point, while this decision could be seen as mere error in the application of law by the PTC that was remedied by the Appeals Chamber, it is worth pondering the extent to which the PTC may have been influenced by the stringent opposition of the United States to this investigation.¹⁷⁵ Although it is impossible to say with certainty the role that pressure from the Trump administration played, there is no doubt that such pressure was there. That pressure underscores the need for judges of the highest qualification and integrity who can make difficult decisions in the face of powerful state opposition, even when that state is not a party to the Statute. And it harkens back to the earlier discussion in this Article about the cruciality of states taking their role in appointing officers of the Court seriously to ensure it is able to fulfill its mandate to end impunity for the most serious crimes.

Collectively, the *interdependence* failures outlined in Part II represent failures in the architecture of the Rome Statute. They also represent over optimism on the part of the drafters of how states would behave and how geopolitics would influence the work of the Court. The concluding part of this Article will outline some proposals for reimagining or restoring the equilibrium of the *interdependencies* in the Statute.

III. RESTORING BALANCE AT THE INTERNATIONAL CRIMINAL COURT: RESTORING AND REIMAGINING *INTERDEPENDENCIES*

The ICC is at an inflection point. It remains the centerpiece of the fragile system of international justice and is needed more today than it was at the conclusion of the Rome Conference more than twenty years ago. Yet, the Court faces significant challenges and needs to step up its performance to deliver justice more effectively to communities affected by the crimes under the Statute, particularly in today's world where

175. See e.g. see *Full Text of John Bolton's Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> [<https://perma.cc/QT77-KF8L>]; *US Sanctions International Criminal Court Prosecutor: Trump Administration's Action Tries to Block Justice for World's Worst Crimes*, HUMAN RIGHTS WATCH (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/us-sanctions-international-criminal-court-prosecutor> [<https://perma.cc/GTD5-HXL7>].

geopolitics are characterized more by polarization than cooperation. The Court has a new generation of leadership following the December 2020 election of six new judges for nine-year terms and the February 2021 election of a new Prosecutor who will be at the helm for much of the next decade. The time is ripe for the Court to make some changes to strengthen its operations and to further delineate the relationships of *interdependence* between actors in the system to ensure that they are appropriately balanced in line with the intentions of the text of the original Rome Statute, or to reimagine some of those *interdependencies* to create new relationships, systems, and structures that would ensure that the Court can meet the challenge it was set, while cognizant of new challenges that have arisen in the past twenty years.

The ASP also realizes that the Court is in need of reform. In December 2019, the ASP appointed a body of Independent Experts to review the practice and procedure of the Court because of its apparent failures and performance shortcomings.¹⁷⁶ In 2020, the IER published its report making recommendations “on specific complex technical issues”¹⁷⁷ that is “aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole.”¹⁷⁸ The findings in the Report are extensive and address three categories of concerns: governance, the judiciary, and the work of the OTP. The Report undoubtedly offers an invaluable common framework for continuing and future discussions between all stakeholders about how to bring about meaningful change and to advance improvements and it is hoped that the Report will help to streamline reform proposals and lead to concrete alterations to the practice of the Court. But the IER does not go far enough as it focuses almost all of its reform proposals internally, which as this Article has shown, is not where the majority of the Court’s challenges lie.

Focusing on internal reforms will not fix a Court that is built on *interdependencies* with external actors, nor will it fix a series of equilibria between the Court and external actors envisaged in the Rome Statute that have been thrown out of balance by the failure of one side to uphold the obligations and duties assigned to it under the terms of the Statute. When viewed through the lens of disequilibrium, a significant shortcoming of the IER is that, despite its breadth, it does not contain many specific recommendations for actors that are outside the Court structure but who are fundamental to its success. The Report does not

176. ICCASP, *supra* note 1.

177. IER Final Report, *supra* note 2, at ¶ 2.

178. *Id.* at ¶ 1; ICCASP, *supra* note 1, at, annex I.A, ¶ 1.

review the ASP and provides few concrete recommendations directed at that body, individual states, or at the Security Council. Much of the Report critiques the OTP and highlights its failures. Many of those failures stem from failures of state cooperation, yet the Report does not make recommendations specific to states to guide them in behavioral change. It remains to be seen whether states will use the Report as a tool of self-reflection to examine states' roles in the ICC failings.

As this Article has shown, some of the most significant inadequacies of the Court stem from external challenges, namely the *interdependence* relationships created between the Court and states and the Court and the Security Council. Indeed, many of the Court's most significant deficiencies and criticisms against it emanate from a failure of states and the Council to uphold their sides of the bargain struck in the Rome Statute. In order to get the Court back on track, those failings need to be addressed as a matter of utmost urgency.

There is no single solution that would address the architectural failings of the Rome Statute, evident in the imbalances of *interdependence* with states and the Security Council. Indeed, addressing the imbalances will be extraordinarily difficult, particularly in a time when international agreement and institution building is at its lowest ebb in many years. Nevertheless, the next three subsections will suggest some proposals for how *interdependence* relationships between the Court and states and the Court and the Council could be revisited with the goal of reimagining or reestablishing the balance between actors envisaged in the Rome Statute. Subpart III.A proposes something radical—a truly independent Court, distanced from states and the Security Council, which would require significant restructuring and buy-in from those actors it would seek to disenfranchise. Subpart III.B recognizes that the Court's relationship with the Security Council is unlikely to change any time soon, and the Court has no power to affect that, so the Court must adapt to the reality of Security Council disfunction and find other ways to proceed with its work. Subpart III.C recognizes the Court is unable to affect state behavior and contains more modest proposals, cognizant of what might actually be achievable within the existing structure of a Court that will remain *interdependent* on states for the foreseeable future.

A. A Radical Proposal: An International Criminal Court Independent from States and the Security Council

Under the system that currently exists in the Rome Statute, the Court heavily relies on external actors to fulfill its mandate of ending

impunity for atrocity crimes. Removing or changing these *interdependence* relationships would require a significant reimagining of the Court and the structure in which it operates: unfortunately, this is not within the power of the Court to do by itself and would instead need to be driven by states. Yet, if we put to one side the practicality of states agreeing to engage in a significant reform process and instead engage in some blue-sky thinking, what could that look like? If we were starting from scratch and didn't need to be beholden to the whims of states, perhaps we could revisit the *independence v. interdependence* dichotomy. Knowing what we know now, and in rejecting the arguments from Posner and Yoo against the *independence* of international courts outlined in Part I.B, it seems that more *independence* from states would be preferable to ensure the Court could more successfully function and be insulated from geopolitics and the whims of states. But what would that require?

First, a truly independent Court would have a financing stream not dependent on state contributions. This would require a complete reimagining of it as an international institution, unlike anything in the international system to date. But perhaps inspiration can be found in other places: could there be a role for individual philanthropy, something like a Gates Foundation equivalent for international justice? The obvious upside to this would be no more geopolitics getting in the way of financing. But it may mean exchanging one set of *interdependencies* for another, this time between individual mega-donors and the Court. Such a system may also be more susceptible to the highs and lows of the global stock market and the availability of private investment funds. So would this really be any more desirable than what we have now?

Second, a truly independent Court would not be reliant on states to cooperate in investigations and arrests of accused persons. That would require some kind of world enforcement or investigative mechanism. The relatively recently established International, Impartial and Independent Mechanism for Syria (IIIM),¹⁷⁹ the Independent Investigative Mechanism for Myanmar (IIMM),¹⁸⁰ and the Independent International Fact-Finding Mission on the Bolivian Republic of Venezuela¹⁸¹ may provide some useful models for thinking about how such an investigative mechanism could be structured. Each of these three models is slightly different in form and mandate, but each has the goal of collecting and preserving evidence for potential future prosecutions of those

179. G.A. Res. 71/248 (Dec. 21, 2016).

180. Human Rights Council Res. 39/2, U.N. Doc. A/HRC/Res/39/2 (Oct. 3, 2018).

181. Human Rights Council Res. 42/25, U.N. Doc. A/HRC/Res/42/25 (Oct. 8, 2019).

responsible for atrocity crimes. These three entities do not have independent jurisdiction. Instead, it is envisaged that each will develop case files that could be used in other domestic or international courts. Each of these entities is increasingly relying on open-source information to collect evidence, which is a practice that the ICC should also adopt to greater effect. The use of photo and video to capture evidence of atrocities being committed has exploded with the proliferation of smartphone usage around the world, opening more avenues to the Court and other justice mechanisms to gather evidence without the cooperation of states. Using this type of evidence would circumvent some of the need for state involvement in the process. Finally, perhaps there are elements that could be borrowed from the model of UN peacekeeping forces as entities that could engage in evidence collection. However, two of the three core principles of peacekeeping require (1) consent of the parties and (2) impartiality, so to use a peacekeeping force for evidence collection in this way would require either the buy-in of the state in question or a reimagining of the mandate of peacekeeping forces more generally, both of which are unlikely to occur.

Third, a truly independent ICC would not be reliant on states or the Security Council to trigger jurisdiction. This would require a beefed-up *proprio motu* investigation process, cutting out state and Security Council referrals and giving more power to the Prosecutor to conduct investigations wherever he sees there are crimes within the jurisdiction of the Court being committed, without requiring the authorization of the Pre-Trial Chamber. While there is some desirability in removing these external and internal *interdependencies*, there are a couple of significant drawbacks: first, under such a system the Prosecutor would be constrained to only investigate crimes that were committed in the territory of a State Party. Second, there is the potential that the Court would be completely overwhelmed by the sheer volume of situations that fulfill the crimes under the jurisdiction of the Court and so the OTP would potentially need to put tighter parameters around the situations it proceeds with investigating.¹⁸² This could narrow the scope of situations the Court addresses, which could have the effect of stymieing the Court's efforts to investigate the most serious crimes of concern to the international community as a whole in the Statute preamble.

Fourth, a truly *independent* ICC would not be reliant on states for electing officers. This would require some kind of independent

182. See, e.g., MARGARET M. DEGUZMAN, *SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW* (Oxford University Press, 2020).

mechanism formed by the Court itself and tasked with accepting and reviewing applications for open positions. This is perhaps the most attainable, yet most radical, proposal to achieve independence, although would require states to consent to remove themselves from this process.

A final, radical proposal could reconsider the mandate of the ICC as a whole, and might consider the following questions: was the Court set up to fail? Does the mandate contained in the Preamble really capture what we can expect from an international institution today? Is ending impunity too big of a goal? Are the enumerated crimes too narrow? Does the Court need a new mandate? Each of these questions would require deep exploration and it is difficult to envisage any of them being answered in a way that does not lead to an expanded mandate for an already overstretched Court.

Creating a truly independent Court would require some heavy lifts to tip the balance entirely away from states into the hands of a Court divorced from their influence. States and the Council are unlikely to voluntarily agree to a reimagined structure that gives them significantly less power in the field of international justice and accountability, and it is not clear who could be the driving force on making these changes. Consequently, a radical reimagining probably is not the right way to go to rebalance the Court. Instead, perhaps there are more modest proposals that are attainable to address some of the Court's significant challenges stemming from its *interdependence* with the Security Council and states and which would go some way to reestablishing the balance envisaged in the Rome negotiations between different actors in the system.

B. Adapting to the Reality of Security Council Dysfunction

The *interdependent* relationship between the Court and the Security Council predicated on the system of Security Council referral envisaged in the Rome Statute reflected how the Security Council was functioning during the drafting of the Rome Statute and assumptions about how the Council would continue to function in the following years. However, the fact that three of the P5 members did not become state parties and the significant geopolitical shifts that have occurred over the past two decades, renders the Security Council referral mechanism almost unworkable. Much has been written about the dysfunction of the Security Council that does not need to be repeated here.¹⁸³ Suffice it to say that there is no easy fix to get the Security Council back to

183. See e.g., JENNIFER TRAHAN, *EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES* (Cambridge Univ. Press, 2020).

a functioning level where powerful P5 states do not exercise their veto in support of their allies. Moreover, the Court is powerless to affect any change within the operation of the Security Council. Consequently, the Court has to adapt to the reality of Security Council inaction until there is a fundamental shift in political winds that may allow for the full restoration of this *interdependence*.

Some proposals have recently emerged aimed at getting the Security Council back on track, three of which have merit in the context of referring situations to the Court. The first involves a proposal developed by the Permanent Mission of Liechtenstein to the United Nations and initially supported by the Accountability, Transparency and Coherence (ACT) Group,¹⁸⁴ which proposed a Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes. Under this Code, parties “*pledge in particular* to not vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity, or war crimes, or to prevent such crimes.”¹⁸⁵ As of early 2020, the Code of Conduct is supported by 121 states.¹⁸⁶ Though the Code doesn’t explicitly include reference to Security Council ICC referrals and the main drafter of the Code, Liechtenstein Ambassador Christian Wenaweser, has not commented on the implementation of the Code for that specific purpose, the language of the Code leaves open the possibility that it could be utilized in that way.

Notably missing from the 121 current supporters are three of the P5 states: the United States, Russia, and China. Given that these three are the states that have proven to use the veto power most willingly in atrocity situations, it is unlikely that they will make this voluntary political commitment. Nevertheless, as Ambassador Wenaweser has said, “the fact that nearly two-thirds of UN states have signed up to the ACT Code of Conduct demonstrates their dissatisfaction with past Council failures and their willingness to do better in the future,”¹⁸⁷ so we must continue to hope that the holdout P5 states may come around to the pledge, which would have the result of restoring the role for the Council envisaged in the Rome Statute, thus restoring the equilibrium between the Council and the Court.

184. This is a group of 25 small and medium-sized States at the U.N. See Letter from the Permanent Representative of Liechtenstein to the United Nations Addressed to the Secretary-General, Annex 1, U.N. Doc. A/70/621-S/2015/978 (Dec. 14, 2016).

185. *Id.* ¶ 3.

186. Amb. Christian Wenaweser & Sina Alavi, *Innovating to Restrain the Use of the Veto in the United Nations Security Council*, 52 CASE W. RESV. J. INT’L L. 65, 67 (2020).

187. *Id.* at 67.

The second proposal could circumvent the role of the Security Council in referring situations to the Court and would involve the General Assembly acting under the Uniting for Peace Resolution.¹⁸⁸ This Resolution, adopted in 1950, “resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for maintenance of international peace and security in any case where there appears to be a threat to the peace, a breach of the peace, or an act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures.”¹⁸⁹

To use this Resolution to make referrals under to the ICC would require a couple of significant shifts. First, a referral isn’t a “collective measure” as traditionally defined under international law. Second, and the more challenging, the implementation of this referral method would require an amendment to the Rome Statute. This would be a giant undertaking. There is no doubt that the P5 states would be opposed to removing referral power from the Security Council and placing it in the hands of the General Assembly, meaning that this reform proposal is unlikely to be utilized for the ICC.

The third proposal would require an overhaul of the Security Council system itself. There have been several proposals circulating for years about various reform measures including expanding the Security Council,¹⁹⁰ and stripping the P5 of their veto,¹⁹¹ which have met with resistance from the P5 states who stand to lose the most. It is safe to say that there is no realistic prospect of this type of reform in the near future.

A final and unrealistic prospect is Russia, China, or the United States ratifying the Rome Statute, which could, in theory, make the process of referral smoother. However, all three states have displayed open hostility to the Court,¹⁹² and those attitudes are unlikely to change

188. See, e.g., YASMINE NAHLAWI, *THE RESPONSIBILITY TO PROTECT IN LIBYA AND SYRIA* (Routledge, 2020); Ved P. Nanda, *The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect*, 52, 119 CASE W. RESRV. J. INT’L L. (2020).

189. G.A. Res. 377A (V) (Nov. 3, 1950).

190. See, e.g., Bruce Russett, Barry O’Neill & James Sutterlin, *Breaking the Security Council Logjam*, 2 GLOB. GOVERNANCE 65–80 (1996).

191. See, e.g., BARDO FASSBENDER, *U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE* (Kluwer L. Int’l, 1998); JAN WOUTERS & TOM RUYS, *SECURITY COUNCIL REFORM: A NEW VETO FOR A NEW CENTURY?* 44 (Academia Press, 2005); Kai Schaefer, *Reforming the United Nations Security Council: Feasibility or Utopia?* (2017) (Master of Arts Thesis, McGill University).

192. See, e.g., U.S. Exec. Ord. 13928 (2020); Shaun Walker & Owen Bowcott, *Russia*

any time soon. In addition, if any of the three were a party to the Court, each could be a potential target for a referral to the Court by another state or a *proprio motu* investigation by the Prosecutor as a result of crimes within the jurisdiction of the Court being committed within their territory or by their nationals.¹⁹³ These three states have always been adamantly opposed to the Court's jurisdiction being directed towards them, and nothing has changed to make them any more likely to be willing to accept that attention now.

With the unlikelihood of any of these reforms being successful in the near, or even medium, term, it seems unlikely that the Security Council will play a significant role in the operation of the ICC any time soon and so the Court needs to adapt to account for that. The Court will need to continue to rely on State Party referral and *proprio motu* investigation to continue its important work, while recognizing the limitation that, without Security Council referral, many situations will remain outside of its jurisdiction. To counter that, the Court will need to get creative in how it can access crimes committed in non-state parties. We see some of this creativity in the ongoing investigation into the situation in Bangladesh/Myanmar, where it has used the existing crime of enforced deportation innovatively and creatively to access jurisdiction over crimes committed by Myanmar, a non-State Party.¹⁹⁴ As other situations arise that have a cross-border component, this may be one way for the Court to access those crimes, albeit in a limited way.

To be abundantly clear, none of these fix the fissure in the Security Council-Court *interdependence* relationship or restore the balance between the two. Any return to equilibrium is unlikely until there can be broader shifts within the Security Council, the P5, and the use of the veto and the Court will need to adapt to do the best it can under the circumstances.

Withdraws Signature from International Criminal Court Statute, GUARDIAN (NOV. 16, 2016), <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>; Dan Zhu, *China, the Crime of Aggression, and the International Criminal Court*, 5(1) ASIAN J. INT'L L. 94–122 (2015).

193. For example, if China were a State Party to the ICC, the treatment of the Uighur people could potentially be referred to the Court by another State Party.

194. *See, e.g.*, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-7, Office of the Prosecutor Request for Authorisation of an Investigation Pursuant to Article 15 (July 4, 2019).

C. Incremental Changes the Court can make within or to its Existing Structure to Adapt to the Reality of State Behavior

As explained in Subparts III(A) and III(B), to truly restore the balance between states and the Court would require fundamental shifts in the behavior of individual states, the operation of the Security Council, or a complete reimagining of the Court as an institution, all of which are unachievable without the participation of states. Not only is that something outside of the Court's control, but it is also unlikely to happen on any large enough scale that would help to restore the disequilibrium we have seen in the various iterations of the *interdependence* relationship between states and the Court. Instead, we must look at what the Court can achieve within its existing structure and corresponding *interdependence* relationships to adapt to the reality of state behavior that it is acquainted with. Many of the proposals in the subsequent subsections recommend action by the ASP. Obviously, this places the onus back on states to fix their errors, but the ASP is an integral part of the architecture of the ICC and will be vital to any incremental reforms to restore balance between states and the Court.

1. Nominating and Electing Judges

Earlier parts of this article have explained the challenges in the *interdependence* relationships between states and the ICC vis-à-vis the nomination and election of court officers. The equilibrium envisaged under the Rome Statute is the involvement of states in nominating and electing qualified candidates, on the one hand, balanced against the Court having qualified personnel appointed to it to ensure that the system is able to successfully function and have legitimacy on the other. The success of this balance was predicated on the assumption made by the drafters that states would take this obligation seriously, but this has not always been the case, sometimes resulting in un- or under-qualified candidates being appointed to the Court. There have been some reform measures put in place for this last round of 2020–21 elections that seem to have shifted things back towards the equilibrium envisaged in the Statute, but more reform is needed to fully restore the balance between states and the Court in this regard.

Prior to the 2020 judicial elections, the problematic imbalance in the *interdependent* relationship between the states and the Court in electing judges manifested in the states appointing unqualified candidates to the bench, thus frustrating the work of the Court. As discussed in Part II.A.1, during the 2020 elections a new process was put in place that

represented a significant improvement over prior elections and resulted in an improved candidate pool. Yet, as the International Justice Monitor concluded, there remained a toxic campaign culture, the continued prioritization of electing diplomats and other governmental officials, and some irregular and opaque domestic nominating procedures.¹⁹⁵

To move towards restoring the equilibrium between the states and the Court envisaged in the Statute, and to respond to continued shortcomings in the process identified by the International Justice Monitor and others, the ASP should institute a number of reforms in advance of the next round of judicial elections. First, the ASP should entirely discard the system of Group A and Group B nomination. Instead, the ASP should adopt a candidate-driven process where court vacancies are advertised and individual candidates submit applications for consideration, illustrating their particular qualifications and competence for the position. The candidates should be evaluated by a new Committee on Judicial Candidate Competency (CJCC), tasked with assessing the viability and qualifications of each individual. The new CJCC should replace the Advisory Committee on the Nomination of Judges but be constituted similarly: nine individuals with established competence and experience in criminal or international law, of a high moral character, representing the principal legal systems of the world and an equitable geographic representation. From the pool of applicants, the CJCC would make a short-list of candidates for consideration by states to ultimately vote on. Although the final candidate would be state selected, this process would ensure much more *independence* by removing states from the early phases of the process, disincentivizing them from interfering to advance their own preferred candidate. This reduced role for states would help restore the *interdependence* equilibrium between states and the Court by retaining a role for states. And, at the same time ensuring a higher caliber of candidates that are equipped to deal with complex criminal trials at the ICC. It is only by having eminently qualified judges that the ICC will be able to address its mandate of ending impunity.

If complete removal of the state nominating procedure is too radical for the ASP, there are some more incremental actions the body could take. For example, the ASP should put in place more stringent requirements for transparency in the domestic selection process. The ASP should consider mandating specific criteria for judges, which could include minimum years of qualification as a lawyer, involvement in complex trials while in practice, prior judicial experience or more. It could also exclude

195. Pena, *supra* note 108.

from nomination individuals who have only non-legal experience, thus ensuring that diplomats and other civil servants without significant legal training are not put forward as candidates to the Court. The ASP should require states to provide documentation that catalogs their search and selection process, and make that accessible to states, civil society, and others, to review. These measures would go some way to ensuring that only qualified candidates are nominated to the Court. The ASP should also put in place a system to encourage candidates from a diversity of states including states which, to date, have not had judges on the ICC or other international courts. While this would not directly address the *interdependence* imbalance, it would have the effect of diversifying the states from which judges are drawn, thus potentially increasing the pool of states who may want to advance well-qualified candidates to the bench.

2. Cooperation Between States and the Court in the Arrest of Suspects

The cooperation regime in the Rome Statute established a system of *interdependence* between the Court and states. This balanced the obligation on states to arrest suspects and to aid the OTP in its investigations against the Office's ability to proceed with investigations and cases, impacting the success of the Court overall. The mechanics of this have failed on various levels. However, without an OTP with unlimited budget and unlimited personnel with unlimited access to conduct on-the-ground investigations on the territory of states, is not possible to imagine a system that would not be dependent on the cooperation of states. Since there is no alternative to state involvement, tweaks are needed to strengthen the willingness and capacity of states to fulfill their existing responsibilities under Part 9 of the Statute.

The Independent Expert Review Report addressed cooperation requests through the prism of the way requests originate through the Jurisdiction, Complementarity and Cooperation Division (JCCD) of the OTP, making several recommendations for how the Division could improve efficiency.¹⁹⁶ The Report also addresses the tracking and arrest of fugitives, but makes no specific recommendations.¹⁹⁷ All of the recommendations that are made related to cooperation are aimed at the OTP, yet, the Report fails to make any recommendations to states who are responsible for fulfilling requests. The Report does note ongoing efforts by the Court and ASP to “coordinat[e] the development of a

196. IER Final Report, *supra* note 2, ¶ 757–60, R279, R282.

197. *Id.* ¶¶ 767–74.

stronger framework for the tracking and arrest of Court fugitives,¹⁹⁸ and the appointment by the ASP of a Rapporteur on Arrest Strategies in 2013, who compiled a comprehensive action plan.¹⁹⁹ Given that the Court has no power to affect the behavior of states, it has to adapt to the reality of the levels of assistance that states have been willing to provide and to find workarounds to address shortcomings.

The Court has long recognized the challenges it faces in ensuring state cooperation and has undertaken several studies with proposed reforms. The initial recommendations made by the Rapporteur on Arrest Strategies in 2014 included (1) developing policies, (2) developing positive and negative incentives, (3) sanctions, (4) the implementation of political and diplomatic measures, (5) the establishment of a Tracking Unit, and (6) the structured implementation of the Action plan.²⁰⁰ The Rapporteur also included novel suggestions such as including language in the mandate of UN peacekeeping missions that they assist with the enforcement of ICC arrest warrants.²⁰¹ Few of these recommendations have been acted upon. In its most recent Strategic Plan 2019–2021, the OTP recognizes the need for increased cooperation with states to secure arrests, including “developing . . . enhanced strategies and methodologies to increase the arrest rate of persons subject to outstanding Court arrest warrants.”²⁰²

In order restore the balance envisaged in the *interdependent* relationship between states and the Court and to ensure the arrest of indictees, what is most needed are systems that encourage state compliance with their obligations. In 2011, the ASP adopted by consensus a range of procedures related to the non-cooperation of states aimed at strengthening the Court and the ASP.²⁰³ These included both formal and informal

198. *Id.* ¶ 768.

199. Rep. of the Bureau on Coop., Assembly of States Parties, 14th Sess. (Nov. 18–26, 2015) ICC-ASP/14/26, (2015).

200. Rep. on Arrest Strategies by the Rapporteur, Assembly of States Parties, 13th Sess. (Dec. 8–17, 2014) ICC-ASP/13/29 (2014).

201. *Id.*; a subsequent report highlights pushback on this idea from States in the interest of ensuring peacekeeping remains impartial. However, that Report suggests that the “Security Council has already adopted in a number of cases mandates for peacekeeping forces that support the enforcement of ICC arrest warrants . . . [and some] States Parties are actively supporting that the emerging practice of the Security Council to take advantage of the ICC as a complementary tool in the international peace and security framework is by now consolidates.” Rep. of the Bureau on Coop., Assembly of States Parties, 14th Sess. (Nov. 18–26, 2015) ICC-ASP/14/26, at ¶ 21–23 (2015).

202. Strategic Plan 2019–2021, The Office of the Prosecutor, (July 17, 2019).

203. The Assembly of States Parties, Res. ICC-ASP/10/Res.5, U.N. Doc. (Dec. 21, 2011).

responses to non-cooperation²⁰⁴ to be carried out by the Bureau and ASP “aimed at enhancing the implementation of the Court’s decisions.”²⁰⁵ Such measures included: a public procedure to address non-cooperation that would be forwarded to all States Parties;²⁰⁶ following a decision of non-cooperation by the Court, an open letter from the President of the ASP to the non-cooperating state reminding it of the obligation to cooperate, with a copy also sent to States Parties “encouraging them to raise the matter in bilateral contacts with the requested state;”²⁰⁷ emergency meetings of the Bureau where the non-cooperating state would represent how it intended to cooperate with the Court in the future; public meetings to allow for open dialogue between the non-cooperating state, States Parties, observers and civil society; and a Bureau report on the outcome of dialogue, and subsequent discussion of the report at the next ASP.²⁰⁸ The ASP should prioritize the implementation all of these measures to encourage state compliance through the threat of naming and shaming those that do not cooperate with requests of the Court.

Moreover, in the 2019 Report of the Bureau on cooperation,²⁰⁹ the Bureau underscored the importance of states signing voluntary cooperation agreements with the Court to allow for “burden-sharing between states . . . and the Court more flexibility on potential cases.”²¹⁰ The report also included a Draft Resolution on cooperation.²¹¹ This matter of voluntary cooperation should be taken up seriously by the ASP to encourage all states parties to develop these voluntary cooperation agreements with the Court, to indicate their willingness to abide by their obligations under Part 9 of the Statute and, in some cases, to concretize how states will cooperate with future requests and any potential limitations to cooperation they might foresee (these should be based only on actual capacity limitations of the state concerned). The ASP should also pass the Draft resolution on cooperation, which “*encourages* states to establish a national focal point and/or a national central authority or working group tasked with the coordination and mainstreaming of Court related issues.”²¹²

204. *Id.* ¶ 9–11.

205. *Id.* ¶ 12.

206. *Id.* ¶ 13.

207. *Id.* ¶ 14(a), (b).

208. *Id.* ¶ 14(c)–(f).

209. Rep. of the Bureau on Coop., Assembly of States Parties, 18th Sess. (Dec. 2–7, 2019) ICC-ASP/18/17, (2019).

210. *Id.* ¶ 6.

211. *Id.* at 6.

212. *Id.* ¶ 9.

Under the Rome Statute, the OTP is able to communicate non-cooperation of states to the UN Security Council. The OTP has done this on several occasions, but the IER identifies that the UN Security Council has failed to respond.²¹³ Given Security Council dysfunction, it is unlikely that this system will be practically available any time soon and so is not currently a viable avenue for compliance.

There may be other methods of sanction that could be taken against non-cooperative State Parties that may go some way to restoring the imbalance between what is envisaged in the Statute and the actual behavior of states. Unfortunately, none of these measures could be taken by the Court itself as it does not have the power to affect state behavior. However, the ASP could play this role, as long as there was a critical mass of states in favor of advancing reforms around cooperation. For example, the ASP could bar non-cooperating states from participating in the ASP meetings until they come into compliance and fulfill their obligations. This may have a positive effect on states who are particularly interested in participating in international justice processes, or at least be seen as participating, but it would likely have less effect with those states who are not supporters of the Court to begin with. The ASP could also impose fines on states that refuse to comply. This may have a deterrent effect towards non-cooperation and encourage them to work with the Court when requested. Of course, the enforcement of fines may be problematic as the Court does not have a mechanism by which to do that, and so the ASP would need to create a system for collections. Any of these measures detailed here could help to restore the balance between the Court and states by encouraging states to abide by their obligations under Part 9 of the Statute to ensure that the Court is able to access those indicted for the most serious crimes of international concern.

CONCLUSION

This Article seeks to reconceptualize our understanding of the ICC from an *independent* institution to an *interdependent* institution. This distinction is important because it allows us to think about the failures of the Court in a new way, to better understand why those failures have occurred, and to apportion some of the responsibility for failures outside the Court itself and onto states and the Security Council which, in many instances, have failed to uphold their duties and obligations as envisaged in the Statute. This lens of *interdependence* also allows us to think about new ways to address the shortcomings of the Court and to propose ways to restore the equilibrium envisaged in the Statute.

213. IER Final Report, *supra* note 2, ¶ 767.