A Force to be Reckoned with? – The International Criminal Court and the Problem of Enforcement

Adam White

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Introduction

The International Criminal Court (ICC) is an a relatively new creation in international law and has only been in operation for around 17 years. Created by international treaty, it has 122 member states and covers roughly a third of the world's population. The court is responsible for the prosecution of the most serious international crimes, specifically genocide, crimes against humanity, war crimes and crimes against humanity. It is the first permanent international criminal court to be established, and this brings with it a feeling that to certain degree the ICC is an experiment in the field of international criminal justice. There were equal amounts of hope and cynicism following its creation, and the whole world is watching closely to see whether or not the ICC can achieve its potential and bring those that commit the crimes under its purview to justice. So far, the ICC has achieved a limited degree of success, but when looking closely it is obvious that it suffers from numerous flaws which hinder its ability to function effectively.

Looking at the problems that the ICC faces, many areas of potential criticism are revealed. Enforcement is one that is of particular interest as it cuts to the heart of why the ICC has been unable to live up to its expectations and bring the majority of those it should to justice. Enforcement for the purposes of this dissertation is the ICC's ability to subject those that commit these crimes to their authority. This encompasses their ability to apprehend people to bring to trial, as well as be seen as a legitimate body possessing the authority to carry out their task.

The aim of this dissertation is to critically analyse the effectiveness of the ICC through the lens of these enforcement capabilities. I will discuss the various factors that prove influential regarding the ICC's enforcement capabilities and I argue that when one looks at the powers that the ICC is given to achieve their aims, as well as the nature of the world it is operating in, an inevitable tension arises which makes it extremely difficult for the ICC to function as an effective court. I then claim our expectations of the ICC are unrealistic, and it might be more effective and influential if it changes its focus to working more

effectively in the system it finds itself in, re-focusing its efforts to encompass more than prosecutions and expand beyond its role as a conventional court .

This dissertation is divided into seven main chapters. The first chapter includes a background on the predecessors to the ICC who contributed significantly to its creation as well as a discussion about the aims of the organisation. This chapter provides important context for the following discussions surrounding the key problems facing the ICC in the area of enforcement.

The next four chapters focus on the ICC's enforcement issues. Chapter Two discusses the jurisdictional issues that the ICC suffers and how these directly relate to its enforcement problems. The relationship between the ICC and the UNSC is also considered. Chapter Three will address the problematic interplay between sovereign states and the ICC and how this severely impacts the ICC's enforcement capabilities. In Chapter Four the conceptual problems surrounding the ICC and how this proves to be challenging for them are addressed. The Fifth Chapter uses the ongoing conflict in Syria to demonstrate the problems mentioned above in an empirical case study setting.

The remaining chapters discuss the potential solutions to the problems raised. When it comes to addressing these problems there are two main avenues of redress, which are either giving the ICC the powers and mechanisms it needs to carry out its aims independently, or change its focus and adapt to its circumstances in order to achieve more with the powers that it has. Chapter Six discusses the empowerment solutions and the final Seventh Chapter elaborates on how the ICC could rethink the way it operates in order to function more effectively in the current international system that it exists in.

Chapter One: Background and Context

A Origins

1 Nuremburg and Tokyo Military Tribunals

The ICC was the product of "a long, somewhat frustrating, and sometimes dormant struggle" which can be traced back to the aftermath of World War I and II.[1] The first step towards the establishment of a permanent court is generally considered to be the International Military Tribunal in Nuremburg and the International Military Tribunal for the Far East. These were temporary military courts established by the victorious allied powers in the aftermath of World War II in order to try individuals who had committed significant crimes that did not correspond to a particular geographic location.[2] These tribunals bore little resemblance to the ICC of today, due to the fact that as military tribunals they were comprised of staff from only the Allied Powers, so there were claims that it was only dispensing victor's justice against those they had defeated.[3] Regardless, it was an important step forward for the development of international criminal law, which significant developments such as the first example of holding individuals responsible for actions that normally would be attributed to states.[4] Behind their creation was a reaction of outrage against the truly horrific crimes that had been perpetrated by those responsible and the belief that they needed to be held to account on the international stage. This was a brief experiment with the concept of an international criminal court however and it would only be around fifty years later that the ideas of international culpability and responsibility were further developed, by the International Criminal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

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[1] Joanna Harrington, Michael Milde, Richard Vernon "Introduction" in Bringing power to justice? The prospects of the International Criminal Court ((McGill-Queen's University Press, Montreal, 2006) at 3.

[2] At 4.

[3] David Bosco *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) at 28.

[4] Eric Stover, Victor Peskin, and Alexa Koenig *Hiding in Plain Sight: The Pursuit of War Criminals from Nuremberg to the War on Terror* (University of California Press, 2016) at 45.

2 ICTY and ICTR

The ICTY and the ICTR were ad-hoc international tribunals created by the United Nations Security Council (UNSC) in response to the ethnic cleansing campaigns that were being undertaken in former Yugoslavia and the genocide in Rwanda.[5] This demonstrated a clear shift towards the acceptance of using international criminal institutions to resolve these conflicts and that they are a desirable way to address these.[6] These tribunals were temporary, bespoke measures though, and did not have the same degree of victim participation or defendant rights that the ICC has.[7] These tribunals enjoyed a limited degree of success, providing important jurisprudential developments for the ICC to build on. The ICTY decision in *Tadic*[8] helped define the scope of war crimes and *Erdemovic* prompted the inclusion of the defence of duress in the Rome Statute.[9] The area of genocide was developed in the case of the ICTR.[10] However both tribunals encountered many difficulties in their operations. The ICTY suffered lack of funding, a troubled relationship with the UNSC, staffing and the arrest of perpetrators and these were exacerbated in the case of the ICTR as it also faced government opposition.[11] Based on these experiences it was widely recognised that there was a gap that needed filling in the world of international criminal justice. It was unreasonable to have to set up a completely new tribunal for every situation that emerged, and they were also very expensive. Therefore, the idea of creating a permanent international criminal court finally gathered enough support and in 1998 the General Assembly of the UN convened in Rome to negotiate the creation of the ICC.[12]

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[5] Andrew Novak *International Criminal Court: An introduction* (Springer, New York, 2015) at 4.

[6] Jess Kyle "The 'New Legal Reality'?: Peace, Punishment, and Security Council Referrals to the ICC" (2015) 25 Transnat L & Contemp Probs 109 at 116.

[7] Novak, above n 5, at 8.

[8] *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Judgement)* ITCY Appeals Chamber IT-94-1-AR72 2 October 1995.

[9] *Prosecutor v. Erdemovic (Sentencing Appeal)* Appeals Chamber IT-96-22-A 7 October 1997.

[10] Novak, above n 5, at 8.

[11] Novak, above n 5, at 13.

[12] William A. Schabas *An Introduction to the International Criminal Court* (Cambridge University Press, Cambridge, 2001) at 7.

B Negotiations

1 Circumstances

The negotiations surrounding the drafting of the Rome Statute, the treaty behind the ICC, were a five-week long process that was as complex as it was contentious. The sheer amount of parties present, with not only 160 states present but also a significant Non-Governmental Organisation (NGO) contingent, meant that there were many competing interests that the parties that held them were determined to be heard.[13] There were two main groups that were the main supporters of the ICC. The first was a collection of states who called themselves the 'like-minded', consisting of over sixty states, many of whom could be referred to as 'middle power states"[14] These were states from a broad world demographic, with Western states such as Canada and New Zealand, South American states like Chile and a number of African states including Ghana and Senegal.[15] They even had the support of the UK, a permanent UNSC memeber. The other strongly supportive group consisted of NGOs, which was called the 'Coalition for the ICC' and 236 organisations of the eventual 800 organisations that now make up the Coalition had representatives at the negotiations.[16] These representatives were very influential in their support of the ICC and were responsible for the unprecedented inclusion of gender crimes in the statute.[17] In this way the supporters of the ICC had the advantage of a unified front against those who would oppose the ICC or limit its powers. This was very helpful considering the power and influence wielded by those that opposed many of the important aspects of ICC functions, such as the independence of the court or *proprio motu*, prosecutor's power to initiate investigations.

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[13] At 15.

[14] At 15.

[15] At 16.

[16] Novak, above n 5, at 24.

[17] William R Pace and Mark Theroff 'Participation of non-governmetal organisations in Roy SK Lee (ed), *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus Nijhoff Publishers, Leiden, 1999) 391 at 392.

The opposition to the ICC was present particularly from large powers such as the US, Russia, India and China. It is this opposition and surrounding compromise that helps to explain the roots of some of the problems that the ICC faces today. Russia, China and the US or the 'big three' as they are sometimes known as, are some of the biggest obstacles to the ICC's ability to operate effectively. Russia and China opposed the ICC for the principled reasons of respecting state sovereignty and non-interference in internal affairs. The US claimed the lack of jury trials meant it ran contrary to their constitution. The ideological reasons were perhaps mere window dressing for the very practical reasons they had against the ICC. They wanted the UNSC to be able to control the ICC and were strongly opposed to *proprio motu* and were very uncomfortable about the idea that they could be susceptible to prosecution.

2 Influence on the ICC

The circumstances surrounding the ICC's creation had a significant impact on the court and the source of some of its political and structural difficulties are evident. The strong support that it had is why it has remained an independent organisation, but the strength of the opposition and the compromises that needed to be made make this a hollow strength.[18] Given the importance of the United Nations Security Council (UNSC) in the global political order, it is unsurprising that they ended up being included in the Rome Statute during the negotiations. The UNSC is the highest global power and wields considerable influence, and purportedly exists to protect international peace.[19] The most important aspect of the UNSC is the five permanent members: France, UK, US, China and Russia. These five nations also have the power to veto any proposed UN resolution, which has proven to be crucial in its dealings with the ICC. The influence of the UNSC manifests itself throughout the Rome Statute, most importantly through the ability to refer situations to the ICC. This was also part of the compromise negotiated by Singapore in order to include the *proprio motu* power, which allows the prosecutor to initiate their own

[18] Novak, above n 5, at 25.

[19] Kyle, above n 6, at 113.

investigations without state or UNSC authorisation. These states played a large part in the rejection of the universal jurisdiction that was suggested by Germany, which would have enabled the ICC to reach many areas of the world that needed it the most. The objections that many of the big world powers had to certain aspects of how the ICC operates are important to note as they contributed to the creation of the problems that would later beset the ICC.

C The emergence of the ICC

The product of these negotiations was the creation of the first permanent international criminal legal institution in the world, the ICC, with jurisdiction over the core crimes of the Rome Statute commencing on 1 July 2002 upon its ratification by 60 states, as per Article 126 of the Rome Statute.[20] The ICC is divided into three main bodies: the Office of the Prosecutor, the Judiciary and the Registry. The Office of the Prosecutor is responsible for the investigations and prosecutions, the Judiciary is the ICC's judges and the Registry is administrative.[21] Upon its inception there was great enthusiasm and hope amongst its proponents that this would prove a turning point for international criminal law and end the seeming impunity that the perpetrators of heinous international crimes seemed to enjoy. However, after 17 years that enthusiasm is turning into weary resignation toward the futility of its task as it is becoming increasingly apparent that the ICC is unable to fulfil the role that was hoped of it and seems to be falling short of its potential.

D ICC's Aims

In order to fully understand the problems that the ICC faces it is necessary to examine the extent of the task that the ICC has set out to do. The ICC exists to punish those responsible for the commission of the worst international crimes, specifically genocide, war crimes,

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[20] Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 126.

[21] ICC "Understanding the International Criminal Court" <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> at 9.

crimes against humanity and the crime of aggression, which came into force in 1 July 2018. We can see further evidence of their aims in the preamble of the Rome Statute: [22]

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished… Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes

From this we can see that not only is prosecution their goal, but deterrence and prevention play a part as well. It was never intended for the ICC to do this on its own and from the very start affirms the need for states to fulfil their role in the punishment of international crimes at a national level as well as through cooperation with the ICC. It is also important to note the prevention of impunity aspect, as the ICC does not recognise immunities derived from official capacity and applies regardless of the existence of these immunities.[23] This means that they have set their sights on leaders that have traditionally enjoyed immunity from prosecution for their actions, sometimes the very leaders of the states that it relies on for support. In light of these lofty goals it becomes apparent that when assessing the ICC's effectiveness their ability to punish and deter perpetrators of these grave international crimes, even if they traditionally enjoy immunity, will be very important. State cooperation will also be crucial for them. Given the gravity of the crimes that it is responsible for overseeing as well as the pioneering nature of its existence, it is always going to be watched very closely. As we can see the ICC's aims are very ambitious and these have proven to be very difficult to achieve.

E The Current Situation

1 The ICC's progress

The ICC has made considerable steps towards its goals towards ending impunity for the serious international crimes that fall under its jurisdiction. Since it came into the force the

[22] Rome Statute, preamble.

[23] Art 27.

ICC has opened investigations in 44 countries, leading to 22 prosecutions, which is impressive considering the budget of the ICC is only around EUR 140 million and it is a massive logistic challenge to remain active in all these different situations all over the world.[24] It is also relatively young as it has been active for only 17 years. Looking at it this way,d the ICC has obviously achieved a limited degree of effectiveness and can be seen to be active in its attempts to fulfil its aims. However, there are still many suspects at large and in regard to convictions the ICC has only completed four to date.[25] For many observers the ICC has not lived up to its potential and many of them feel that the ICC is not living up to its potential or is structurally flawed, and when one starts to look at the ICC there seems to be a certain weight to these claims.

2 The Importance of Enforcement

As it stands, the ICC actually has relatively weak enforcement capabilities. It has no police force or enforcement capabilities of its own and therefore relies on states to carry out this task for them. Enforcement is a crucial part of the ICC achieving its aims as if the ICC is unable to produce any consequences then its goals are seriously harmed. It loses legitimacy as an international court and its aspirations towards universal jurisdiction are harmed. The further that its legitimacy is eroded then the authority that it has is diminished. If the ICC is unable to get the perpetrators to stand trial, there is also a detriment in the practical sense, in that it hinders the development of ICC court processes and international criminal law in general. It also looks ineffective as it does not prosecute enough people for it to be seen as an effective institution, with many holding this against the ICC.[26] Furthermore, if the ICC appears unable to bring those who commit these crimes to justice then it drastically reduces its ability to serve as a deterrent. It is clear that currently the ICC is not having the effect that it would hope for and any deterrence factor present only operates to a limited degree. Authoritarian dictators around the world are still acting with perceived immunity. Syrian

[24] Yaël Ronen 'The ICC and nationals of non-party states', in Gerhard Werle and Andreas Zimmermann (eds) The ICC in Turbulent Times (T.M.C Asser, The Hague, 2019) 83 at 106.
[25] ICC home page <https://www.icc-cpi.int/>.
[26] Alana Tiemessen "The International Criminal Court and the politics of prosecutions" (2014) 18 IJHR 444 at 444.

president Bashar al Assad authorised brutal crimes against his population and enjoys the protection of Russia. Laurence Gbago, the former president of the Cote D'Ivoire, was threatened with ICC prosecution but he did not step down and even though Mali was a signatory to the ICC, rebels and government troops still committed crimes in Northern Mali in 2012.

The number of outstanding warrants for arrest demonstrates the problems the ICC is having in this area, with 15 outstanding.[27] If the ICC is not able to bring those that it indicts in front of its courts to stand trial, then there is the fear that if criminals know that it is unlikely that they will be brought to justice then they will continue to act with impunity.
Legitimacy and authority are important parts of the ICC's enforcement capabilities, as since it is reliant on state cooperation it is vital that the ICC be seen as a legitimate enforcer of international criminal law and the appropriate response to these crimes, commanding the respect of the states it works with. If the ICC does not have this it will not get the support that it requires to function effectively, and those who are opposed to it will be able to resist it more easily.

Chapter Two: Jurisdictional Issues and the UNSC

Jurisdictional issues are a key aspect of the ICC's problems with enforcement, and the UNSC is linked closely to this It is only through UNSC referral that the ICC can obtain jurisdiction over non-party states if the leaders of the state refuse to refer the situation to the ICC. The importance of jurisdiction is that if the ICC is unable to exercise it over the perpetrators of core ICC crimes then it is obviously not going to be able to do anything about them. This diminished reach is undesirable since the ICC is founded around and aiming towards the principle of universal jurisdiction. The fewer states that it can exercise jurisdiction over reduces its resources and authority, as this is derived from state consensus/participation.

[27] ICC home page <https://www.icc-cpi.int/>.

A How Jurisdiction is Achieved

Before examining the problems that the ICC has regarding jurisdiction it is worth explaining how the ICC can bring a state under its jurisdiction. The first step for jurisdiction to be triggered is that the crime must be either genocide, crimes against humanity, war crimes or the crime of aggression.[28] In terms of who the ICC can exercise jurisdiction over, it can normally only do this over State parties or nationals, as provided for by article 12 of the Rome Statute[29]. In terms of opening an investigation, this can be done in three ways.[30] The first is a state referral, which is under article 14 of the Rome Statute and involves the state inviting the ICC to open an investigation, an example of which is Uganda. Non-party states can use this option as well, as was the case with Cote D'Ivoire. The Second is through the Chief Prosecutor using *proprio motu*, which is described in article 15, and is the exercise of discretion to open an investigation that the prosecutor thinks fit, however this must be confirmed by the pre-trial chamber.[31] The final way is through a referral by the UNSC. This is the only way that the ICC is able to investigate crimes committed in a non-party state against their wishes, and has only been used twice, in Libya and Sudan.

One aspect that the ICC struggles with is the voluntary nature of its jurisdiction. Since it is a voluntary process, states with poor human rights practices and non-democratic states are less likely to sign up to a treaty where they could possibly be held to account.[32] This results in the unfortunate reality where often the states where the core crimes of the Rome Statute are being committed are either non-signatories of the Rome Statute or have not ratified it and therefore do not fall under ICC jurisdiction. This means that the ICC can do nothing whilst some of the worst humanitarian disasters occur before them and it makes them look

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[28] Rome Statute, art 5.

[29] Rome Statute, art 12.

[30] Art 13.

[31] Art 15.

[32] Zlata Đurdevic "Legal and Political Limitations of the ICC Enforcement System: Blurring the Distinctive Features of the Criminal Court" in Bruce Ackerman, Kai Ambos and Hrvoje Sikirić (ed) *Visions of Justice* (Duncker & Humbolt, Berlin, 2016) 163 at 197.

weak and impotent. It is reliant on the UNSC to allow them to act, and as will be shown this is unlikely to be forth coming. The situation in Myanmar is a clear example of this.

B Myanmar

Myanmar serves to highlight the problems that the ICC face when trying to fulfil their role. The situation involves the genocide of the Rohingya people by the Myanmar military forces and Buddhist extremist militias which has been occurring since 25th August 2017.[33] This is a situation that the ICC was founded to both deter and punish, with genocide and crimes against humanity being committed with seeming impunity and the report by the UN Special Rapporteur detailed the extensive atrocities that it has found being committed, and said they had the "hallmarks of genocide."[34] Unfortunately the ICC has no jurisdiction over Myanmar so is unable to investigate directly. Instead it is forced to rely on UNSC referral to get this, which has proven to be not forthcoming due to China being an ally of Myanmar and the exercising of its veto power. This is despite repeated recommendations from various groups such as the OHCHR-appointed independent fact-finding missions mentioned earlier to refer the situation to the ICC. What is interesting about Myanmar is that the ICC is trying to use the deportation of Rohingyan refugees to Bangladesh in order to bring the matter under ICC jurisdiction, arguing that the crime of forced deportation, which falls under ICC jurisdiction was completed in Bangladesh. In a majority judgement, the Pre-Trial Chamber ruled in favour of the prosecutor and allowed jurisdiction, stemming from the international nature of the ICC.[35] They also took into account the circumstances surrounding the crime of deportation, which involves the crossing of international borders.[36] The majority also stated that this principle giving the ICC jurisdiction over crimes partially committed in a member state territory applied to all the crimes mentioned

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[33] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64 (Sept. 12, 2018).

[34] Yanghee Lee, *Special Rapporteur on the Human Rights Situation in Myanmar*, UN Doc. A/HRC/37/70 (9 March 2018).

[35] *Decision on the "Prosecutor's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute (Judgement)* ICC Pre-Trial Chamber I ICC-RoC46(3)-01/18 September 6 2018 at [73].

[36] *Decision on the "Prosecutor's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute* at [71].

in the Rome Statute.[37] While this, on the face, of it is a positive development, it remains to be seen whether it is a satisfactory one. There has been criticism of the judgement for its lack of clarity regarding ICC authority, and as the dissent mentions there were certain procedural issues, as well as the fact that it was an advisory opinion, which the ICC has stated it will try to avoid.[38] It also still only allows the ICC to charge those in Myanmar for crimes that have been 'completed' in Bangladesh and they are unable to charge them with any of the crimes that took place solely in Myanmar. It also undermines the legitimacy of the ICC in that it is reduced to using workarounds instead, almost appearing that the ICC is accepting diminished legal culpability in order to get a conviction. Furthermore there is no guarantee that the ICC will be able to do anything in Myanmar as they are hostile to the ICC, and since it is so early on in the investigation it remains to be seen if the attempt that the ICC has made to circumvent jurisdictional issues will be successful.

C The United Nations Security Council

The relationship that the ICC has with the UNSC is one that leads to problems with its enforcement. As can be seen from the aforementioned example, the big three of the UNSC have proven to be very reluctant to exercise its ability to refer situations to the ICC. This is an unfortunate circumstance as the UNSC is the only body that can enable the ICC to exercise jurisdiction over non-party states. Furthermore China, Russia and the US are seen as the three major powers in the world at the moment so not only is the ICC missing out on their considerable resources, but being in opposition to them threatens the ICC's position and makes it even harder for it to exert influence over states and work towards achieving their goals.

Russia and China have consistently been against the ICC from the outset and had voiced their objections during the negotiations. The US relationship with the ICC has fluctuated depending on the administration, as it was actively hostile under Bush, then started to cooperate more under Obama. However, under Trump the attitude has turned hostile again, with Trump's former national security advisor John Bolton stating "the ICC is already dead

[37] *Decision on the "Prosecutor's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute* at [74].

[38] Michael Vagias "Case No. ICC-RoC46(3)-01/18" (2019) 113 AJIL 368 at 373.

to us."[39] Trump was very clear on his attitudes towards the ICC in his first address to the UN, where he said:[40]

> The United States will provide no support in recognition to the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority. The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process. We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy

This position has not wavered and in response to the ICC's attempts to investigate US troops for crimes in Afghanistan the US cancelled Fatou Bensouda's visa and threated to do the same to all those who aid in the investigation.[41]

The close association with the UNSC that the ICC has is a double-edged sword that seems to currently harm more than help the situation. While it enables the ICC to potentially have jurisdiction over countries that have not signed up to the statute (although as will be shown this has proven to be a very unfulfilled potential), it also links the ICC maybe too closely with the UNSC and its exercise of political power, leaving it at best a political tool used by them or at worst a dumping ground for situations the UNSC wants to wash its hands of.
The fact that the UNSC is able to exercise so much power over the ICC brings into question the ICC's independence and pursuit of equity before the law and justice.[42] The UNSC permanent five members have the ability to veto any proposal to refer a situation to the ICC and the UNSC can also delay any ICC investigation for a year, and there is no limit to

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[39] "John Bolton threatens ICC with US sanctions" BBC News (11 September 2018) < https://www.bbc.com/news/world-us-canada-45474864>.

[40] Donald Trump, President of the United States, "Remarks by President Trump to the 73rd Session of the United Nations General Assembly" (United Nations Headquarters, New York, September 25 2018).

[41] "US revokes visa of International Criminal Court prosecutor" BBC News (5 April 2019) <https://www.bbc.com/news/world-us-canada-47822839>

[42] Leslie Vinjamuri "The International Criminal Court and the Paradox of Authority" (2016) 79 Law & Contemp. Probs. 275 at 286.

the number of times that this can be renewed.[43] The power to delay means the UNSC can exercise extensive control over the ICC, as even if the ICC has jurisdiction the UNSC can effectively stop any proceedings. These powers also result in the fact that its members will likely never face charges from the ICC as they can just prevent referrals or delay investigations indefinitely. Even if they did not have this power it would be very difficult for the ICC to carry out a proper investigation or fulfil any of its arrest warrants, and this was even recognised by the Pre-Trial Chamber who denied the request to investigate Afghanistan as it was deemed unlikely to succeed.[44]

A further problem is the fact that because of the opposition of the big three towards the ICC the UNSC has little motive to refer situations to the ICC. Regardless of whether they are politically linked to the state in question or not, it is in their interests for the ICC to be starved of as many cases as possible, as this further weakens the ICC and makes it unable to challenge them.

Even when the UNSC does refer situations to the ICC it has proven to not result in cooperation or a speedy resolution of the situation. The UNSC has only exercised this power twice, in Libya and Sudan and unfortunately the UNSC seems to only use the ICC as a way to deal with politically difficult situations in order to appear to the international community as if they are doing something about it.[45] After the situations were referred there was no aid provided to the ICC from Russia, China or the US. This aid is needed by the ICC as often these situations are particularly dangerous and the big powers are likely the only ones with a real chance at arresting those that get indicted and have extensive control over whether the investigation is maintained. The UNSC also placed limitations as

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[43] Rome Statute, art 16.

[44] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Judgement)* Pre-Trial Chamber II ICC-02/17-33 12 April 2019 at [96].

[45] Catherine Gegout "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace" (2013) 34 Third World Q 800 at 805.

to who the ICC could pursue, exempting officials and nationals from the non-party state from ICC jurisdiction.[46]

The attempts to bring Bashir to justice were very detrimental to the ICC. When the ICC's authority becomes based on the UNSC it becomes problematic as UNSC are looking at the issue through an entirely different lens which makes them more likely to consider the political ramifications and the effect on international peace and security rather than the strict legal realities.[47] This means that there is an inextricable political element, and it is this that becomes the driving factor behind the referral.

Furthermore, when looking at Syria and Myanmar it becomes evident that if a state enjoys the protection of one of the permanent members of the UNSC who oppose the ICC, namely Russia, China or the US, then they are effectively protected from ICC prosecution regardless of the gravity of the crimes that they commit. In this way the UNSC's power is a blow to the authority and credibility of the ICC and proves to be one of their biggest obstacles in their attempts to end impunity for perpetrators of serious international crimes.

Chapter Three: Sovereign States and the ICC

A Reliance on states

This is perhaps the crux of the issue when it comes to the ICC's ability to operate like a conventional criminal court. It raises serious questions as to the ability of the ICC to act as an effective enforcing body. While the ICC operates as a conventional criminal court, it has no police force of its own and it is entirely reliant on state cooperation for investigations and apprehending those that the court has issued indictments against. This dependence on states that the ICC is required to have in order to carry out all the practical tasks regarding what needs to be done when carrying out an investigation clearly demonstrates the ICC's weakness in enforcement and their inability to act fully independently. It is the states who

[46] Đurdevic, above, n 32, at 190.

[47] Clare Frances Moran "The Problem of the Authority of the International Criminal Court" 18 ICLR 883 at 887.

are responsible for arresting suspects, transferring and protecting witnesses, arranging protection and access for investigators who are gathering evidence and intelligence assistance, and often governments fall short of their responsibilities in this area.[48] While France and Belgium have arrested suspects on their territory and transferred them to the ICC, when it came to the case of al-Bashir many countries shirked their duties.[49] This is a far from a desirable situation and along with the fact that the aid is provided on an irregular basis, this reliance on states inevitably introduces political considerations into the mix, which cause tension with the ICC's status as a legal institution. This is because the ICC must take these considerations into account on a practical level whilst still appearing to be above these on an ideological level.

B State Sovereignty

Since the ICC derive their authority from an international treaty and consequently from states themselves their power will always be inferior to state sovereignty, which gives its authority a degree of fragility. Their inability to challenge state sovereignty is reinforced by that fact that the ICC's coercive powers are weak.[50] The problem that this presents is that if it is states that are having the final say in regard to the exercise of ICC authority then it becomes an inherently political question outside of the ICC's control. This is because while the court is primarily concerned with accountability and the pursuit of justice, states are less concerned about the development of international criminal law and holding those to account than they are about their own interests. States operate on the political sphere and thus all their cost/benefit calculations are done through a political lens. When the ICC's aims do not align or impinge on their political interests they turn against the ICC and stand in the way of the pursuit of justice.[51] This is problematic as since the ICC is heavily reliant on the cooperation of its member states in order to conduct effective investigations and apprehend criminals it means that keeping them on their side is vital and this can prove to

[48] Tiemessen, above n 26, at 450.
[49] At 455.
[50] Đurdevic, above, n 32, at 165.
[51] Vinjamuri, above n 42, at 277.

be a difficult task when the ICC's investigations interfere with the political interests of states or peace negotiations.[52]

The task becomes even more difficult for the ICC when it is pursuing a situation without an invitation from the state in question as it has no outward authority to rely on other than their own. We can see from the protests that have occurred in states where this has happened, it seems evident that for states the authority of the ICC depends on what it does, rather than any inherent authority due to its position as an international court of law[53] Even a referral from the UNSC has resulted in immense protests from the states in question that the ICC has had trouble dealing with. The ICC only focuses on investigations that it thinks are feasible, due to its limited capabilities and resources, and only works in places that already have the presence of a degree local judicial development and are accessible for its investigators with government protection, so it is limited in a practical manner by this.[54] The problem with this is that if the ICC is seen to be very selective in its cases, particularly due to the reason that the state would be uncooperative, then it has the potential of undermining its claims for universal justice.[55]

A classic example of the weakness of the ICC in the face of state non-cooperation is the case of Kenya, which have taken an active stance against the ICC and was not cooperative ragarding the investigation.[56] The deterrent factor of the ICC was further called into question as those indicted by the ICC were able to win an election, questioning the effectiveness of indictments. The Chief Prosecutor Fatou Bensouda has said that in Kenya witness intimidation is still a serious problem and unlikely to change and this has resulted in the charges against Kenyans being withdrawn.[57]

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[52] At 279.

[53] Vinjamuri, above n 42, at 283.

[54] Gegout, above n 45, at 807.

[55] Gegout, above n 45, at 801.

[56] Jason Emmanuel, "The International Criminal Court and Sovereignty: What Does Kenyatta Mean for the Future of the ICC" (2014) 24 Transnat L & Contemp Probs 133 at 137.

[57] At 139.

C Potential for State Manipulation

When it comes to states referring situations to the ICC the fact that often states will have ulterior motives when referring a situation to the ICC comes into play, and there is the danger that the ICC becomes, or is seen to become, a political tool for states to use against rivals.[58] Even when the ICC becomes involved due to the use of *proprio motu* or UNSC referral, the fact that the ICC relies on government protection and assistance for most of the practical steps involved in carrying out a formal investigation means that it is much easier for the ICC to prosecute rebel leaders rather than government officials. We can see evidence of this with what happened in Uganda who invited the ICC to conduct a formal investigation of the conflict involving Joseph Kony and the Lord's Resistance Army that was proving to be a serious and difficult situation to deal with. The government was very cooperative until the ICC started investigating the crimes that were being committed by the government forces as well as the rebels. Suddenly the government was not particularly happy to have the ICC there and support and cooperation dried up, making it much harder for the ICC investigators to do their job, and Uganda became a vocal opponent of the ICC.[59]

These are complex situations that the ICC finds itself having to deal with. It is operating during a live conflict, often in territories that are not under control, with those responsible often enjoying the protection of a military force. There are often other international actors that also have differing stakes and agendas in this conflict such as democratisation or destabilisation and the ICC has to try and navigate this.[60] This makes it hard for the ICC to try and achieve anything without aiding any of these agendas, intentionally or otherwise. This is the inevitable result of the ICC's need for state cooperation, as well as the fact that ICC prosecutions will undoubtedly be of political benefit to a particular side in a conflict.

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[58] Steven C Roach "Should the International Criminal Court Impose Justice" 7 Yale J. Int'l Aff. 64 at 67.

[59] Roach at 66.

[60] Darryl Robinson "Inescapable Dyads: Why the International Criminal Court Cannot Win" 28 LJIL 323 at 333

D Head of State Immunity

Another area that demonstrates the supremacy of state interest over the ICC is that of sovereign immunity, which has proven to be a big obstacle for the ICC when it comes to enforcement. The presence of article 27 of the Rome Statute, which essentially does away with official immunities, was lauded as a huge step forward for international criminal law as a whole and a key aspect of the ICC's quest to stop impunity for the commission of grave international crimes. This revocation of immunity is tempered by the presence of article 98 however, which provides that the court cannot require states to break state or diplomatic immunity when it requests surrender or assistance of an individual from a third state and needs the third state to waive this immunity. Regardless of the fact that the ICC can in theory prosecute heads of state, when it comes to putting this article into operation the weak enforcement powers that it possesses means the ICC faces great difficulty in prosecuting top officials.[61]

The prime example and a source of constant consternation for the ICC was the case of Omar al-Bashir who was the president of Sudan when it was referred to the ICC by the UNSC. Even with this referral the ICC was unable to apprehend al-Bashir and faced embarrassment when he was able to visit numerous countries such as South Africa and Kenya with impunity. He further managed to gain the support of the African Union who have become a vocal opponent of the ICC, accusing the ICC of neo-colonialism and calling it a western institution.[62] They also allege African bias and have recently increased their overt opposition to the ICC by calling for mass withdrawals. The ICC's inability to prosecute al-Bashir demonstrates its apparent incapability to deal with those that wield tangible political power.[63] It is very unlikely that this will change anytime in the future as well, as it is in every leader's interest to maintain the strength of head of state immunity, and therefore they have little motivation to change this.

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[61] Đurdevic, above n 32, at 164.

[62] Gegout, above n 45, at 805

[63] HG van der Wilt "Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States" (2011) 9 JICJ 1043 at 1064

E State Withdrawals

The problems arising from the voluntary nature of a state obligations to the ICC are evident when it comes to the issue of state withdrawals. If states are unhappy with the ICC's decision to prosecute them, or just unhappy with them in general then the option is available for them to withdraw, or at least hold that threat over the ICC. After a state withdraws it is still open to ICC jurisdiction for crimes committed before its withdrawal[64] but nevertheless a state withdrawal poses serious problems for the ICC in the areas of authority and enforcement capabilities.[65] While the ICC has legal jurisdiction, the state itself is under no obligation to cooperate with the ICC, making it difficult for the ICC to pursue the investigation.[66] Furthermore it means that the State is not only no longer paying into the ICC coffers but also any future crimes are now beyond the ICC's jurisdiction. When the ICC announced that it will be conducting a preliminary investigation against the Philippines due to Robert Duerte's war on drugs, the Philippines responded by challenging the ICC's authority and subsequently leaving, as well as threatening to have the investigators arrested.[67] In response to this the ICC's prosecutor has said that the preliminary investigation against the Philippines will go ahead regardless of the withdrawal.[68] This case will be watched closely and will be a clear demonstration of the court's capabilities. It means the Philippines will be unlikely to hand over suspects and will in all probability impede investigators, and we can see from the situation in Kenya that the ICC struggles to pursue warrants in countries that do not support them. Burundi has also left the ICC and South Africa and the Gambia threatened to leave, although they subsequently reversed this. The consequences of withdrawal are serious, damaging the ICC's authority and ability to exert its influence, as well as reducing the resources it has

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[64] Rome Statute, art 127(2)

[65] Hannah Woolaver "Withdrawal from the International Criminal Court: International and Domestic Implications" in in Gerhard Werle and Andreas Zimmermann (eds) The ICC in Turbulent Times (T.M.C Asser, The Hague, 2019) 23 at 42

[66] Woolaver, above n 65, at 30

[67] Moran, above n 47, at 884.

[68] "ICC prosecutor: examination of Philippines continues despite withdrawal" (March 19 2019) Reuters Africa <https://af.reuters.com/article/worldNews/idAFKCN1QZ28M>

available. With this in mind it is important that the ICC carefully manages its relationships with states and prevents this from occurring in order to preserve its membership.[69]

Chapter Four: Conceptual Problems

A Nature of the ICC's legal position

The ICC encounters further problems when it comes to the fact that it is not only dealing in a relatively new field in law, but that it is trying to operate as a conventional court applying individual criminal responsibility in an international arena. The ICC has been set up as using the principles of international law rather than criminal procedural law and it shows. Individual criminal liability sits at odds with the conventional way that international law works, as in the international sphere it has traditionally been the domain of state interaction and the premise of the inviolable right of state sovereignty underpins the law that governs this. This is where we can see difficulties when the ICC tries to apply conventional criminal law methods. Compared with a national criminal court the ICC has significantly reduced ability to work effectively. National criminal courts are effectively the exercise of executive power over that of individual citizens, which is generally accepted to be superior, therefore national courts can compel witnesses to comply, have significant authority that is very difficult for these citizens to challenge and they have the advantage of the support of national enforcement bodies to assist them. In the case of the ICC it has the additional hurdle of getting the backing of the state before it is able to exercise any influence over those in the state it wants to prosecute and is subservient to state sovereignty. The relationship between states and the ICC is seen as a relationship between two sovereign individual entities rather than a court and law enforcement.[70] The ICC is unable to compel witnesses to appear and their authority, which is based on agreement, can be challenged. As we can see, the operation of a conventional criminal court in the international arena leads to certain tensions and it is the criminal processes that are compromised when

[69] Woolaver, above n 65, at 42

[70] Đurdevic, above n 32, at 169

attempting to reconcile these difficulties. An example of this is the ICC's inability to compel witnesses to attend, which the ICTY in *Blaškić* stated is a power "as necessary for the proper functioning of the International Tribunal as it is for domestic criminal courts".[71] This demonstrates the diminishment of the ICC's enforcement powers it had to accept in order to operate in the international arena and the resulting subservience to international law that this led to.[72]

B Political - Legal Divide

The problem with the ICC being so closely connected to states and the political dimension this brings is that in order to maintain legitimacy in its role as an international criminal court it must appear to act beyond political influence and pressure.[73] Otherwise there is the danger that it will lose a key essence of its purpose, that is to fight impunity for these crimes, which often results due to political reasons. This is because once political leaders or those indicted by the ICC capable of wielding political influence know that the ICC is an institution that can be influenced through the use of political tools then they will feel that they can use these methods against the ICC.[74] If this occurs it has the potential to undermine the legitimacy of the ICC as a court of law and its inherent authority as a legal institution.[75] If the legal nature of their mission is undermined then the ICC faces the danger of being reduced to existing as a mere political institution. There exists a considerable tension between the political field that these states are operating in and the pursuit of law and human rights and the ICC's work can be damaged by this.[76]

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[71] *Prosecutor v Tihomir Blaškić, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum* ICTY Trial Chamber II IT-95-14 18 July 1997 at [59]

[72] Đurdevic, above n 32, at 167

[73] Michael J Struett "Why the International Criminal Court Must Pretend to Ignore Politics" (2012) 26 Ethics Int. Aff. 83 at 83.

[74] At 84.

[75] At 85.

[76] Hans-Peter Kaul "The International Criminal Court – Current Challenges and Perspectives" (2007) 6 Wash. U. Global Stud. L. Rev. 575 at 578.

It unfortunately seems impossible for the ICC to ignore the political realities of the world though and this is evident when one looks at the situations that it is investigating. It appears that powerful states and those that are under their protection are less likely to be investigated, or successfully prosecuted, than those that are weaker.[77] This is due to the ICC wanting to pursue cases that it can actually win and it faces significant difficulties regarding this the more powerful that state is. There is also the claim that not paying attention to the interests of state parties will reduce the effectiveness of international courts, and while the terms of effectiveness used when making these claims tend to be focused on quantitative results, it is not hard to see how this could be true.[78]

The political dimension that is present with the ICC is something that is likely unavoidable due to the nature of international legal arguments. Koskieniemmi claims that any legal argument is open to one of two criticisms, either what he terms as apologia which is too political, cannot change the status quo and utopia which is too divorced from the political realities of the world and thus will be lacking in the support it requires.[79] We can see that this can apply to how the ICC gets jurisdiction over states. If it does not use the *proprio motu* power then it can be seen as being weak and catering to states, but if the ICC does not receive any referrals from states then the claim could be made that the ICC is marginalised and ineffective.[80] The broad nature of the meaning of the word 'political' is and the fact that it can be applied in many different situations makes the influence of politics one that is inescapable for the ICC.[81]

C Peace vs Justice Debate

[77] Elise Keppler "Managing Setbacks for the International Criminal Court in Africa" (2012) 56 JAfrL 1 at 7.
[78] Yuval Shany "Assessing the Effectiveness of International Courts: A Goal-Based Approach" (2012) 106 AJIL 225.
[79] Martti Koskenniemi, *From Apology to Utopia: The Structure of Legal Argument* (Cambridge University Press, Cambridge, 2005), at 16.
[80] Robinson, above n 60, at 327.
[81] Robinson, above n 60, at 345.

The fact that the ICC is operating on a primarily political sphere and is reliant on states means that it faces a tension with these states in terms of the preferred way to resolves these conflicts. This is a prominent issue surrounding the exercise of ICC influence, and the essence of it can be found in the peace vs justice debate that surrounds the resolution of these conflicts. This involves argument as to whether it is better to pursue peace or justice during an armed conflict. The ICC is firmly on the side of justice as it wants to bring perpetrators before the court rather than allow them to go free unpunished, as this obviously runs counter to everything the ICC stands for.

Those that argue for peace argue that the pursuit of justice hinders the search for peace as it makes the perpetrators dig in and removes any incentive they have for surrender, thus dragging out the conflict at great cost to the people subjected to this conflict. They say that efforts to help the affected populace resettle and restart their new lives would constitute an immediate and better option to most of them than subjecting them to the pursuit of a trial, which even if achieved would be a lengthy and difficult process, especially when one considers the dangers that witnesses face and the problems the ICC is having with witness intimidation. [82] While the Ugandan government stopped cooperating with the ICC in part due to the ICC deciding to investigate government officials, another factor that they claimed to have turned them against the ICC was the fact that it was hindering the peace process the threat of prosecution prevented the reaching of a successful amnesty. In 2008 the Ugandan government offered the Lord's Resistance Army the possibility of being tried at a national level instead of subjecting them to ICC jurisdiction in an attempt to provide peace.[83]

Those that are justice proponents claim that threats could be used in order to leverage a peace deal or judicial amnesty instead of facing the ICC, thereby increasing their incentives to commit or threaten to commit further crimes.[84] Once they see that if they make peace

[82] Susanne D Mueller "Kenya and the International Criminal Court (ICC): politics, the election and the law" (2014) 8 J. East Afr Stud 25 at 34.
[83] Gegout, above n 45, at 805.
[84] Struett, above n 73, at 84.

worth more than the perceived value of justice, especially in the shorter term thinking that tends to exist in politics, especially democracies, then it encourages them to increase the violence or threat of violence in order to secure a better deal for themselves, or force a political solution rather than face the prospect of appearing before the ICC.[85] It also gives them the opportunity to return to violence in the future, as peace deals do not always last if the root causes behind them are not addressed. We can see evidence of failed amnesties in Sierra Leone and Angola and it seems that pursing peace over justice is a short term solution that treats the symptoms rather than the causes, and is a less sustainable path forward for peace.[86] Justice is a better long term solution. This would contribute towards the development of a society where an international structure is created where this sort of violence is condemned and widely recognised as something that will attract punishment.[87] We can see an illustration of this debate when looking at the reaction that al-Bashir had when indicted by the ICC, which was the immediate banning of various humanitarian groups, which led to an increase in pain and suffering. But arguably without the ICC then al-Bashir and others like him would feel able to inflict pain and suffering with more impunity, having less to worry about in terms of accountability.[88]

As political entities states and those that are leading them tend to prefer to resolve these conflicts using diplomatic tools, and like the flexibility of amnesties rather than the absolutes that the pursuit of justice often deals with. It is easy to speak of lofty ideals of justice and ignore the brutal reality on the ground where the suffering is great, and likely the promise of this illusory idea of justice is of little use to the people being attacked, displaced and killed. These competing ideals are hard to balance, even if the long term solution seems to be a better one on paper and the way states approach this issue explains

[85] At 84.

[86] Kingsley Chiedu Moghalu "Reconciling fractured societies: an African perspective on the role of judicial prosecutions" in Ramesh Thakur and Peter Malcontent (ed) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University, Tokyo, 2004) 197 at 219.

[87] Struett, above n 73, at 86.

[88] At 86.

why justice rarely gets achieved in armed conflict, since they ultimately have the final say on the issue.[89]

Chapter Five: Syria, an Illustrative Case Study

Syria will be used as a case study as it is a significant ongoing conflict in the modern world and is exactly the sort of situation that the ICC is supposed to exist to not only punish but to prevent. It also serves to highlight many of the problems that were discussed earlier.
The conflict in Syria has proven to be a source of significant consternation for the ICC and for many stands as a stark example of the limits of ICC power. The forces of Bashar Al Assad and the rebels fighting against him have committed many war crimes and crimes against humanity.[90] These include torture, violence against civilians, murder and the use of chemical weapons.[91] This is exactly the sort of scenario that the ICC exists to prevent and punish, yet it finds itself helpless and unable to do anything. This is because like Myanmar, Syria is not a signatory to the Rome Statute and they have a strong ally on the UNSC, which in this case is Russia. Though there was pressure for the UNSC to refer Syria to the ICC, ranging from then United Nations Human Rights High Commissioner Navi Pillay and a French resolution that had the support of 50 countries and over 100 civil society organisations, this was unable to alter the position of Russia.[92] The calls were ignored and Russia and China vetoed the resolution.

The reasoning that Russia provided in explanation of its decision to veto is illustrative of the peace vs justice debate and how it is a challenge to the ICC's role in resolving

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[89] Đurdevic, above, n 32, at 192.

[90] Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/21/50 (16 August 2012).

[91] *United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Rep. on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus*, U.N. Doc. A/67/997-S/2013/553 (2013).

[92] Hill Moodrick-Even Khen, "Revisiting Univeral Jurisdiction: The Application of the Complementary Principle by National Courts and Implications for Ex-Post Justice in the Syrian Civil War" (2015) 30 Emory Int L Rev 261.

international conflict. Russia claims that ICC involvement would interfere with attempts to end the current bloodshed in Syria.[93] The ability for the just one or two permanent members of the UNSC to completely block all attempts to involve the ICC, even if that effort is brought before them by another UNSC member supported by a large number of other states highlights the significant powers that the UNSC has over the ICC. It also shows how political considerations regarding state interest and alliances can so resoundingly negate the ICC's influence and leave it helpless to do anything. If the ICC tried to involve itself without UNSC referral it would trigger criticisms that it is interfering with state sovereignty, and would find it very difficult to do anything productive.[94]

Even if the UNSC referred the situation to the ICC it is doubtful the ICC will be able to do anything about it and this is evident when the aforementioned problems are applied to the Syrian context. We can see from the experiences that the ICC have had in Sudan that it would find it extremely difficult to bring any of the perpetrators to trial, as the UNSC would not support it and Syria would be hostile towards it. It would also be highly unlikely that the ICC would be able to apprehend Assad and would be once more defeated by head of state immunity, even though this is not supposed to matter to them. The non-cooperation of the Syrian government would severely limit their ability to properly investigate, and it is likely that witness intimidation would be a problem, as it was in Kenya. Those that the ICC would be most likely to apprehend would be the rebels, and it is not inconceivable that the Syrian government would be much more cooperative regarding handing them over. This is providing the ICC doesn't try and investigate Syrian officials, in a similar situation to Uganda. This would open the ICC to criticism of opportunistic justice, making it seem like it was being manipulated by the Syrian government and damaging its legal legitimacy as it is only pursuing members of one side of the conflict.

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[93] "Russia Opposes Syria Crisis War Crimes Court Referral" Reuters (15 January 2013) <http://www.reuters.com/article/2013/01/15/syria-crisis-russia-idUSL6NOAKCNB20130115>.

[94] Christian Wenaweser and James Cockayne "Justice for Syria?: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice" (2017) 15 JICJ 211 at 220.

While the ICC exists to deter and punish exactly the sort of situation that is occurring in Syria it finds itself helpless, demonstrating the inherent structural weaknesses that the ICC possesses at the moment. It is necessary for a change in the way it operates, if it is to avoid being side-lined in the international arena.

Chapter Six: Empowering the ICC

A Police Force

Currently a major reason behind the ICC's enforcement problems is the fact that it lacks any real independent power. The ICC has no police force of its own and no sanctioning powers to wield against those states that refuse to comply with their obligations under the Rome Statute.[95] A possible solution, therefore, would be to provide the ICC with their own enforcement body in the form of a supranational police force or military force, which would be able to operate within ICC jurisdiction to apprehend those that the ICC has indicted and bring them to trial, without having to rely on states to carry out this task, thus potentially circumnavigating the reticence that some states seem to have when required to do this. However, this is very unlikely to be a realistic prospect in the near future. It is hard to imagine states agreeing to set up such a force that would take away a degree of their control. It would also not solve the deeper problems regarding the superiority of state sovereignty and reliance on states, as this force would still be highly dependent on state cooperation and permission in order to operate effectively. Finally, it would take away from the ICC's legal authority if it turned into a quasi-military organisation, as it would then get involved directly in the messy conflicts that the situations it is referred to usually are.

If the ICC is seen to be actively fighting against rebel forces it reinforces the question of it being used as a tool by states. It is also extremely hard to apprehend many of these leaders, and military attempts to apprehend wanted criminals can go very wrong, as we can see from Somalia, where the US ended up caught in a costly pursuit of an African warlord.

[95] Michael J Gilligan "Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime" (2006) 60 IntlOrg 935 at 938.

The ICC faces the danger of getting involved in a debacle that significantly detracts from its ideals towards accountability and international criminal justice. Finally, there is the purely practical reason that ICC resources are stretched very thin and it would not be able to afford the upkeep of such a force, unless the state parties increased the funding, which again is very unlikely to happen.

B Sanctioning Powers

With the possibility of its own enforcement body out of the question, the other way that the ICC could increase their power would be giving them the ability to directly sanction states that fail to fulfil the obligations that they have agreed to, as the Rome Statute requires full state cooperation.[96] This would be instead of the current procedure where the ICC refers non-compliance situations to the Assembly of State Prates (ASP). This would enable the ICC to level the playing field and wield some influence against states, rather than being relatively helpless in the face of situations like that of Bashir. In a similar vein there is the possibility of implementing stricter consequences such as fines or sanctions for those countries that do not fulfil their obligations under the Rome Statue. But even if the ICC had this power it is unlikely it would use it often enough to be effective. The ICC has proven to be reluctant to refer non-compliant states to the ASP, choosing not to refer South Africa despite findings of non-compliance.[97] This in turn enabled Jordan to win an appeal against referral, with the ICC Appeals chamber ruling that Jordan should not be treated differently to South Africa, especially when it had sought to consult the court on its obligations.[98] If the ICC is unable to use even its limited sanctioning powers effectively it is hard to imagine it directly sanctioning states with the increased conflict and tension this would inevitably bring. Regardless, the implementation of increased sanctioning power would require the agreement of the member states in question to give the ICC this power, which as stated earlier is not something they would be likely to do.

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[96] Rome Statute, art 86.

[97] Yudan Tan "The ICC's South Africa Non-Compliance Decision: Effect of Security Council Resolution 1593 on Referring the Darfur Situation" (2018) 10 ALF 72 at 72.

[98] *Judgment in the Jordan Referral re Al-Bashir Appeal (Judgement)* ICC Appeals Chamber ICC-02/05-01/09-397-Corr 6 May 2019 at [212].

C Universal jurisdiction

Getting universal jurisdiction or as near to it as possible is crucial for the ICC to become an effective international criminal institution. This could take the form of reviving the universal jurisdiction that Germany tried to have implemented during the negotiations in Rome regarding the founding of the ICC. Failing that, there could be a Generally Assembly override to the UNSC referral or veto. These are unlikely to occur due to the presence of the veto power however and there is no way that any of the big three would allow their veto to be overridden or their countries to be subject to ICC jurisdiction without their consent. Even if the ICC could exercise jurisdiction it would still need to address the more practical side as with its current enforcement powers it would be unable to do anything. At the very least the ICC should attempt to encourage and motivate states to join, particularly those that have signed the Treaty but not ratified it.[99] This means that the ICC should try and attract as many states as possible to join it, enabling it to cover a much broader part of the world and enhance not only its budgetary reach but also give it more coverage for arrest warrants.[100]

D Direct enforcement

There is also the possibility of implementing an international judicial enforcement regime where the national courts are enforcement bodies for the ICC and directly communicate with and enforce ICC judgements without input from the state. [101] This would bypass state interference and emphasize the legal nature of the ICC. Obviously, this would only work with a competent and well structed judiciary that is not able to be influenced greatly by the states themselves. And the problem is that the nature of this relationship would likely still be governed by a degree of politics as it would depend on the laws that the state made.

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[99] Bertram Schmitt, "Foreward" in Gerhard Werle and Andreas Zimmermann (eds) The ICC in Turbulent Times (T.M.C Asser, The Hague, 2019) v at vi.

[100] Gegout, above n 45, at 808.

[101] Đurdevic, above n 32, at 195.

Combined with a strong use of *proprio motu* would serve as a potential balance against claims the ICC is controlled by the UNSC or is politically motivated, enabling it to operate on the legal level with much more freedom.[102]

E Limitations

While these solutions would be desirable in an ideal world, the problem with tackling the ICC's enforcement problems by increasing ICC power is that it does not address the root cause of the ICC's problems, which is the power of state sovereignty as any avenue for increasing the ICC would have to be accepted by these states, which is unlikely to happen and it would be extremely hard to prevent states from refusing to cooperate or withdrawing from the ICC without resorting to extreme measures. This leads to the conclusion that changing the way the ICC operates will potentially be more conducive to increased ICC effectiveness.

Chapter Seven: Rethinking the ICC

A Dual Identity

Since the ICC has considerable difficulty operating as a conventional criminal court in the highly political international world it would be potentially beneficial for it to stop trying to present itself as being a purely legal institution and instead embrace its unique position as a dual legal and political entity, and work to turn this to its advantage. It will always be dealing with states and very political situations, so it seems naïve to try and avoid having to come to terms with this. In line with this it could try and be clearer on its goals and what it hopes to accomplish and shift the dialogue from a convictions-based analysis to a more structural and ideological basis, which focuses more on deterrence and developing local institutions to be able to effectively deal with the breaches that the ICC cannot reach. If the measures of success are focused on long-term development and potential then the ICC will not struggle to be seen as relevant and successful.[103]

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[102] Schmitt, above n 99 at vii.

[103] Shany, above n 78, at 236.

Along with this the ICC could also further increase their ties with NGOs and incorporate them more into the process. NGOs have proven to be of great help to the ICC, especially when it comes to gathering evidence and lobbying.[104] We can see this through the work of the coalition for the ICC in promoting the ICC, as well as the significant role they were shown to have played in the negotiations. They also have much more flexibility than states and this would enable the ICC to extend its influence much further than its limited resources would normally allow, doing so without having to have as direct an influence. This would also go hand in hand with a shift towards broader actions to address the root causes of these crimes, through outreach activities, educational initiatives and information dissemination.[105]

There are potential issues regarding the undermining of the legal authority of the ICC if it is regarded to be subject to political considerations as well, and it risks losing sight of the ideals that it was founded upon.[106] This means that if the ICC were to go down this route then it would have to clearly and carefully manage the interplay between the legal side and the political side. It is important for the ICC to maintain its relevance as a criminal court as it its avoidance of the legal principle of head of state immunity differentiates it from national courts and regional human rights courts, all of which preserve this state immunity.[107] The ICC is still needed to step in if these leaders continue to perpetuate the belief that they can commit abuses like those in Syria and Myanmar with impunity.

Since the political element is always going to be there no matter how hard the ICC attempts to ignore it, the risk to its legal authority the ICC faces from embracing its dual role is one that it should take. The most important objective is to bring criminals to justice and if the

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[104] Đurdevic, above n 32, at 182.

[105] Chang-ho Chung "The International Criminal Court 20 Years After Rome – Achievements and Deficits" in Gerhard Werle and Andreas Zimmermann (eds) The ICC in Turbulent Times (T.M.C Asser, The Hague, 2019) 9 at 18.

[106] Struett, above n 73, at 84

[107] Charles Majinge "The International Criminal Court and the question of alternative justice system in Africa: a case of be careful of what you wish for?" (2009) 42 VRU 151 at 153.

ICC needs to be more political to achieve this then it surely should do so. Furthermore this could act as a stepping stone to increasing its power, as the more support it gathers and the more convictions it procures it is not inconceivable to imagine a situation in the future where the ICC can ease up from the political side and lean into its legal side more once it has more authority and is seen as a more established part of the international world order. This gradual process might be of more use to it during its fledgling state in order to secure that important foothold that it requires.

B Peace vs Justice

It is important to hold those responsible accountable to not only punish them for their crimes but also to create a culture of accountability and record of facts, which considerably aids the peace process and democratic transition.[108] It is also important to further develop international criminal law and build a strong base of case law and precedent in order to not only entrench international criminal law but also to clarify it, leading to a more efficient and reliable trial process. There is also the belief that justice is vitally important with regard to democracy, democratic institutions and international and local peace negotiations.[109] There is evidence that demonstrates that over time the ICTY has had positive and underappreciated effects on the societies where the violence took place.[110] It is plausible to believe that the ICC could have a similar effect providing that it is successful in persuading states that the long term benefits of the pursuit of justice and the establishment of a culture of accountability outweigh the short term benefits that an amnesty would provide.

This push for a shift towards justice being the dominant paradigm in the resolution of international conflicts relies on the ICC being an effective deterrent factor. It still remains as to whether the ICC can influence or deter the commission of these crimes with its

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[108] Struett at 86.

[109] Jamie Mayerfeld "The Democratic Legacy of the International Criminal Court" (2004) 28 FFWA 147 at 148.

[110] Lara Nettelfield *Courting Democracy in Bosnia and Herzegovina* (Cambridge University Press, New York, 2010) at 200.

relatively weak enforcement mechanisms, or if it can do so without addressing them. There is however an argument that it already provides a degree of deterrence by making it more costly for leaders to commit human rights abuses.[111] States that have ratified the Rome Statute tend to commit lower human rights abuses and the costs of doing so are present in the reaction of their domestic population, the international audience and the threat of personal prosecution.[112] The ICC can work as a long term deterrent factor as no state or militia leader wants to be arrested.[113] However this deterrent factor is only relevant if the threat of potential arrest and punishment is believable. If the ICC is able to convince leaders that the pursuit of justice is a better aim than amnesties then it would give the ICC a more prominent and accepted role in this conflict resolution, rather than it being shut out through the political preferences of states.

C Complementarity

1 Introduction to Complementarity

Complementarity, which is enshrined in article 17 of the Rome Statute, is arguably one of the most important provisions in the statute. This works through the idea that the primary responsibility for the prosecution of these crimes lies with the states, and the ICC will only step in if the state in question is "unwilling or unable genuinely to carry out the investigation or prosecution."[114] This means that the ICC is always meant to be a court of last resort and finds itself in the ironic position of needing to have cases to justify its existence yet is arguably at its most successful when it has no cases to deal with. The ICC cannot prosecute everybody however and this leaves it open to criticism where people could see the ICC as only providing symbolic justice as it can only prosecute a select few. This could be resolved with complementarity is it enables the states to take on the majority of the cases. This means that it needs to be assisted by national courts and people must

[111] Benjamin J. Appel "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?" (2018) 62 J. Confl. Resolut. 3 at 9.
[112] At 8.
[113] Gegout, above n 45, at 802.
[114] Rome Statute, art 17.

have confidence in their own local institutions for this to work effectively. The ICC can contribute two roles due to its complementary nature, motivating states to develop their national judicial mechanisms and to bring those to justice where the state is unable to do this in its position as a court of last resort.

It is clear that many of the member states, particularly those with developed legal institutions, view complementarity as the most satisfactory way of operating. Norway believes the primary responsibility for the prosecution of the most serious crimes lies with States and Ireland states it is an institution to encourage states to carry out these investigations and prosecutions rather than trying to usurp them.[115] If this is how states view the ICC then it makes it an even more beneficial path to pursue.

2 Developing Complementarity

The strength of the ICC is not really their quantitative record but rather their ability to set a moral or legal example and contribute towards the establishment of international norms and conventions of behaviour.[116] Because the ICC faces the severe limitations that it does, in the face of these vast and complex international crises it will never be truly able to be as effective as it would like and will remain more of a moral authority rather than a court to try every internationally liable criminal.[117] The court realistically will never be able to conduct more than a few symbolic trials, but the majority of the work in bringing the many people who are responsible for these crimes to justice lies with the states.[118] It makes sense, therefore, that the ICC should play a large role in developing and assisting with this project, and turn the states from working against the ICC to working with it. This way the ICC can build on the platform it has been given as the guardian of international criminal law. While complementarity already exists as a principle of ICC operation, there remains room for the ICC to further develop and build off of the foundation that this principle provides.

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[115] Jan K Kleffner *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, Oxford, 2008 at 309.

[116] Carsten Stahn "Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?" (2012) 25 LJIL 251 at 264.

[117] Kaul, above n 76 at 577.

[118] At 577.

Complementarity needs to go hand in hand with the active development of legal institutions deemed to be currently at an inadequate standard. We can see the tension with Africa is an indirect effect of complementarity and a potential weakness with it.[119] This is because most of the Western countries have judicial systems that are seen as able to conduct their own trials, something the conflict strewn states where the referrals are taking place lack. Therefore, exchanging knowledge with domestic legal bodies is also an important aspect in the development of complementarity.[120] The court needs accompany this with taking up the role as an authoritative source of judgements and legal knowledge.[121] Working the ICC crimes and cooperation provisions into domestic law through a model developed by the ICC would ease the burden on the ICC and make it easier for national courts to work closely and effectively with the ICC.[122] Complementarity will be a strength to the ICC and a mark in its favour if it leads to the national courts being better able to adjudicate national crimes.[123] It is the national courts themselves are arguably best placed to resolve the issues that arise from conflict situations, and they can take care of the majority of the lower level criminals that are required and the ICC are unable to hold to account. This is because national courts (assuming they are developed enough) are not as susceptible to the same political minefields and restrictions the ICC faces. These national courts are however open to certain weaknesses, such as concerns of corruption or inadequacy, which means the ICC still has a role to play in ensuring these national prosecutions are held to a certain standard and assisting where the courts themselves are unable to do so. Complementarity is also an attractive option for states as it affirms state sovereignty and in this way it encourages compliance.[124] Increased compliance would reduce the burden on the ICC and enable it to focus on where it needs to be, as well as giving it more legitimacy as a genuine deterrence mechanism.

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[119] Linda E. Carter "The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?" (2013) 12 Wash. U. Global Stud. L. Rev. 451 at 458.

[120] Chung, above n 105, at 17.

[121] Schmitt, above n 99, at ix.

[122] Chung, at 16.

[123] Carter, above n 119, at 459.

[124] Kleffner above n 115 at 313.

Care needs to be taken however as complementarity has the potential to be used against the ICC, as states can effectively prevent ICC interference if they conduct prosecutions of their own, challenging the ICC's authority. This could starve the ICC of cases and if these courts are not up to standard or have issues with corruption then it would be a blow to the ICC. It could lead to damaging and lengthy battles about admissibility that would call into question as to what exactly the parameters of the term "unable" mentioned in article 17 of the Rome Statute are. However, it seems clear that the benefits outweigh the potential risks and a more active and broader pursuit of the complementarity principle would be beneficial to the ICC.

3 Observer role

In line with this focus towards complementarity another potential area for the ICC to develop is potentially taking on the role of observers and through this assist national jurisdictions in their local prosecutions, whether verifying their court process or directly facilitating the national prosecutions. This observer and quality assurance role could allow the ICC to project its influence beyond the few symbolic cases that eventually reach it. By taking an active role and working with national bodies in the troubled areas the ICC could be integral in contributing to the construction of a more sophisticated international legal world structure. This would be a less direct form of intervention as well, so would likely be more palatable to the states in question, whilst enabling them to assure the world that the ICC is holding those that require it to account. A shift in the ICC's role towards encouraging and developing national judicial systems could help to shift the indicators of success beyond mere prosecutions, which as we know do not paint the ICC in a particularly good light. [125]

If the ICC is able to build on how it uses complementarity then this could help it maintain its position as advocates for the provision of international justice as well as playing a significant role in aiding the development of local legal institutions. This would allow the ICC to share the burden of prosecutions without allowing people to get away with the

[125] Carter, above n 119, at 455.

commission of the core ICC crimes, and build more cooperative relationships with the states in question.

D Conceptions of Justice

1 Importance of alignment

It is crucial that the ICC is seen to provide universally accepted justice in order for it to be effective in its enforcement. This is because states and the people belonging to them will be unlikely to want to cooperate with or support the ICC if they do not believe that the ICC is capable of providing the flavour of justice that is acceptable to them. The ICC has trouble in this area as it operates as a Western court but claims to be a world court and the ICC has been criticised for imposing one size fits all solutions in order to provide international justice.[126] An example of this is the different conceptual view that Asian societies have in regard to the individual's place in society. In Western states, the individual is the most important unit of society, whereas in many Asian societies it is society that is at the top of the hierarchy.[127] The ICC will need to take into account the cultural views of each particular country otherwise it risks harming its legitimacy and authority, making people less likely to support it as the appropriate vehicle for providing international criminal justice. For the ICC to be viewed as a truly international and universal provider of justice the ICC will need to have conceptions of justice that are either flexible and able to appeal to a broad range of differing cultures and ideas. This can also be achieved if it is successful in developing national jurisdictions that can be seen to be giving internationally recognised justice but with their own unique national flavour. Additionally, if the ICC is to make any progress in peace and justice then it needs to look at the needs of the victims.[128] These victims may be more inclined to have rehabilitative or restorative justice rather than the punishment that the ICC is providing.[129] The ICC already has a platform for involving the victims in the trial process, with the Rome Statute already providing for the views and concerns of the

[126] Rosemary Nagy "Transitional Justice as Global Project: critical reflections" (2008) 29 Third World Q 275 at 275.

[127] Yash Ghai "Human Rights and Governance: the Asia Debate" (2000) 1 APJHRL 9 at 15.

[128] Gegout, above n 45, at 812.

[129] At 811.

victims to be presented to the court.[130] This should be built upon in order to better understand and facilitate the needs of victims in the way the ICC provides justice, which will in turn bring them on the side of the ICC.

2 Anti-ICC Sentiment

Having a broader and bespoke attitude towards the provision of justice could potentially help address the anti-ICC sentiments that have emerged, especially those from the African Union who have become a loud voice of opposition against the ICC. These claims include accusations of neo-colonialism as well as the claims that the ICC are being used by Western states to suppress African states and impose their own system of justice on them.[131] However, claims that the ICC is biased towards Africa are revealed to be no more than opportunistic rhetoric when one considers the facts. The majority of the situations that are being investigated in Africa are the result of voluntary referrals.[132] The head prosecutor is African and a majority of African states, 33 out of 54 are members of the ICC and there is support for it amongst the general populace.[133] We can also see now that the ICC has its sights set much further than Africa, as it has opened preliminary investigations in the Philippines, Myanmar and Venezuela.[134] It faces considerable resistance in realising this aim though as many of these governments are not cooperative, as was shown by the Philippines withdrawal. It cannot hurt to further rebut these claims though and the ICC would surely benefit from the increased support that transitional justice methods would likely bring amongst the African populations, meaning the ICC would be able to more effectively counter the vocal criticism that the AU levels their way.

3 Transitional Justice

Since the places that the ICC are involved in are those where catastrophic human rights abuses take place, it is only natural that transitional justice could be of significant assistance

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[130] Rome Statute, art 68(3).

[131] Van der Wilt, above n 63, at 1045.

[132] Keppler, above n 77, at 6.

[133] At 7.

[134] ICC home page <https://www.icc-cpi.int/>

to the ICC when it is considering how it can provide justice. Transitional Justice The question of what transitional justice is a complex one, as it is constantly evolving.[135] A helpful definition is provided by the International Centre for Transitional Justice, which is:[136]

> Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice, but justice adapted to societies transforming themselves after a period of pervasive human rights abuse.

The UN is supportive of a similar broad definition, which is essentially the use of judicial and non-judicial mechanism to provide accountability, justice and reconciliation.[137] Transitional justice is an important consideration for the ICC as it takes into as it takes into account the complicated range of circumstances and needs that arise in the conflicts the ICC is required to investigate. It gives the ICC an increased range of methods when tacking the problems that arise and allow it to attain the justice that it desires, whilst ensuring that this does not come at a cost to the civilian population.

Transitional justice has the potential to suffer from the same problems that the ICC has been accused of, namely the imposition of a paternalistic western conception of justice, which fails to take into account the unique cultural circumstances and fails to address the root causes of the conflict itself.[138] Though conceptually attractive, it is potentially unrealistic considering how stretched the ICC's resources are for it to get involved in the transitional justice process too directly (unless it could secure additional funding for the pursuit of these measures). This is where complementarity comes in, and the importance of working with the state in question to help shoulder the burden, with the ICC assisting

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[135] Giada Girelli *Understanding Transitional Justice: A Struggle for Peace, Reconciliation, and Rebuilding* (Palgrave Macmillan, London, 2017) at 2

[136] What is Transitional Justice?" (1 January 2009) International Center for Transitional Justice <www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> at 1.

[137] *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies* S/2004/616 (23 August 2004) at [8].

[138] Girelli, above n 135, at 232.

the creation of transitional justice mechanisms and proving them with knowledge and expertise as to how to go about it.

If the ICC can be seen to be providing and assistance justice to those affected, as well as bridging the gap where these do not align with international standards, then it will acquire an increased relevance and legitimacy and states would be more likely to cooperate with the ICC and sign up to the Rome Statute. This would lead to increased engagement and compliance from the member states. The pursuit of transitional justice that takes into account the specific cultural circumstances of the situation is a fine balancing act. Implementing this inevitably requires a compromise between domestic and international standards if the ICC is to retain its international validity and ICC must make sure that the standards being set are done so at an acceptable level for the international community. This is because the ICC is and will remain primarily an international body, answerable to no one state alone. Because of this it should save the more contentious changes that might come to light to the national courts.

Conclusion

Even though it is perhaps harsh to judge the ICC when it is in relative infancy, it is clear that it suffers from crippling structural problems that severely limit its ability to bring perpetrators to justice. These range from the fraught relationship the UNSC that the ICC has, to the tension between the ICC's pursuit of justice and the inherent supremacy of state sovereignty. The political dimension that the ICC exists in makes it difficult for the ICC to maintain its identity as an independent legal identity. Although there are several promising solutions that would potentially be of great assistance for the ICC in pursuing its goal of ending impunity for the commission of serious international crimes, most of these are unlikely to be able to be implemented due to the requirement for states to accede to them. This is because the problems with the ICC are deeply rooted in the way the international world order works, and it is something that is particularly difficult to address. This is particularly true if the ICC attempts to continue acting in the same manner, that of a conventional criminal court of law. The best way forward for the ICC has is to attempt to

change its focus and adapt to the situation it finds itself in, as once it becomes a more established institution it will most likely find it easier to enforce its will. If it is the state's attitudes towards the ICC that are the problem, then the ICC should endeavour to secure their support and make the goals that the ICC pursue ones that the states want as well. Potential solutions that would enhance the ICC's credibility and influence include reducing its reliance on states, increasing its jurisdictional coverage and developing complementarity further. However, implementing this is much easier said than done and ultimately it seems that unless the current world order changes from its current Westphalian structure built around state sovereignty there is little hope of finding a solution to the most enduring problems afflicting the ICC.

Appendix

Rome Statute of the International Criminal Court

Preamble (relevant sections)

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Article 5

Crimes within the jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15

Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. 6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 68(3)

Protection of the victims and witnesses and their participation in the proceedings

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Article 86

General obligation to cooperate

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.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

1. 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 the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Bibliography

A Cases

1 ICTY

Prosecutor v. Erdemovic (Sentencing Appeal) Appeals Chamber IT-96-22-A 7 October 1997.

Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Judgement) ITCY Appeals Chamber IT-94-1-AR72 2 October 1995.

Prosecutor v Tihomir Blaškić, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum ICTY Trial Chamber II IT-95-14 18 July 1997.

2 ICC

Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Judgement) Pre-Trial Chamber II ICC-02/17-33 12 April 2019.

Decision on the "Prosecutor's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute (Judgement) ICC Pre-Trial Chamber I, ICC-RoC46(3)-01/18 September 6 2018.

Judgment in the Jordan Referral re Al-Bashir Appeal (Judgement) ICC Appeals Chamber ICC-02/05-01/09-397-Corr 6 May 2019.

B Treaties

Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998 entered into force 1 July 2002).

C Books and Chapters in Books

David Bosco *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, New York, 2014).

Kingsley Chiedu Moghalu "Reconciling fractured societies: an African perspective on the role of judicial prosecutions" in Ramesh Thakur and Peter Malcontent (ed) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University, Tokyo, 2004) 197.

Giada Girelli *Understanding Transitional Justice: A Struggle for Peace, Reconciliation,*

and Rebuilding (Palgrave Macmillan, London, 2017).

Joanna Harrington, Michael Milde, Richard Vernon "Introduction" in B*ringing power to justice? The prospects of the International Criminal Court (*(McGill-Queen's University Press, Montreal, 2006).

Martti Koskenniemi, *From Apology to Utopia: The Structure of Legal Argument* (Cambridge University Press, Cambridge, 2005).

Lara Nettelfield *Courting Democracy in Bosnia and Herzegovina* (Cambridge University Press, New York, 2010).

Andrew Novak *International Criminal Court: An introduction* (Springer, New York, 2015).

Yaël Ronen 'The ICC and nationals of non-party states', in Gerhard Werle and Andreas Zimmermann (eds) *The ICC in Turbulent Times* (T.M.C Asser, The Hague, 2019) 83.

William A. Schabas *An Introduction to the International Criminal Court* (Cambridge University Press, Cambridge, 2001).

Eric Stover, Victor Peskin, and Alexa Koenig *Hiding in Plain Sight: The Pursuit of War Criminals from Nuremberg to the War on Terror* (University of California Press, 2016).

Hannah Woolaver "Withdrawal from the International Criminal Court: International and Domestic Implications" in in Gerhard Werle and Andreas Zimmermann (eds) The ICC in Turbulent Times (T.M.C Asser, The Hague, 2019) 23.

D Journal Articles

Benjamin J. Appel "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?" (2018) 62 J Confl Resolut 3.

Payam Arkhavan "The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC statute" (2019) 17 JICJ 325.

Linda E. Carter "The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?" (2013) 12 Wash U Global Stud L Rev 451.

Roman David and Ian Holliday "International sanctions or international justice? Shaping political development in Myanmar" (2012) 66 AJIA 121.

Zlata Đurdevic "Legal and Political Limitations of the ICC Enforcement System: Blurring the Distinctive Features of the Criminal Court" in Bruce Ackerman, Kai Ambos and Hrvoje Sikirić (ed) *Visions of Justice* (Duncker & Humbolt, Berlin, 2016) 163.

Jason Emmanuel “The International Criminal Court and Sovereignty: What Does Kenyatta Mean for the Future of the ICC” (2014) 24 Transnat L & Contemp Probs 133.

Catherine Gegout “The International Criminal Court: limits, potential and conditions for the promotion of justice and peace” (2013) 34 Third World Q 800.

Douglas Guilfoyle “The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar” (2019) 73 AJIA 2.

Hans-Peter Kaul “The International Criminal Court – Current Challenges and Perspectives” (2007) 6 Wash. U. Global Stud. L. Rev. 575.

Elise Keppler “Managing Setbacks for the International Criminal Court in Africa” (2012) 56 JAfrL 1.

Jess Kyle “The ‘New Legal Reality’?: Peace, Punishment, and Security Council Referrals to the ICC” (2015) 25 Transnat L & Contemp Probs 109.

Charles Majinge “The International Criminal Court and the question of alternative justice system in Africa: a case of be careful of what you wish for?” (2009) 42 VRU 151.

Jamie Mayerfeld “The Democratic Legacy of the International Criminal Court” (2004) 28 FFWA 147.

Hill Moodrick-Even Khen, “Revisiting Univeral Jurisdiction: The Application of the Complementary Principle by National Courts and Implications for Ex-Post Justice in the Syrian Civil War” (2015) 30 Emory Int L Rev 261.

Clare Frances Moran “The Problem of the Authority of the International Criminal Court” 18 ICLR 883.

Rosemary Nagy “Transitional Justice as Global Project: critical reflections” (2008) 29 Third World Q 275.

Michael J Gilligan “Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime” (2006) 60 IntlOrg 935.

Stephen J Rapp “Overcoming the Challenges to Achieving Justice for Syria” (2015) 30 Emory Int L Rev 155.

Steven C Roach “Should the International Criminal Court Impose Justice” (2012) 7 Yale J Int Aff 64.

Darryl Robinson “Inescapable Dyads: Why the International Criminal Court Cannot Win” 28 LJIL 323.

Yuval Shany "Assessing the Effectiveness of International Courts: A Goal-Based Approach" (2012) 106 AJIL 225.

Carsten Stahn "Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?" (2012) 25 LJIL 251.

Michael J Struett "Why the International Criminal Court Must Pretend to Ignore Politics" (2012) 26 Ethics Int Aff 83.

Yudan Tan "The ICC's South Africa Non-Compliance Decision: Effect of Security Council Resolution 1593 on Referring the Darfur Situation" (2018) 10 ALF 72.

Alana Tiemessen "The International Criminal Court and the politics of prosecutions" (2014) 18 IJHR 444.

Susanne D Mueller "Kenya and the International Criminal Court (ICC): politics, the election and the law" (2014) 8 J East Afr Stud 25.

Michael Vagias "Case No. ICC-RoC46(3)-01/18" (2019) 113 AJIL 368.

Leslie Vinjamuri "The International Criminal Court and the Paradox of Authority" (2016) 79 Law & Contemp Probs 275.

Christian Wenaweser and James Cockayne "Justice for Syria?: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice" (2017) 15 JICJ 211.

Paul J Zwier "Social Media and Conflict Mapping in Syria: Implications for Peacemaking, International Criminal Prosecutions and for TRC Processes" (2015) 30 Emory Int L Rev 169.

E Reports

UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar,* UN Doc A/HRC/39/64 (12 September 2018).

Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/21/50 (16 August 2012).

Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies S/2004/616 (23 August 2004).

Special Rapporteur on the Human Rights Situation in Myanmar, UN Doc. A/HRC/37/70 (9 March 2018).

United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Rep. on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus, UN Doc A/67/997-S/2013/553 (21 August 2013).

F Speeches

Donald Trump, President of the United States, "Remarks by President Trump to the 73rd Session of the United Nations General Assembly" (United Nations Headquarters, New York, September 25 2018).

G Internet Resources

"ICC prosecutor: examination of Philippines continues despite withdrawal" (March 19 2019) Reuters Africa <https://af.reuters.com/article/worldNews/idAFKCN1QZ28M>.

ICC Home Page <https://www.icc-cpi.int/>.

ICC "Understanding the International Criminal Court" <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> at 9

"John Bolton threatens ICC with US sanctions" BBC News (11 September 2018) < https://www.bbc.com/news/world-us-canada-45474864>.

"Russia Opposes Syria Crisis War Crimes Court Referral" Reuters (15 January 2013) <http://www.reuters.com/article/2013/01/15/syria-crisis-russia-idUSL6NOAKCNB20130115>.

"US revokes visa of International Criminal Court prosecutor" BBC News (5 April 2019) <https://www.bbc.com/news/world-us-canada-47822839>

What is Transitional Justice?" (1 January 2009) International Center for Transitional Justice <www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.