

International Criminal Court: A Report Card

Despite severe shortcomings, the importance of the ICC lies in the possible deterrent effect it may have on the commission of most serious crimes under international law in future



Representative image of the ICC. Credit: Wikimedia Commons



Saumya Uma



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This is the last in a series of eight articles on the International Criminal Court (ICC). The Rome Statute creating the ICC entered into force on July 1, 2002 and the court is now in its 20th year. To mark the occasion, The Wire is publishing a series of articles evaluating its performance over the past two decades. See also: [Part 1 \(Afghanistan\)](#)| [Part 2 \(Powerful states staying above the law\)](#)| [Part 3 \(Rohingya crisis\)](#)| [Part](#)

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On September 15, the trial chamber of the International Criminal Court (ICC) **authorised** a full-fledged investigation into Philippines President Rodrigo Duterte's "war on drugs" campaign, observing that there was reasonable basis to believe that crimes against humanity were committed, particularly of murder. The court also observed that these did not appear to be a legitimate law enforcement operation, or "mere excesses" but a "widespread and systematic attack against a civilian population pursuant to or in furtherance of a state policy".

On August 9, 2021, Brazil's Indigenous People Articulation filed a **statement** before the International Criminal Court (ICC), accusing President Bolsonaro of carrying out genocide, 'ecocide' and crimes against humanity and causing more than 1,160 deaths of indigenous people.

On August 3, 2021, the Sudanese cabinet **voted** to ratify the ICC treaty, pursuant to which the ICC prosecutor **announced** establishing an office with a permanent team in Sudan to investigate and gather more evidence against officials indicted by the ICC, including former president Omar al Bashir.

On July 14, 2021, the Yoruba Nation agitators of Nigeria **petitioned** the ICC, alleging that the former Nigerian president, minister of justice, chief of army staff and inspectors general of police committed genocide and crimes against humanity against the Yoruba people in various parts of Nigeria.

The agitators affirmed their collective will for a criminal investigation, prosecution and justice. At a time when the developments at the ICC are keenly followed on some counts, and when it has faced scathing criticism on some counts, it is gratifying to see sets of victims from different geo-political contexts look to the ICC, as a last straw for their pursuit of justice and accountability.



Supporters of Sudanese President Omar al-Bashir carry a mock coffin representing the International Criminal Court in Khartoum, Sudan, June 15, 2015. Photo: Reuters/Mohamed Nureldin Abdallah

The International Criminal Court: a snapshot

The ICC was created in 1998 through the **Rome Statute**, in order to prosecute individuals committing crimes under international law – crimes against humanity, genocide and aggression – of a permanent nature that became functional in The Hague, The Netherlands on July 1, 2002.

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), established by the UN Security Council in 1993 and 1994, respectively, are predecessors to the ICC that prosecuted individuals for heinous crimes under international law but within specific geo-political contexts.

The ICC was primarily created to end impunity for the most heinous crimes by making accountable individuals involved in those crimes, irrespective of their rank, position or stature. By holding them criminally responsible, it hopes to deter and prevent future crimes of a similar nature; and ensure that justice remains an essential ingredient for everlasting peace and security. A snapshot of the ICC is given in the table below:

Headquarters	The Hague, The Netherlands
Functioning from	July 1, 2002
Ratifications	123 (out of 195 countries)
Cases before the court	30
Arrest warrants issued	35

Suspects detained in ICC	17
Suspects at large	
Convictions	10
Acquittals	4
Situations under Preliminary Examinations	12
Ongoing investigations	15
Number of judges	18
Chambers of judges	3 (pre-trial, trial and appeals)
Number of staff personnel	900 (from approximately 100 countries)
Estimated budget for 2020	€149,205,600

Ratifications, withdrawals and the challenge of state cooperation

Ratification of the Rome Statute/treaty by a state leads to its membership in the ICC, with a binding obligation to implement the statute for the state concerned. The ICC has 123 state parties till date. There are 195 countries (including two with observer status – the Holy See and the State of Palestine). The geographic distribution indicates that 33 state parties are from the African region, 28 from Latin America and the Caribbean, 25 from Eastern Europe and North America, 19 from Asia Pacific and 18 from Eastern Europe.



The entrance of the International Criminal Court (ICC) is seen in The Hague, Netherlands. Photo: REUTERS/Jerry Lampen

The numbers for the Asia Pacific are deceptive as they include Asian countries such as Cambodia, Fiji, Japan, Mongolia, Republic of Korea and Timor-Leste, and also countries in the Pacific region such as Cook Islands, Cyprus, Jordan, Marshall Islands and Palestine. While Asia has few member states, Afghanistan, Bangladesh and Maldives are the only SAARC countries to have ratified the treaty and become member states of the ICC. Ironically, South Asia is one of the few regions in the world that does not have a regional human rights

mechanism to address heinous human rights violations including the most serious crime

Despite 123 member states to the Court, such as India, Iraq, Israel, Russia, China and the US have not become state parties so far. It is necessary to reflect on the reasons for the same – are they afraid of the ICC as skeletons may tumble out from their closets, or has the ICC not inspired enough confidence in them, or a bit of both?

Additionally, the unprecedented act of ‘unsigned’ the ICC Treaty by the US in 2002 was followed by Russia’s ‘unsigned’ in 2016, Burundi’s withdrawal from ICC’s membership in 2017 and **the Philippines’ withdrawal** in 2018. These can be termed acts of desperation made with a view to shield the perpetrators of ICC crimes within their countries. Russia’s ‘unsigned’ is discussed in further detail in **one of the articles** of this series.

An interesting development is **the African Union’s 2017 resolution** directing African countries to withdraw its membership from the ICC Statute *en masse* as a protest against the ICC excessively focusing on African situations, and due to ICC’s attempt to prosecute an incumbent head of state (Sudanese president al-Bashir, up to 2019). It is not clear if immunities available to a head of state under national laws would be respected by the ICC.

The withdrawals (both actual and threatened) possibly indicate waning support for the ICC. At the same time, the African Union’s resolution seems to have only a symbolic effect, as there were no mass withdrawals in pursuance of its resolution. Africa remains a region extending broad support for the ICC, notwithstanding the resolution. This is discussed more elaborately in the article on **state cooperation** in this series.

Reduced membership to the ICC leads to reduced state cooperation for ICC's work, as there is no legal obligation to cooperate with the court. Even the state parties to the Rome Statute are not required to discharge their obligation, as obvious from the failure of several African countries in implementing ICC's arrest warrant against **Omar al-Bashir** – the Sudanese president accused of genocide, war crimes and crimes against humanity.

Non-implementation of ICC's arrest warrant against **Simone Gbagbo** – a former first lady of the Côte d'Ivoire accused of crimes against humanity, and against **Saif al-Islam Gaddafi** of Libya for attacking unarmed civilians during the **Arab Spring protests** have left the ICC look red-faced: like a jumbo warrior with a toy gun.

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Situations under preliminary examination

The Office of the Prosecutor (OTP) of the ICC makes a preliminary examination in any given situation, prior to seeking permission from a pre-trial chamber to launch a full-fledged, formal investigation. The aim of the preliminary examination is to assess if the situation meets the legal criteria

set out by the Rome Statute in order to warrant an investigation by the OTP.

This includes jurisdictional matters (whether the concerned state is willing or able to carry out prosecutions for the ICC crimes), gravity (seriousness and scale of crimes), and the interests of justice. The OTP's **policy paper on preliminary examinations**, released in 2013, outlines the focus areas and processes followed by the OTP in its preliminary examinations.

At present, six situations around the world have an ongoing preliminary examination by the OTP. These include **Bolivia** (alleged crimes against humanity committed in August 2020); **Colombia** (alleged war crimes and crimes against humanity since 2009 and 2002, respectively); **Guinea** (crimes against humanity committed in September 2009); **Nigeria** (war crimes and crimes against humanity, with the completion of preliminary examination in December 2020, and awaiting pre-trial chamber's authorization for an investigation); **Ukraine** (alleged ICC crimes since November 2013); and **Venezuela** (alleged crimes committed during demonstrations and political unrest since April 2017). It is evident that these examinations span varied geographical regions such as Africa, Eastern Europe and South America.

Not every preliminary examination by the OTP leads to an investigation. In certain situations, the OTP decided to close the preliminary examination based on factual and legal analysis, concluding that there was no reasonable basis to proceed with an investigation, or such an investigation would be legally untenable at the present point in time.

Examples of this include **Comoros, Greece and Cambodia** (closed in November 2017), **Gabon** (closed in September 2018), **Honduras** (closed in October 2015), **Iraq/United Kingdom** (closed in December 2020) and the **Republic of**

Korea (closed in June 2014). Among these, the decision of the ICC Prosecutor to close the examination in Iraq has evinced the strongest elaborately discussed in the article **'Fish'** in this series.

Situations under investigation

As a next stage after the completion of preliminary examination by the OTP, upon authorisation by the pre-trial chamber, the prosecutor would commence an investigation into a situation. The investigations focus on gathering and examining evidence, and lead to identifying certain suspects who would subsequently be charged with the commission of ICC crimes. The OTP is duty-bound to investigate both incriminating and exonerating circumstances equally.

The OTP is currently investigating 14 situations. Some of them are ongoing investigations into older situations, even after some accused have been charged, prosecuted and convicted or acquitted. These include **Central African Republic** (two investigations on alleged war crimes and crimes against humanity committed since July 2002 and from 2012 onwards); **Democratic Republic of Congo (DRC)** (alleged war crimes and crimes against humanity committed in Eastern DRC since July 2002); and **Uganda** (alleged war crimes and crimes against humanity by the Lords Resistance Army and the Ugandan authorities since July 2002).

Investigation will shortly commence on the **Philippines situation** (alleged crimes committed since July 2016 in the “war on drugs” campaign). Investigations have been commenced into the situations in **Burundi, Côte d’Ivoire, Georgia, Kenya, Libya** and **Mali**. Additionally, there are ongoing investigations into the situations in **Afghanistan, Bangladesh/Myanmar** and **Palestine**, which are situations of special interest to South Asians. Separate articles in this series

on each of the three situations discusses various dimensions for international justice.

While the first several situations subjected to a trial before the ICC were from the African region, leading to a large-scale public perception that the ICC was going after the African region, the current situations under investigation and preliminary examinations indicate a wider regional diversity.

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Convictions: too little, too late?

Since its inception in 2002, till date, the ICC has dealt with 30 cases, with some having multiple numbers of accused persons. Out of these, there have been ten convictions and four acquittals. A major milestone for the ICC was the 2012 conviction of **Thomas Lubanga Dyilo**, for war crimes, particularly in relation to enlisting and conscripting child soldiers in DRC. He was sentenced to 14 years imprisonment and was released in March 2020.

Bosco Ntaganda from the DRC was convicted of war crimes and crimes against humanity and was sentenced to 30 years of imprisonment, in one of the longest periods of imprisonment awarded by the ICC. **Germaine Katanga** from the DRC was convicted of war crimes and crimes against humanity, and sentenced to 12 years' imprisonment. **Dominic Ongwen** was convicted of crimes against humanity and war crimes in Northern Uganda, as a commander of the Lords Resistance Army (LRA), and sentenced to 25 years' imprisonment.

In a historic judgment – the first in the context of the destruction of monuments as a war crime – **Ahmad Al Faqi Al**

Mahdi was found guilty as a co-perpetrator of the war crime for intentionally directing attack on historic buildings in Timbuktu, Mali, and was sentenced to nine years' imprisonment.



Ahmad Al Faqi Al Mahdi (a.k.a. Abu Tourab) enters the courtroom of the International Criminal Court (ICC) in The Hague the Netherlands, September 30, 2015. Photo: Reuters

Questions have been raised about the fact that in the 19 years of its existence, the ICC has convicted only ten persons from a handful of situations. Given the scale at which the global community has invested time, human and financial resources, and built an elaborate infrastructure for the ICC's functioning, this appears hugely disproportionate and woefully inadequate.

Some have **critiqued** the cost of international justice as too high and the convictions too few to have a deterrent effect. Others have **argued** that the cost-effectiveness of the court cannot be judged merely by the number of convictions or the (lack of) speed at which it convicts. The rules of procedure may be too elaborate and cumbersome, leading to prolonged litigation. If the ICC is to have a deterrent effect to prevent possible crimes in future, justice must not only be done but also perceived to be done, in the eyes of the global community.

Acquittals

Among the acquittals, an early one was of **Mathieu Ngudjolo Chui** – a leader from the DRC situation in 2012. He was acquitted of war crimes and crimes against humanity and ordered to be released. There was global outrage over the acquittal of **Jean-Pierre Bemba** – the former vice-president of the Central African Republic, by the appeals chamber in June 2018. Bemba had been convicted by the trial court of serious crimes such as murder, rape and pillaging.

This was followed by a much-publicised case in 2019, in which **Laurent Gbagbo** – the former president of Côte d’Ivoire – was acquitted of all charges of crimes against humanity: intentional attacks on civilians leading to the deaths of

thousands, rape, other inhumane acts, attempted murder, and persecution in the context of 2011 Côte d'Ivoire. The prosecution based on the testimony of 82 witnesses and other evidence acquitted him on the ground that there was insufficient evidence to illustrate a common plan to foment violence.

Charles Blé Goudé – Gbagbo's right-hand man – was similarly acquitted of crimes allegedly committed in the same context. The two acquittals were confirmed by the appeals chamber of the ICC in March 2021. He has recently **demanding compensation from the ICC**, alleging “grave and manifest miscarriage of justice”.

As is obvious from these facts and figures, the information about convictions and acquittals, drawn from the official website of the ICC, appears to conflate cases related to the major ICC crimes, and those related to offences against administration of justice (such as tutoring and bribing of witnesses).

Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido have been convicted for offences against administration of justice, mainly related to Bemba's case. So the actual outcomes related to the major ICC crimes may be lesser.

Suspects at large

A matter of serious concern and introspection is that the ICC commenced proceedings against several heads of state, but has not been able to convict any of them. Former Sudanese president **Omar al-Bashir** – alleged of committing genocide and crimes against humanity – has successfully remained a fugitive from 2009. This may soon end, as it was recently **reported** that the Sudan government will surrender him and

other officials indicted by the ICC for trial. If he is surrendered, that would be a huge trial against him for war crimes :

Charges against the Kenyan President **Uhuru Kenyatta** were withdrawn after he and his supporters allegedly “interfered” with witnesses; Bemba and Gbagbo – leaders of Central African Republic and Côte d’Ivoire respectively, were acquitted.

Walter Osapiri Barasa and **Philip Kipkoech Bett**, against whom arrest warrants have been issued by the ICC in relation to offences against the administration of justice in the Kenyan situation, continue to remain at large. Since the ICC does not conduct trials in the absence of the accused, their arrest or voluntary appearance in the ICC is a precondition for the cases to proceed.

Ongoing trials and appeals

Trial against **Alfred Yekatom** and **Patrice-Edouard Ngaïssona** for war crimes and crimes against humanity in the Central African Republic, and against **Abdallah Banda Abakaer Nourain (Banda)** for war crimes in Sudan are currently ongoing.

The trial of **Al Hassan Ag Abdoul Aziz Ag Mohamed** for torture, cruel treatment, outrages upon personal dignity, intentionally directing attacks against buildings dedicated to religion and historic monuments, rape and sexual slavery in Mali, is also currently pending in the ICC. **Dominic Ongwen** – a military leader of the Lords Resistance Army in Uganda was convicted of war crimes and crimes against humanity in February 2021. An appeal against the decision of the trial chamber is currently pending.

Another important trial to follow is that of **Paul Gicheru**, a Kenyan lawyer who has been accused of witness interference during the trial of William Ruto in 2013. The charges against him were announced by judges on July 15, 2021.

Trigger mechanisms

There are three ways in which a case can be taken up by the ICC: referral by the concerned state party, investigation by the prosecutor on their own initiative and referral by the UN Security Council.

Many situations have been referred to the ICC for investigation by the concerned state party themselves due to an inability of the state to prosecute the offenders for ICC crimes in the national courts. Of all the cases that have been prosecuted in the ICC, a majority are through self-referrals of situations by state parties.

Examples include Central African Republic (2004), Democratic Republic of Congo (2004), Gabon (2016), Mali (2012), Uganda (2003) and Union of Comoros (2013). In the initial years of the ICC's functioning, its investigation and prosecution of offenders from self-referred situations was preferred as there was more assurance of state cooperation for gathering evidence and other such issues in such situations.

The prosecutor's powers of investigation *proprio motu* (on own initiative) were a bone of contention for the ICC by countries including Iraq. The ICC's motivated investigations by the International Criminal Court's observation of ICC's functioning over the years indicates that the checks and balances to the exercise of the Prosecutor's powers, built into the ICC Statute, have been implemented in their true spirit.

The Office of the Prosecutor (OTP) cannot proceed with an investigation on its own initiative, though it may undertake a preliminary examination of a situation to gather evidence. The ICC's pre-trial chamber is required to authorise the commencement of an investigation after it is convinced that the legal criteria have been met. These include jurisdictional issues, and the commission of ICC crimes of sufficient gravity.

For example, the Prosecutor conducted a preliminary examination of the Palestinian situation for nearly five years, and of the Afghanistan situation for close to ten years, before the pre-trial chamber of the ICC authorized a formal investigation. In other situations such as Honduras, **the prosecutor closed the preliminary examination** on grounds that the legal criteria for an ICC investigation were not met.

The OTP is legally mandated to work with the highest professional integrity and be fair, objective and impartial in its investigation. Although a state may self-refer a situation to the ICC, the prosecutor is not precluded from examining the culpability of the governmental forces in that situation as well.

For example, in the Nigeria situation, at the conclusion of preliminary examination in December 2020, the prosecutor **announced** that there was reasonable basis to believe that both Boko Haram (and its splinter groups) as well as the Nigerian security forces have committed crimes against humanity and

war crimes. In a similar vein, in the Palestine situation, the erstwhile ICC prosecutor issued she “had reasonable basis to believe committed by both Israeli military groups, including Hamas, in the Gaza Strip and Israeli-occupied West Bank.”

Such non-partisan positioning of the prosecutor is a welcome and a much-needed one for ICC’s institutional credibility. It advances the ICC’s vision of countering the impunity of perpetrators for ICC crimes, whoever they may be.

The third trigger mechanism is through a UN Security Council referral. The role of the Security Council in referring cases to the ICC, and in deferring cases that are pending before the ICC (for a period of one year) is contentious. The ICC Statute carefully carved out its role in an attempt to harmonise with the mandate given to the Security Council under the UN Charter.

However, the reality that has been unfolding indicates that the permanent members of the Security Council have placed themselves and their allies above and outside the pale of international criminal justice. This is a matter of grave concern that violates rule of law and **the ICC’s vision to end impunity for serious crimes** under international law.

Shortcomings and limitations

The ICC is not a perfect judicial institution, nor is it a panacea for international justice. Even staunch supporters of international criminal justice have **highlighted shortcomings and limitations**, in an effort to improve ICC’s functioning. The processes and procedures in the ICC are extremely slow and arduous, leading to concerns if the ICC is doing too little too late.

Justice delayed may mean justice denied. in many situations, as witnesses may weaken in their testimony, documentary evidence may disappear, and the ICC may be delayed before justice is rendered. The ICC's reluctance for not "taking on" powerful countries, the Prosecutor's refusal to open an investigation into the UK war crimes being an example.

Significantly, the ICC has faced enormous challenges in **state cooperation** for implementing arrest warrants and surrendering suspects to the ICC.

ICC judges have been critiqued for their narrow and excessively technical interpretation of the relevant law, leading to adverse consequences such as an acquittal by the appeals chamber in Bemba's case. The **ICC's record on sexual and gender-based violence** has been demonstrably weak, as discussed in another article in this series.

Even though the ICC postures itself as a legal and judicial institution, the role of the UN Security Council in referring situations to the ICC and its veto power in blocking situations from being referred to the ICC necessarily fuses politics with international justice. Despite elaborate witness protection measures by the Victims and Witnesses Unit, **witness interference in the ICC appears to be rampant.**

Further, the ICC has faced a lukewarm response from South Asia, with only three member states: Afghanistan, Bangladesh and the

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Relevance for South Asia

Despite these severe shortcomings, the importance of the ICC lies in the possible deterrent effect it may have on the future commission of most serious crimes under international law. Victims of heinous crimes deserve justice, and if that is not possible from their national legal systems, they must have recourse to other avenues, including but not limited to the ICC. Victims' participation and reparations to victims, facilitated by the ICC, help in breaking new ground in treating victims, not as passive recipients but as active agents and important stakeholders in the justice process.

Members of the civil society in India and other South Asian countries have long been engaged with the developments related to the International Criminal Court. From the years 2000 to 2010, ICC-India – an anti-impunity campaign – engaged in deliberations with a cross-section of society in India on the significance of the normative standards and legal principles enshrined in the Rome Statute. Eleven years later, much water has flowed under the bridge, with an ICC that has arrested, indicted and prosecuted several accused persons in relation to heinous crimes in varied geographical contexts. It is interesting for South Asians engaged with the ICC from its inception to observe how the principles and provisions of the Rome Statute have taken shape and been implemented.

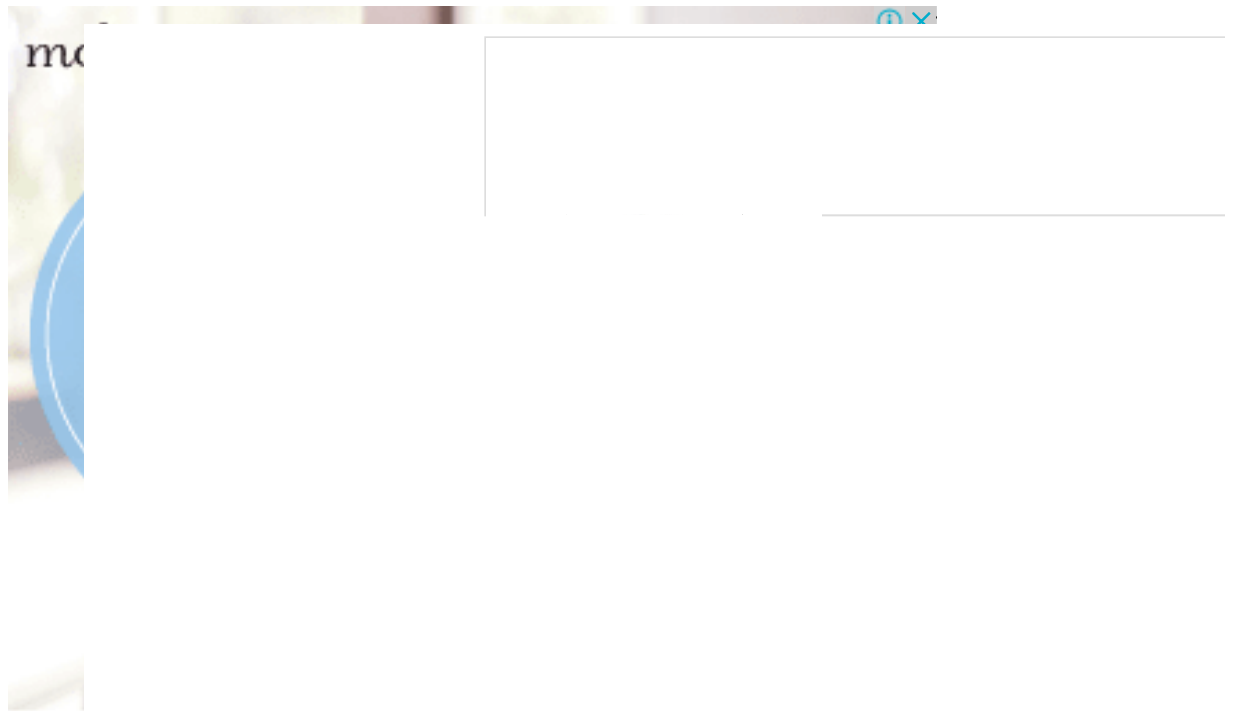
In January 2021, the Association for Relatives of Enforced Disappearances in the North and East Provinces of Sri Lanka

requested the UN Human Rights Council to refer the Sri Lankan situation to the ICC. The Commissioner for Human Rights **observed** the “demonstrated inability (Sri Lankan) government to advance accountability at the national level” and called for “international action to ensure justice for international crimes”, namely for war crimes, crimes against humanity and genocide against the Sri Lankan Tamils.

In March 2021, the UN Human Rights Council passed the eighth **resolution** on Sri Lanka, emphasising the importance of accountability for crimes committed by all parties in Sri Lanka, including by the Liberation Tigers of Tamil Eelam (LTTE).

The situations in Afghanistan, Myanmar and Palestine, currently under investigation at the ICC, and any possible action related to Sri Lanka – will be keenly observed by many Indians and South Asians.

However, if a singular reason must be given for our continued engagement with the ICC, it is that the big and powerful actors (such as the US, UK and Israel) are employing whatever means are at their disposal to shield their nationals from the ICC. They fear that the long arm of international criminal justice may effectively counter impunity, after all.



This is an exciting phase in the ICC's functioning that gives a glimmer of hope in the global fight against impunity. The ICC's role as a safety net is of prime importance, particularly when political, military and other leaders escape with impunity from the national legal system due to their official position and political clout. Indians, more than anyone else, know the importance of such a safety net.

Saumya Uma was a co-founder of ICC-India: an anti-impunity campaign on the International Criminal Court and served as its national coordinator in the years 2000-2010. She is currently a professor of law at Jindal Global Law School, O.P. Jindal Global University, India and a Board member of Women's Regional Network. The views expressed are her own. She acknowledges the research assistance rendered for this article by Navami Krishnamurthy and Sonam Nanda – students of Jindal Global Law School.

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