CARTA INTERNACIONAL
ASSOCIAÇÃO BRASILEIRA DE RELAÇÕES INTERNACIONAIS
ISSN 2526-9038

# Navigating the Dual Crisis: The Politics of the International Criminal Court within the Liberal International Order

## *Navegando na Dupla Crise: A Política do Tribunal Penal Internacional na Ordem Internacional Liberal*

## *Navegando la Doble Crisis: La Política de la Corte Penal Internacional en el Orden Internacional Liberal*

DOI: 10.21530/ci.v19n3.2024.1473

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## Abstract

Throughout its existence, the International Criminal Court encountered numerous challenges, leading many to perceive it as in a state of perpetual crisis. This article explores the ICC's recurring crises and its difficulty in responding to them. It questions how they reflect broader issues and argues that these challenges stem from the international legal system's inherent features. The article has three sections:

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Artigo submetido em 31/05/2024 e aprovado em 13/03/2025.

it first examines the ICC's 'crises'; then inquires the modern liberal international project's implications for the ICC; and proposes a reading of the ICC's situation as a dual crisis which is an inevitable result of international legal argumentation's structure.

**Keywords:** International Criminal Court; Politics of International Law; Crisis; Liberal International Order; Law and Politics.

## Resumo

Ao longo da sua existência, o Tribunal Penal Internacional encontrou numerosos desafios, levando muitos a considerá-lo num estado de crise perpétua. Este artigo explora as crises recorrentes do TPI e a sua dificuldade em respondê-las. Questiona como refletem questões mais amplas e argumenta que estes desafios decorrem das características inerentes do sistema jurídico internacional. O artigo tem três seções: primeiro examina as "crises" do TPI; em seguida, questiona as implicações do projeto internacional liberal moderno para o TPI; e propõe uma leitura da situação do TPI como uma crise dupla que é resultado inevitável da estrutura da argumentação jurídica internacional.

**Palavras-chave:** Tribunal Penal Internacional; Política do Direito Internacional; Crise; Ordem Liberal Internacional; Direito e Política.

## Resumen

A lo largo de su existencia, la Corte Penal Internacional ha enfrentado numerosos desafíos, lo que ha llevado a muchos a considerarla en un estado de crisis perpetua. Este artículo explora las crisis recurrentes de la CPI y su dificultad para responder a ellas. Cuestiona cómo reflejan cuestiones más amplias y sostiene que estos desafíos surgen de las características inherentes del sistema jurídico internacional. El artículo tiene tres secciones: primero examina las "crisis" de la CPI; luego cuestiona las implicaciones del proyecto internacional liberal moderno para la CPI; y propone una lectura de la situación de la CPI como una doble crisis que es un resultado inevitable de la estructura de la argumentación jurídica internacional.

**Palabras-clave:** Corte Criminal Internacional; Política de Derecho Internacional; Crisis; Orden Liberal Internacional; Derecho y Política.

## Introduction

Throughout its life span, the International Criminal Court (ICC) has faced an array of challenges and time and again has been considered to be in a state of crisis. Benvenisti and Nouwen (2016) emphasize that the 'crisis' vocabulary has been a constant in the ICC's history. "Judging by the news headlines, and conference and publication titles, [crisis] is the main leitmotif in the present discourse about the ICC" (Vasiliev 2020, 630). The institution is said to have been in crisis since the beginning of its operations. Reasons range from "a weak record of prosecutions, discord among the court's judges, and a difficult relationship with the world's great powers, such as Russia and the United States" (Sterio 2020, 468). Among criticisms is the argument that the prosecution is largely dependent on "coercive conflict resolution" and "on the political agendas of those states whose cooperation is necessary" (Rodman 2016, 239). Many reflections on the ICC's activities in the past two decades point to failed promises and missed opportunities (see, for example, Akande 2011; Jacobs 2011; Schabas 2012; Blok 2019; Jacobs 2019).

Even though criticism for the ICC's missteps looms large, none of the 'crises' that befell the ICC were satisfactorily responded by the Court (Vasiliev 2020, 636). Accordingly, our article reflects on the ICC's difficulty to respond (or even transform) considering the demands of international (legal) practice by questioning: *how can we make sense of the ICC's recurring crises as a (aporetic) normality of the international (legal) order?* We argue that the ICC has great difficulty in adjusting to the criticisms due to symptoms deeply ingrained in international legal order that conditions international practice. The recurring crises faced by the ICC seem to reveal the very paradoxes intrinsic to the international legal order — where normative aspirations and political realities are perpetually at odds. These conditions of possibility for international legal practice can be studied through a reading that tries to "lay bare [the field's] contradictions [...] unpacking its contentious origins, workings, and effects, [...] [as to] expose the extent to which international criminal justice may be a part of the problem rather than solution" (Vasiliev 2020, 634).

Therefore, our interest here does not lie in understanding the motivations or the consequences of these 'crises' but to comprehend what dwells on the

larger picture and makes this institution a site of recurring hassles. We claim that the serial occurrence of failed undertakings has to do with the very essence of international criminal justice's project, one that promises justice and deterrence but is only able to provide a faulty form of utopic legalism. This 'faulty utopic legalism' is less about a design flaw that could eventually be improved, rather being an inevitable outcome of the ICC's embeddedness in an international order that simultaneously demands and undermines utopian aspirations. The article is structured into three sections. The first makes a twofold undertaking in which it initially introduces some of the so-called 'crises' of the ICC from the Court's first case to more recent events that sparked huge criticism against the ICC and then ponders on the labeling of such events as crises. The second section proceeds to an inquiry regarding the implications of the modern liberal international project for the ICC. And, finally, the last section proposes a reading for the ICC's situation as a dual crisis, considering it an inevitable result of the structure of international legal argumentation.

## The International Criminal Court's many 'crises'

In its very first case, the ICC faced harsh criticism after the Trial Chamber decided to suspend proceedings in the Lubanga Case. The Chamber found that the actions of the Office of the Prosecutor (OTP) in a matter related to disclosure of evidence compromised the trial process "to such a degree that it [was no longer] [...] possible to piece together the constituent elements of a fair trial" (Trial Chamber I 2008, para. 93). This decision was a novelty in the practice of the ICC. Neither the Rome Statute nor the Rules of Procedure and Evidence mention the possibility of remedying an abuse of process by staying the proceedings. The decision was based on the practice of human rights courts and jurisprudence from the ICC's Appeals Chamber (Turner 2012, 178). This situation was labeled at the time a "crisis of maturity" (Anonymous 2008).

Soon after, the ICC entered its most turbulent period by opening the Al Bashir Case. The issuance of arrest warrants for Bashir was soon followed by a series of non-compliances which befuddled the Court into creating in the ensuing years a series of different reasonings to uphold the obligatory nature

of its arrest warrants for Bashir (Giannini and Yamato 2021). In the wake of a series of debacles in the ICC-Africa relationship, the year 2016 witnessed what perhaps was the apex of the backlash against the ICC. Three African States announced their withdrawal from the Court. On an African Union draft document, a larger group of States indicated their intention — and, consequently, demonstrated that the these notifications of withdrawal were not isolated acts — towards a project of "collective withdrawal" which according to them had the ultimate goal of being "an attempt to shift from an old equilibrium that benefits some states and disadvantages others to a new equilibrium with different distributional consequences" (Assembly of the African Union 2017, para. 19). After these episodes, however, the African blow out with the ICC eased somehow. "The Court recoiled from the abyss and something akin to normalcy set in, only to give way to 'crises' on other fronts" (Vasiliev 2020, 631).

Whilst the ICC still managed to create dissent with its reasonings in the Al Bashir Case, another process managed to draw the attention for its unexpected turn. The acquittal on appeal of Jean Pierre Bemba, in June 2018, overturning the 2016 landmark conviction which had been "the first ICC conviction for crimes of sexual violence and the first conviction based on the legal concept of command responsibility" (Hibbert 2019, 97). The Appeals Chamber decision in the Bemba Case was regarded as "a naïve act of formalism" (Whiting 2018) which was even criticized by the Court's Prosecutor (International Criminal Court 2018). In the following year, the "'no case to answer' judgment acquitting Gbagbo and Blé Goudé added fuel to the debate as to whether the Court is in a profound crisis and in dire need of reform" (Vasiliev 2020, 632). Around six years after the beginning of the trial, the Trial Chamber considered that the Prosecution's case was unconvincing since it was purely based on NGO reports, a documentary and press articles (Bouwknegt 2019; Minkova 2023, 242).

The subsequent ICC controversial moves that bred further talk of crisis centered around cases that involved somehow the world's great powers. In September 2021, the Prosecutor requested the Pre-Trial Chamber to resume the Afghanistan situation investigation, with the caveat that the focus would be on crimes committed by the Taliban and the Islamic State, while the investigation on the Afghan and US armed forces would be deprioritized (Office of the Prosecutor 2021). The Palestinian situation also drew a lot of criticism for its

lack of meaningful progress and for the absence, until very recently, of an OTP demonstration of "interest in meddling into a situation that might stir trouble in its relation to the US and its allies" (Giannini 2022, 150).

These events display that the ICC's many 'crises' do not amount to one particular kind of development. The label seems to encapsulate an attempt of framing the field's "current precarious condition" (Vasiliev 2020, 632). Flagging a situation as a crisis, however, can be problematic. Repeatedly evoking the crisis vocabulary for a vast range of contexts and situations might create the notion of a state of exception that can be remediated with emergency measures. "Crisis is uncertain and does not in itself predict a specific form of outcome" (Bergman-Rosamond et al. 2022, 466). Nevertheless, it is shaped by space and time "in context and by context", which makes it not static even though some experiences might create the "sense of permanent crisis", of crisis being the new normalcy (Bergman-Rosamond et al. 2022, 466). Therefore, following Bergman-Rosamond et al. (2022), we understand crisis not as ahistorical, but rather uncertain and contingent. Crises often create the perception that change will come, even though it might not be that way. For example, reading "about the 'crisis' in the ICC, [one] expects a fundamental decision, turning point or termination, but business seems to go on as usual, until the next 'crisis' comes around" (Benvenisti and Nouwen 2016, 206). In our reading, the notion of 'crisis' appears as an operational condition of the current international (legal) order—chronic rather than extraordinary, ordinary rather than exceptional.

Another issue on the use of crisis to identify certain phenomena is that 'the crisis' becomes associated with a particular event. Such construction creates the perception that such crisis is taking place "in a societal void" when instead it "gains substance through its dialectical relation to the empirical condition it seeks to critically explore" (Bergman-Rosamond et al. 2022, 481). Examining the challenges that the ICC faces must contemplate both context within which the Court presumedly operates and the aspirations that underlie its functioning. The ICC is founded upon expectations which inevitably lead to "inherent disappointment[s]" (de Hoon 2017, 613). These foundational expectations operate as regulative ideals that legitimate the Court's existence within the liberal international order. Furthermore, "the Court's practice deviates too much from their vision of a legitimate ICC" (Gissel 2018, 747; see, also, Schabas 2013,

548–49). With the prerogative to try the perpetrators of the most atrocious crimes possible, the ICC began its activities after the entry into force of the Rome Statute on July 1, 2002.[3] Its mission is to put an end to impunity for the perpetrators of these crimes, considered to be of concern to all humanity, and consequently contribute to ensuring that such crimes do not occur again. Therefore, preventing the recurrence of such crimes is an important element of the Court's foundation and is present in the preamble of the Rome Statute. The Court's web page also introduces to the public the beacon which sets its mission. It presents that the Court's call is to participate in a global fight to end impunity, and through international criminal justice, [...] to hold those responsible accountable for their crimes and to help prevent these crimes from happening again (International Criminal Court n.d.). This capacity for deterrence would be exercised, according to the Pre-Trial Chamber I — when judging the OTP's request for the issuance of an arrest warrant against Thomas Lubanga Dyilo –, especially due to the existence of two elements: the Court's focus on trying high-ranking military officials and politicians (Pre-Trial Chamber I 2006, para. 54); and the additional gravity threshold established by the Rome Statute's article 17(1)(d) (Pre-Trial Chamber I 2006, para. 60). Through these two components, the ICC would be ensuring its effectiveness "to perform its deterrent function and maximizing the deterrent effect of its activities" (Pre-Trial Chamber I 2006, para. 60).

The discussion related to the legitimacy of the ICC is closely linked to the frequent and recent references to a crisis in the Court. ICC's legitimacy has been increasingly challenged (de Hoon 2017, 593). Most of the literature on the subject anchor the Court's ability to achieve its proposed mission to a greater degree of legitimacy[4] (see, for example, deGuzman 2009; Hibbert 2019; Dutton and Sterio 2023). However, an appraisal of the ICC's crisis requires an analysis

3 Despite coming into force on July 1, 2002, the first judges elected to the ICC were only sworn in on March 11, 2003 (International Criminal Court 2003).

4 Since assessing the ICC's legitimacy goes beyond (and perhaps against) our proposal, we do not elaborate upon the way these events impact the Court's legitimacy or even what comprises the notion of legitimacy. These events' impact on the Court's legitimacy is undeniable. Our skepticism is, however, in relation to the possibility of measuring an event's impact on the Court's legitimacy. It is our belief that discourses on legitimacy are open and subject to constant modification, a dispute over truth. Recognizing the contingency concerning the definition of legitimacy and the inability of its use in a descriptive way to explore its critical potential, we embody the semantic incommensurability of legitimacy (see Florentino 2017, 211).

that dives further and goes beyond the attempt of establishing a causal link between its performance and consequent level of legitimacy. Our quest in this article follows the provocation made by Benvenisti and Nouwen (2016, 206) focusing "not so much on whether international criminal courts and tribunals have erred, but on the conditions for their existence and operations, and how these conditions influence the type of justice they render, intentionally or unintentionally". By investigating the ICC's overlapping crises, our goal is to examine the underlying features that render this chain of crises inexorable. Their inevitability comes from the very way the field of international (criminal) law and its practices structured (and is structured by) a modern liberal order which is not able to respond to international politics' current challenges. In the following section, we will take a closer look at the way international (criminal) law's structures are heavily embedded in this modern liberal international legal order and its consequences for international legal practice.

## The International Criminal Court as a modern liberal institution

Since the 18th century, international law has been conceptually connected to the idea of an international rule of law — and, thus, to the liberal principles of the Enlightenment (Koskenniemi 1990, 4). If modern international law was developed from the emergence of a liberal sensibility that sought to civilize late nineteenth-century attitudes towards race and society (Koskenniemi 2001), post-World War Two (particularly post-Cold War) international law furthered the liberal international order (LIO) (Buchan 2013; Ikenberry 2018). As the Western hegemony aimed and managed to "universalize" the liberal internationalism ideology (Puchala 2005), critical scholars have underscored how the LIO has been built with an exclusionary motivation at heart (Lascurettes 2020) by asserting imperial and colonial conditions onto non-Western countries (Anghie 2005; Prashad 2007).

The Cold War, a period of mainly bipolar power disputes, culminated in the consolidation of the LIO, albeit in "a unipolar moment, not a unipolar era" (Allison 2018, 130). International law, as a legal translation onto the

international domain of liberal political theory (Carty 1991), is afflicted by its hegemonic nature that arises from a specific conception put forth that aims to legitimize the power differences among States through the incorporation of specific legal advantages for the powerful States into the international legal order (Hernández 2007). Although international law is hegemonic politics[5], it also turns private violations into matters of concern for the political community itself (Koskenniemi 2004); it is therefore in a precarious, but valuable position between "the demands of the powerful and the ideals of justice" (Krisch 2005, 408).

Scholars have consistently pondered about the crisis and consequent future of the LIO, as other international stakeholders challenge the current hegemon (see Ikenberry 2018; Kochi 2020).[6] International Law, as a discipline and discourse of crisis (Charlesworth 2002; d'Aspremont 2022), is constantly under scrutiny for its role as an empire-serving, neocolonial-facilitating "cloak of legality" (Pahuja 2005) that continues to promote Western rule structure and reform in the colonies and the Global South before and after formal colonialism (Koskenniemi 2016). Furthermore, the moral rhetoric of liberal pragmatism masks deeper structural issues contained within the international legal framework as a distraction from the inadequacy of global liberal politics and law to address the root causes of global social conflict and widespread problems of social injustice and inequality (Kochi 2020).

As one of the many legitimization enterprises of the international liberal order, International Criminal Law (ICL) is mirrored to its image. If an examination of different branches of Public International Law "described in dominant histories of the field [...] [takes] us on a narrative path that lurches from crisis to crisis" (Nesiah 2021, 232), so does ICL's traditional historiography route, going from Nuremberg to The Hague[7]. The idea of establishing an

5 International law can also be counterhegemonic. For instance, Rajagopal (2006) discusses how international law can be fruitful for the Third World, if past strategies of Third World engagement through international law are revamped. However, for the purposes of this paper, we focus on the hegemonic character of international law and its intricate relation to crisis.

6 Yet, as Ikenberry (2010) observes, although the American liberal hegemonic order is in crisis, it appears to be a crisis of the American governance of liberal order and not of liberal order itself.

7 Although there are important precedents (*e.g.* Bassiouni 1997), the current ICL structure was established in the 1990s by the *ad hoc* International Criminal Tribunals for the former Yugoslavia (1993) and Rwanda (1994) and further crystallized by the Rome Statute (1998). Thus, this paper focuses on this period.

international criminal court in the aftermath of World War Two was pushed forward by the United States (Bassiouni 1997), which is symptomatic of the confluence of distinct political interests that aligned in favor of prosecuting (some) international criminals (Overy 2003, 29).

A similar argument could be used for the rebirth of international criminal justice, which "emerged in the 1990s at a euphoric moment of the promise of liberalism, cosmopolitanism, and internationalism" (Ba 2020, 161) and was elbowed by the political forces at work then (Méttraux 2008, xii). International criminal courts are "created at a given time, in pursuit of specific objectives, based on certain assumptions, and reflecting a particular distribution of power" (Reydams, Wouters and Ryngaert 2012, 7), and their trials represent a middle ground between "a liberal cosmopolitanism with its roots in procedural justice, equality before the law and individualism, and an illiberal particularism (anti-formal, violent, sometimes chauvinistic, exceptional and collective)" (Simpson 2007, 12).

The international criminal system, underpinned by its main goal of ensuring that the most serious crimes of concern to the international community as a whole do not go unpunished, is "inescapably liberal" (Kersten 2021, 149). This is not a random choice: rather, this justice narrative is deeply associated with a typically Western worldview that is rooted in the intersection of legalism and liberalism (Drumbl 2007, 5) and entails the full application of liberal, post-Enlightenment criminal law principles such as legality, culpability and fairness (Ambos and Heinze 2018). Therefore, while the ICC can and should be defined by its fight-against-impunity ethical universal approach, it may serve as a hegemonic tool to expand the predominant Western liberal model (Kowalski 2017).

In that sense, scholars have assessed how the ICC is entangled with politics and can therefore be instrumentalized by Western interests (*e.g.* Roach 2013; Dissenha 2016; Ba 2020). As an inherently political institution, the ICC "provides a vocabulary with which opponents can label the enemy as violators of universal norms, and thereby as the enemy of humanity itself" (Nouwen and Werner 2011, 962); its interventions stigmatize some conflict parties as *hostes humani generis* while legitimizing others (Royer 2018, 232; Yamato 2020) through a group-based selectively focused on differential prosecutions

of similarly-situated offenders within States and situations (Kiyani 2016). This leads to the marginalization of alternative conceptions to ICL's domination over justice discourses (Nouwen and Werner 2015) and contributes to Western countries and their forces evading effective scrutiny of their actions (Anghie 2023, 75; see also Creuz 2024).

Yet, a major consequence of the liberal nature of ICL is the denial of politics in the juridical processes and administration of international justice (Krever 2014); international criminal justice institutions "seek to transcend politics by proffering justice as a superior alternative" (Vasiliev 2020, 627). Faced with the ICC's unavoidable nature as a political actor, disavowing politics is but a prudent strategy to avoid moral and political consequences and ultimately secure the existence of the Court (Royer 2018). Nonetheless, perceiving the ICC as either anti-political or a-political not only leaves it susceptible to ideological manipulation (Mégret 2001), but also perpetuates the liberal order the court is meant to reinforce. In a multipolar world (Stahn 2023), this may have three main consequences.

First, the application of international criminal justice's liberal principles in non-Western social frameworks, which represent most countries in which the ICC is carrying investigations out or prosecuting individuals, contributes and deepens the permanent state of crisis the court constantly finds itself inserted into. It risks marginalizing and precluding other, perhaps more adequate alternatives for conflict solution and transition in post-atrocities societies and thus inadequately address structural issues (see Blumenson 2006; Nouwen and Werner 2015). Moreover, the legalist rhetoric may not be as effective as intended, which could further harm the ICC's perceived legitimacy (Kotecha 2018).

Second, the 'specter of civilization' has given rise to an imperialistic ICL, built on the patterns of exclusions of international law and International Humanitarian Law, which makes prosecution the sole appropriate (*i.e.*, civilized) response to international crimes (Nielsen 2008). In a multipolar setting, on top of prosecution not being the most adequate response to every post-atrocity society, it distinguishes between enemies, whom to prosecute, and friends, whom to spare, of mankind (Chazal 2013; Royer 2019). Plus, ICL's capacity to deliver justice to post-atrocity societies in international crimes

contexts may be affected by perpetrators and victims who do not fit the savages-victims-saviors Western frame (Mutua 2001). As the ICC aims to perpetuate the LIO and its *magnum opus* rule of law principle, it may promote a group-based selectivity (Kiyani 2016) that fails to fully comprehend non-Western, non-liberal demands.

Third, by superseding other viable alternatives to conflict resolution, ICC's preferred choice to prosecute may isolate the court in its legalistic *ethos*, which privileges legal objectivism over political influence (Shklar 1986, 3). The belief that law can be isolated from non-law (*i.e.* politics) renders the ICC blind to its own political nature (Roach 2013; Royer 2018) and incapable of promoting structural change (Krever 2013; Kersten 2021), while also sustaining the Court's role in maintaining neocolonialist and imperialist power relations in place (Ba 2020; Anghie 2023; Giannini 2022; Creuz 2024).

## The dual legitimacy crisis of the ICC: no way out?

While it may be true that, in part due to its intrinsically liberal design, international criminal justice is permanently under the 'shadow of crisis' (Katzenstein 2014), a less observed aspect of this conundrum is that this is a dual crisis, or at least it has two distinct aspects, both equally harmful to the ICC's legitimacy. One aspect stem from the ICC's liberal design, as a perceived tool for hegemony; the other arises, on the contrary, when the Court pursues any goal that threatens Western interests. The dual nature of this crisis is indelibly imminent in the sense that either aspect may materialize under specific conditions, in reaction to choices, decisions or courses of action elected by the Court or the OTP.

The first aspect of the dual crisis, a crisis of design, is revealed when the ICC exercises discretionary decision-making in a way that takes on differential prosecutions of similarly situated offenders within situations (Kiyani 2016). The Court's eagerness to "prosecute some of those responsible for some atrocities" with "no practical push towards geopolitical egalitarianism in who or what is prosecuted" (Reynolds and Xavier 2016, 963) fails the basic non-discrimination requirement for the attribution of international responsibility.

Furthermore, the legalistic, politically-averse liberal approach can only deliver a top-down, one-size-fits-all meaning of justice that fosters a discrepancy between the utopian ideals that international criminal justice is perceived to be able to bring and what it can actually contribute (de Hoon 2017, 597). The promotion of Western values as a mascaraed universal and civilized answer to atrocities, through which the 'other', the enemy, is brought within the universal standard of civilization set by ICL (Nielsen 2008, 108), creates a misalignment between the expectations of survivors in the Global South and the ICC, "thereby creating fertile conditions for the failure of the Court in these geographies" (Benyera 2022, 60).

This first aspect of crisis is best demonstrated by Africa's rapidly deteriorating relation with the ICC. African countries have denounced the enduring hyperfixation of the ICC with African nationals while ignoring violations committed by Western powers to the point of questioning the Court's legitimacy and developing regional, arguably less biased responses (Niang 2017; Omorogbe 2019). As the ICC "becomes a transposed arena where domestic politics are enmeshed with the rule of law and legal procedures" (Ba 2020, 113), the unequal enforcement of ICL leads to skepticism and untrust in the Global South.

The design crisis is related to how African countries envisioned international criminal justice as an independent arena that would rectify inequality in the international system (Ba 2023). That is: it underscores how, unlike once hoped, ICL became another tool for maintaining and furthering the LIO and its hegemons (Giannini, Yamato, and Marconi 2019). As scholars and practitioners grow more heedful to how power imbalances affect and influence the creation and implementation of international criminal norms and Global South is less, or push for lesser marginalization within the international system, so should the design crisis expand and strike the Court's perceived legitimacy in the South.

Parallelly, the second aspect of the dual crisis, a practical crisis, emerges whenever the ICC pursues its goals to the detriment of the interests of the LIO. From the outset, the Court has faced the difficult challenge of ending impunity and delivering justice, which spur an unprecedented momentum, albeit now partially frustrated due to the limited ability of criminal trials to

address more complex post-conflict realities (de Hoon 2017). Meanwhile, ICL is a "field of repetition and recurrence [of] unresolved arguments about the shape and fate of retributive justice in the international order" (Simpson 2007, 4) in the midst of the interplay "of ideology, politics, judges' perception and professional preferences" (Koskenniemi 2006, 68). The uses and meanings of ICL are constantly under dispute.

However, the ICC's success is dependent on many factors, including the support it receives from States. Its association with core liberal legalist assumptions (Drumbl 2007, 123) and the degree of major-power control over the institution, a main issue during Rome Statute negotiations (Bosco 2015), complicate matters: the Court often finds itself "entangled in the wider web of political instrumentalization and strategic calculations" (Ba 2020, 161). As Grzybowski and Reis (2024) argue, the ICC's handling of cases like Iraq, Afghanistan, and Palestine illustrates its engagement in the 'meta-politics of legality', *i.e.* the strategic redrawing of boundaries between international law and politics. This practice reinforces the Court's authority while exposing its vulnerability to contestation. The ICC's liberal ties associate it with Western values and interests, making its authority contingent on how it navigates these boundaries. When the Court challenges powerful States, it is often met with contestation and marginalization attempts. Ultimately, its authority hinges on its ability to maneuver within this shifting terrain, highlighting both its capacity to challenge power and its dependence on the very order it seeks to transcend.

Grzybowski and Reis (2024) have underscored the meta-politics of (re) drawing boundaries between law and politics when the ICC decided to (not) investigate alleged international crimes committed by British forces in Iraq, by the United States forces in Afghanistan and by Israeli authorities in the Palestine situation. In a similar fashion, Ambos (2022) has alerted to the peculiar attention given to the Ukraine situation and how it calls for greater Western consistency in international norms application. These developments arguably shed light on how the ICC is constantly looking for ways to deal with and respond to political pressure over its proceedings.

Moreover, the United States has shared a delicate relation with the ICC. Considering most recent developments relating to Palestine, the Court faces a

new wave of criticism, mainly from Israeli and American authorities (AlJazeera 2024; Cabral, Looker and Pigliucci 2024), but also from British representatives (Reuters 2024). Karim Khan, Prosecutor of the ICC, has recently admitted that an unnamed leader told him the ICC was "built for Africa and for thugs like Putin" (CNN 2024). Therefore, the practical crisis may arise whenever the ICC deviates from its hegemonic role and pursues goals contrary to Western interests.

This dual crisis results from the modern legal liberal agenda which works through the juncture of "utopian legalism and the apology of sovereignty" (Hoffmann 2016, 966). International legal argument perpetually oscillates between apology and utopia "in ways that frustrate any attempt at definitive legal closure" (Mégret 2017, 265). However, international law can never fully achieve both objectives simultaneously. By prioritizing concreteness, international legal practitioners risk devolving into an apologetic practice that entirely overlooks its normative nature. Adhering to utopian standards creates a disconnect between idealized law and legal practice. The argumentative practices of international law are in a continuous transit amidst the two contrasting positions (Koskenniemi 2006, 58–65).

These argumentative patterns are tied to a dual structure of authority that justifies these positions. Law is external to state behavior, deriving its authority from "a normative code" (Koskenniemi 2006, 59). State obligations stem from a moral code based on "justice, common interests, progress, nature of the world community or other similar ideas to which it is common that they are anterior, or superior, to State behaviour, will or interest" (Koskenniemi 2006, 59). The opposing perspective asserts that the behavior, will, and interest of the State serve as the authoritative source, outweighing the moral code, in determining the direction of the law. The authority always stems from either the international community or the State, values or sovereignty, respectively. One position will inevitably appear subjective to supporters of the other. Despite accommodating both ultimate sources of authority within the structure of international legal argumentation, their inherent incompatibility precludes the possibility of finding a middle ground (Koskenniemi 2006, 59). The contradictory premises underlying international law practice result in the formation of predictable patterns in legal argumentation. Depending on

the chosen premise, a preferred answer to a legal dispute emerges. This shows that despite the legalist position's assertion of distancing international law from politics, its opposition to international politics is inherently a political endeavor. It defends international law as superior to international politics (Hoffmann 2012). Reducing international law to a set of concrete and normative rules falsely assumes a distance from politics, leading to a perception of it as bureaucratic and detached. However, substantive decisions within the law inherently involve political choices (Koskenniemi 2011a, 2011b). Consequently, international law becomes a framework for postponing substantive resolution. Therefore, the crises faced by institutions like the ICC stem not only from international law's faulty operation but also from its inability to prevent such shortcomings due to its inherent structure.

There seems to be no way out for the ICC: whether design or practical, it feels like the Court's is bound to crisis. Does this mean it is also doomed to fail? Not necessarily — others have predicted the end of the ICC before. What we aim to demonstrate is that no matter which way it sways, the Court will always have to face harsh attacks to its legitimacy, as both an international court and, simultaneously, a criminal court that challenges well-established international principles such as sovereignty and non-intervention. We also highlight how the Court cannot escape the political costs of its decisions — and, ultimately, its own political nature. There is no easy way out of these crises; it is up to the ICC to find a way to better navigate these moments and embark on a reflexive endeavor on how to get past these 'crises'.

The ICC seems caught between a rock and a hard place: either it continues with its "pattern of marked caution" and risks losing support, or it can venture a confrontation with powerful states, which "may leave the institution crippled and humiliated" (Bosco 2015). In other words, it may find itself relentlessly maneuvering between apology and utopia, between international norms' manipulable facade for power politics and its moralistic character, distanced from such politics (Koskenniemi 2006). Not to oversimplify the Court's range of possibilities. Whether the ICC can effectively navigate such troubled waters, it would still fluctuate between political constraints and normative aspirations. The ICC's future will not be determined solely by external pressures but also by its own capacity to redefine its role within a constant changing aporetic

international legal order. Whether it can maneuver through these complexities without succumbing entirely to power politics or idealism remains an open question—one that its responses to future crises will help answer.

## Conclusion

In an international order with few, if any solutions to structural and pressing issues, we still look to the ICC for answers. The utopian promise of international criminal justice was quickly overridden by politics and the Court's inability to respond to non-Western demands for justice. From the outset, the institution endured heavy blows to its perceived legitimacy and was deemed incapable of effectively resolving any of its crises. In this paper, we sought to address and highlight how the ICC's recurring crises are not isolated issues, but symptoms of a larger picture within the international legal order that defines the very conditions of the Court's existence and operation.

We argued that this aporetic normality is mainly related to the overall crisis of the liberal international order, which, despite its continued relevance, faces growing challenges from alternatives to the current hegemony. By establishing that the ICC is fundamentally a product of the liberal hegemonic order, we underscored how its inability to effectively respond to demands for justice and its resulting crises are deeply intertwined with liberal internationalism's dominance over justice discourses and, broadly, with the current state of international politics and its splashes in the international legal order. Therefore, these crises are not merely a byproduct of a dysfunctional international legal system but are intrinsic to the system's operation and condition of existence.

In terms of perceived legitimacy, the ICC faces a dual crisis mainly related to double standards. Firstly, a design crisis that emerges whenever the Court prosecutes some but not others, usually to the detriment of non-Western societies. Secondly, a practical crisis that arises whenever the ICC pursues goals unaligned with Western values or interests. While it is true that there is no easy way out, the institution should assess on a case-by-case basis which course of action is a better fit, with fewer repercussions for its authority. In any case, the

Court cannot escape the political costs of prosecution and punishment, which is something it has struggled to cope with over the years.

Ultimately, the ICC faces a formidable journey ahead, particularly because it cannot extricate itself from the ruthless realm of international politics or the liberal values and principles that have shaped it since its inception. Although crisis may indeed be inscribed in its essence, this is not the end for the Court, as it must look for ways to diminish impunity and deliver justice, not in the current (outrageously) selective fashion. The ICC still has significant progress to make in navigating these challenges and adapting to the evolving landscape of international relations. Moving forward, the Court would benefit from recognizing the complex (and inevitable) relationship between law and politics and embracing a more nuanced approach that could eventually strengthen its legitimacy while working on other ways to uphold its mandate.

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