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The International Criminal Court on Trial

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[Abstract]

This article assesses the structure and operation of the ICC by setting out a case for the defence of the Court, a case for its prosecution and a verdict. Defenders of the Court suggest it has had a positive impact because: it has accelerated moves away from politics and towards ethics in international relations; it goes a long way towards ending impunity; it is a significant improvement on the previous system of *ad hoc* tribunals; it has positive spill-over effects onto domestic criminal systems; and because the courage of the Prosecutor and Trial Judges has helped to establish the Court as a force to be reckoned with. Opponents of the Court see it as mired in power politics, too reliant on the UNSC and on state power to be truly independent; failing to bring peace and perhaps even encouraging conflict; and starting to resemble a neo-colonial project rather than an impartial organ of justice. The verdict on the Court is mixed. It has gone some way to ending impunity and it is certainly an improvement on the *ad hoc* tribunals. However it is inevitably a political body rather than a purely legal institution, its use as a deterrent is as yet unproven and the expectation that it can bring peace as well as justice is unrealistic.

[Article]

‘In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.’(Annan 1999)

Introduction

As I write, three Congolese nationals, Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui, are being tried at the International Criminal Court (ICC), based in the Netherlands.¹ They are charged with war crimes involving the enlisting and conscripting of children under the age of 15 into the Forces Patriotiques pour la Libération du Congo and using them to participate actively in armed hostilities in the Ituri region of the Democratic Republic of Congo (DRC). Katanga and Ngudjolo are additionally charged with crimes against humanity including sexual slavery, rape and murder. An arrest warrant for Lubanga, whose case was the first to be heard by the Court, was issued by the ICC in February 2006, and the DRC surrendered him to ICC

¹ I am grateful to Stephanie Carvin, David Karp, George Lawson, Gerry Simpson and, in particular, two anonymous reviewers for their constructive comments on this article.

custody in the same month. France transported him to The Hague, where judges from Bolivia, Costa Rica and the UK are hearing the case against him; a case that has been assembled by the Argentinean Prosecutor. Arrest warrants for Katanga and Ngudjolo were issued in July 2007, and they were transferred to ICC custody in the Netherlands in late 2007 (Katanga) and early 2008 (Ngudjolo). Their trial is being heard by judges from France, Belgium and Mali. If convicted, these men will be guilty of breaches of a statute that was drafted at a conference of delegates from 160 states, 33 inter-governmental organisations (IGOs) and a coalition of 236 non-governmental organisations (NGOs) in Rome in 1998, and that has now been ratified by 113 states (including every country in South America, every member of the European Union and 31 African states) and signed by a further 26. For all that the Court may or may not be able to deliver in terms of universal justice and world peace, its very existence is remarkable. It seems to significantly challenge those theories of international relations that see states as self-interested units operating in an international anarchy governed only by norms of state sovereignty and non-intervention, and where order, regrettably perhaps, but inevitably, takes priority over justice.

Yet is this image of the ICC – as a multilateral institution bent only on providing justice for the ‘innocents of distant wars’ – a convenient fiction? Is it more accurate to understand this institution in a realist frame – as a body that works to discipline weak states and to protect the powerful? An institution that the West can use to prosecute the rest? Critics of the institution see the ICC as deeply political, and all the worse for it. In order to impose some order on the arguments in favour of and opposed to the Court, and to draw conclusions about its role in the contemporary international system, this article follows the structure (but not the order) of a legal case – with arguments presented for the defence of the court, then arguments against it, followed by a verdict. When examining arguments in favour of and critical of the ICC, I differentiate between those arguments which are focussed on the project of the ICC as such (that is, which are concerned with the structure or structural position of the Court, or the content of the Rome Statute) and those which are focussed on the operation of the Court (the way the Rome Statute is being implemented). In principle, structural elements of the ICC would be hard to change but operational elements relatively more straightforward to refine, so arguments which find fault with the structure should weigh more heavily than those finding fault with process. However, as Justice Robert Jackson observed of Nuremberg ‘courts try cases, but cases also try courts’ – process can, to some extent at least, influence structure (Jackson 1945). The Court has not yet completed a case, and only two cases (Katanga and Ngudjolo are being tried in the same case) have reached the trial phase, thus an interim verdict is all I attempt below.

The official website of the Rome Statute of the ICC lists the following as reasons for the establishment of an international criminal court: to achieve justice for all; to end impunity; to help end conflicts; to remedy the deficiencies of ad hoc tribunals; to take over when national criminal justice institutions are unwilling or unable to act; and to deter future war criminals.² It is simply too early to establish beyond reasonable doubt whether the Court has achieved these goals, though I return to them explicitly in the final section and mention them where relevant throughout. For the most part,

² ‘Overview’ page on website of the Rome Statute of the International Criminal Court at <http://untreaty.un.org/cod/icc/general/overview.htm>

however, a rather more prosaic standard is used to judge the Court against: does the ICC, on balance, have a positive, negative or negligible impact on the international system, its constituent states and their inhabitants?

The Case for the Defence

The case for the defence of the Court suggests that the ICC has a positive impact. The case is based on five claims: three structural and two operational. First, it is claimed that the Rome Statute which established the Court is a key document in the constitutionalization of international relations (IR) and the process of the establishment of the Court has accelerated the move away from power politics in IR towards the realisation of common ethical goals. Second, given that there is a growing consensus in the international community that atrocities should be punished, the Court has significant advantages over *ad hoc* tribunals in doing so. Third, the Rome Statute definitively establishes the individual responsibility of perpetrators for crimes, whether or not they are members of a government, whether or not they directly committed crimes, and whether or not they were following orders. The Statute, it is claimed, ends impunity. The operational claims are first, that the Court and the process of its establishment has had positive spill-over effects in supporting domestic and hybrid criminal investigations and prosecutions, and second, those who work at the Court have shown significant courage in challenging not just those actors who flout international law, but also in challenging each other to ensure that the Court lives up to the highest standards in its legal practice.

The states, IGOs and NGOs that met in Rome in 1998 managed, against the odds, to draw up a statute that distils a clear international criminal code from the disparate decisions of past international criminal tribunals at Nuremberg, Tokyo, and for the Former Yugoslavia and Rwanda, as well as the Hague Conventions, Geneva Conventions and the Additional Protocols. The majority of the decisions made at the conference on the drafting of the statute were made by consensus. Although the US forced a vote on the statute at the final session of the conference, thus preventing the hoped for consensual adoption of the draft, 120 states voted in favour, with 21 abstaining and only 7 voting against. After the Rome Conference, states quickly began to ratify the statute, and it entered into force just four years later, on 1st July 2002, once 60 ratifications had been deposited. In 2003 the first 18 judges were inaugurated, and Luis Moreno Ocampo was appointed as Prosecutor of the Court. ‘Situations’ (in the vocabulary of the Rome Statute) in Uganda and the DRC were referred to the Court in 2004, and situations in the Central African Republic and in the Darfur region of Sudan were referred in 2005. The Office of the Prosecutor (OTP) has opened investigations in all four of these situations, and cases against specific defendants have begun to be compiled. On July 8th, 2005, the court issued its first arrest warrants, for Joseph Kony, Vincent Otti and three other officers of the Lord’s Resistance Army (LRA) in Uganda (the warrants were under seal until October 13, 2005). On 26th January 2009 the trial commenced of the Court’s first case: The Prosecutor v. Thomas Lubanga Dyilo. On 31st March 2010, the Pre-Trial Chamber granted the OTP authorisation for the first time to open an investigation *proprio motu* (that is, on his own initiative rather than waiting for the situation to be referred by a State Party or the United Nations Security Council (UNSC)) into the situation of crimes against humanity allegedly committed in Kenya 2005-2009. Alongside these

investigations, the OTP is currently conducting preliminary analyses of situations in a number of countries including Afghanistan, Georgia, Guinea, Côte d'Ivoire, Colombia and Palestine.

This relatively swift process for the establishment and full operation of such an innovative and potentially threatening (to state sovereignty) international institution is all the more impressive when one considers the length of time it took for states to write a statute to establish an international criminal court.³ As far back as 1872, Gustav Moynier, one of the founders of the International Committee of the Red Cross, called for the creation of a permanent international criminal court. Yet through a century in which more than 200 million people died in wars and conflict, many murdered by their own governments, little substantive progress was made towards establishing a permanent institution to hold to account those responsible for crimes against humanity (Leitenberg 2006, 1). Provision was made in Article 227 of the 1919 Treaty of Versailles for a special international tribunal to try ex-German Emperor Kaiser Wilhelm II for 'a supreme offence against international morality and the sanctity of treaties', thus establishing the principle of individual criminal responsibility under international law. The same Article noted that the Allies would send 'a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial'. Ironically, the Netherlands, now seat of the ICC, refused to extradite the Kaiser so no trial was held.

During the Second World War (WW2), calls were again made for an international criminal court, but the Allies instead established *ad hoc* International Military Tribunals at Nuremberg and Tokyo to prosecute individuals for crimes against peace (known, at the time, as the crime of crimes), crimes against humanity and war crimes. These tribunals represented a move forward in international criminal law to the extent that they targeted individuals rather than states or peoples as the agents responsible for international crimes, and they rejected the principle of sovereign immunity (i.e. the principle that sovereigns are immune from prosecution for acts committed during their time in power). But the tribunals were widely criticised for breaching the principle of *nullum crimen sine lege* (no crime without law) by prosecuting defendants for acts which were not defined under international treaty law as crimes at the time of their commission and for doling out 'victor's justice'. Every judge at the Tribunals was a national of one of the victorious allies and alleged allied crimes were not investigated. In contrast to (contested – on which more later) claims made about the ICC, the Tribunals were as much about international politics as they were about international law, as Gerry Simpson explains:

³ Of course, 10 years may not seem swift to some readers. The claim here is not that the establishment of the court was fast in an absolute sense but that, once a Statute had been agreed, the Court was up and running surprising quickly given the protracted process leading up to the Rome Conference and given the radical nature of an ICC. The Human Rights Watch report 'Courting History' echoes this view that the 60 ratifications needed before the Rome Statute entered into force were gained much faster than anticipated, and that the Court has made significant progress since then. See Courting History, p.4 at: <http://www.hrw.org/en/node/62135/section/4>. Schabas claims that most people involved in the Rome Conference thought it would take a decade or more before 60 states had ratified the Statute: <http://iccobservers.org/2009/03/26/icc-observers-exclusive-interview-william-schabas-professor-of-human-rights-law-and-director-of-the-irish-centre-for-human-rights-at-the-national-university-of-ireland-galway/>

As well as trying alleged war criminals, these trials serve as vindication of Western progress ... they function as moral demarcations between the accused and the accuser, they avert attention from war crimes closer to home and, finally, they contain the message that the untried crimes are not of this magnitude or order. (Simpson 1997, 9)

Post WW2, widespread horror at the extent of losses during the war, and shame at the Holocaust having taken place in the heart of the 'civilised' world, led to an increase in the volume and codification of law concerning state and individual behaviour during conflict. The Geneva Conventions were revised and extended, and in 1948 the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. The General Assembly, in adopting the Convention, also requested that the International Law Commission 'study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide'⁴. The Commission reported that the establishment of an international court to try crimes of genocide or other crimes against humanity was both desirable and possible, and the General Assembly established a Special Committee to prepare proposals relating to the establishment of such a court. The Committee prepared a draft statute in 1951 and a revised draft statute in 1953, but each draft tabled before the General Assembly was rejected due to disagreements over the definitions of crimes to be covered. However, by the end of the 1950s, the Cold War had led to such deep divisions in UN bodies that work on an international criminal court all but ceased.

It took, rather unexpectedly, the drugs trade, and, more predictably, the end of the Cold War and the conflicts that followed in the 1990s to reinvigorate the drive towards a permanent Court. In June 1989, Trinidad and Tobago were struggling to control international drug traffickers operating on their soil and requested the International Law Commission to resume work on establishing a permanent institution. Support for the idea grew in a wide range of states, in part because the end of the Cold War and the supposed triumph of liberalism made an international criminal court seem like a viable proposition, and also because, after losing the ability to justify foreign policies by claiming them to be necessary in the fight against communism, Western democracies began to be publicly concerned with giving their policies an ethical dimension⁵. The International Law Commission prepared a draft statute of an International Criminal Court (1994) and a draft Code of Crimes (1996), but before a court could be established, the UNSC came under such pressure to act over the atrocities accompanying the dissolution of Yugoslavia that it created an *ad hoc* criminal tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY), in 1993⁶. The genocide in Rwanda prompted the establishment of a second tribunal, the International Criminal Tribunal for Rwanda (ICTR), in 1994⁷. The tribunals were subsidiary organs of the UNSC, and were tasked with 'prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council (UNSC) upon the restoration of peace' in the case of Yugoslavia and 'prosecuting persons responsible for genocide and other

⁴ General Assembly Resolution 260 B (III), 9 December 1948

⁵ See Smith & Light eds (2001) for analysis of the rise of 'ethical foreign policy'.

⁶ UNSC Resolutions 808 (1993) and 827 (1993)

⁷ UNSC Resolution 955 (1994)

serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994' in the case of Rwanda⁸. These tribunals, while undoubtedly innovative, are also territorially and temporally tightly bound in their jurisdiction, as well as expensive and slow in carrying out their work. Funds of almost \$1.9bn (to end 2011) have paid for only 89 cases to be concluded at the ICTY since 1993 (with proceedings on-going in 15 cases, including those against Radovan Karadzic, captured after eluding arrest for 12 years, and Ratko Mladic, still at large). Funds of \$1.6bn (to end 2011) have paid for 50 cases to be completed at the ICTR since 1994 (with 24 cases still in progress)⁹. The tribunals had some significant successes, notably in finding Jean Kambanda of Rwanda guilty of genocide – the first time a head of government has been convicted of the crime – and in putting Slobodan Milosevic on trial for 66 counts of war crimes, crimes against humanity and genocide. Milosevic died in custody in 2006 before a judgment was reached, but his trial marked the first time a former head of state had been prosecuted for such grave crimes. While the success of courts is not marked by trials and convictions alone, the tribunals demonstrated that political leaders are no longer safe from prosecution.

The high cost and slow pace of the tribunals, the high level of media interest in them and the brutal nature of the crimes prosecuted by them spurred the international community towards finally establishing an ICC. The Court it established was built largely on consensus, but not, for the most part, on compromise. Its provisions are far-reaching (much more so than the most powerful states in the system can currently accept, as I discuss below) and the existence of the Court challenges the notion of state sovereignty more than any other institution in the contemporary global order. The Court is not an organ of the UNSC, and the Council has limited powers over its operation – most significantly, the Council cannot veto prosecutions by the Court. The Court is not limited to ruling on crimes committed in international conflicts: the Rome Statute includes provision for the prosecution of genocide, crimes against humanity and war crimes committed in international and internal armed conflict, and also for the prosecution of genocide and crimes against humanity committed in times of peace. Cases can be referred to the Court by States Parties to the Statute and by the UNSC, but they can also be instigated by the Prosecutor, who may be petitioned by NGOs or other interested parties to open an investigation. The Court can exercise jurisdiction in cases instigated by the Prosecutor or referred by States Parties if either the state on whose territory the alleged crime was committed, or the state of which the accused is a national, is a Party to the Rome Statute. Additionally, if cases are referred by the UNSC, as is true of the situation in Darfur, the Court can exercise effective universal jurisdiction. Specific state consent to the jurisdiction of the Court (through ratifying the Rome Statute or accepting the *ad hoc* jurisdiction of the Court) is not required in UNSC referrals, as the Council acts under its competence in Chapter VII of the UN Charter in referring cases, and the Charter is binding and legally enforceable on all UN member states. In short, the Court has significant *actual* power

⁸ UNSC Resolution 827 (1993) and UNSC Resolution 955 (1994)

⁹ Figures taken from websites of the ICTY at <http://www.icty.org/sid/325> and the ICTR at <http://69.94.11.53/default.htm>. A direct comparison between the Tribunals and the ICC does the Court no favours – having only managed to get two cases to the trial stage so far, it is costing approximately \$135m per year. Economies of scale should make the comparison considerably more favourable in the future, as the set-up costs of *ad hoc* tribunals will be avoided, but for now the ICC is hardly a bargain.

over leaders and nationals of those states that have ratified its founding Statute, and significant *potential* power over leaders and nationals of those states that have not. If there is a global constitution emerging in international politics, as an increasing number of commentators claim, then the Rome Statute is one of the most important elements of it¹⁰.

As a centralised, permanent institution for investigating and prosecuting war crimes, the Court has (or should have) two main structural advantages over *ad hoc* tribunals: cost and efficiency. Cost savings may not be obvious yet due to setup costs and some delays in process, but the ICC staff have achieved a great deal since 2002, suggesting the structure itself is efficient.¹¹ As well as creating a functioning court from scratch, including writing administrative and operating procedures, they have consolidated the decisions of, and learnings from, prior international criminal tribunals into a single body of knowledge. This knowledge is disseminated through databases designed to enable those preparing cases for trial at the ICC (and other international or hybrid domestic-international criminal tribunals) to access the most up-to-date and authoritative text and readings of the substantial number of international criminal law statutes, conventions and precedents now in existence. The ICC Legal Tools project comprises more than 44,000 documents and legal commentaries and provides legal professionals with a (long overdue) complete library on international criminal law¹². The Court's efficiency is also significantly structurally increased vis-à-vis tribunals because it does not have to wait for the UNSC to establish a tribunal in order to begin an investigation, so it is neither held up by the slow pace of UNSC decision-making, nor is it prevented from investigating situations that the UNSC may not be prepared to set up tribunals for, as long as the crimes involved are committed on the territory of, or by a national of, a State Party.

The final structural argument for the defence of the Court is the role its Statute plays in consolidating the decisions of past tribunals on immunity¹³. The Statute seems to go a long way towards ending impunity, one of the key reasons the Court was established, and a goal which enjoys broad support. Before the establishment of the ICC, political leaders could generally avoid criminal prosecution or even civil suits by claiming sovereign immunity (immunity from foreign, and sometimes domestic, legal proceedings for acts committed in an official capacity unless the proceedings are consensual). Exceptions were the defendants prosecuted at Nuremberg, Tokyo and the

¹⁰ For more discussion of international constitutionalism, see Dunoff & Trachtman (2009); Habermas (2006); Lang (2008); Leiden Journal of International Law (2006), contributions by Peters, de Wet and Petersmann; Reus-Smit (1997); McDonald & Johnston eds (2005); Weller (forthcoming).

¹¹ Schabas notes that there was a slow period for a few years from mid-2003 as the court failed to begin its first trial in 2005 as predicted, but is moving forward faster now. Schabas blames process (in the form of the Prosecutor) rather than structure for any delay. See <http://iccobservers.org/2009/03/26/icc-observers-exclusive-interview-william-schabas-professor-of-human-rights-law-and-director-of-the-irish-centre-for-human-rights-at-the-national-university-of-ireland-galway/>

¹² See the ICC Legal Tools Project website at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Legal+Tools/> for more details. Maintenance and development of the project has been outsourced to academic institutions – itself an innovative move – since 2005.

¹³ Immunity is still asserted in other branches of international law. The ICJ is currently hearing a case Germany vs Italy on Jurisdictional Immunities of the State in which Germany claims that Italian courts have repeatedly disregarded the jurisdictional immunity under customary international law of Germany as a sovereign state by awarding damages to victims of Nazi war crimes during the period of German occupation 1943-45.

ad hoc tribunals, but these represent only a fraction of the political leaders and senior functionaries who bear responsibility for atrocity over the last century. Article 27 of the Rome Statute makes clear that official capacity is now judged to be irrelevant both to criminal responsibility and to mitigation of sentence:

‘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. ... 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.’¹⁴

Not only are leaders who order atrocities no longer immune from prosecution nor are those who follow their orders. Article 33 of the Statute states that the presumption of the Court is in favour of holding the defendant criminally responsible (‘The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless ...’) then allows for the defence of ‘Superior Orders’ to be considered in cases where ‘(a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful’¹⁵. Article 33 states that orders to commit genocide or crimes against humanity are manifestly unlawful in every case, thus making the defence of Superior Orders only possible in cases of war crimes (and, arguably, aggression) and even then the onus of responsibility is on the defendant to know the law. Those who issue illegal orders but do not directly perpetrate crimes are also covered by the Statute. Article 28 establishes that both military and civilian commanders can be criminally responsible for acts committed by any subordinates who were or should have been under their effective command and control. And many other forms of direct and indirect perpetration of crimes are identified by Article 25 (3): a person can be responsible for a crime committed with or through another person, a crime she attempted, ordered, solicited, induced, facilitated, directly and publicly incited (in respect of genocide) or in any other way intentionally contributed to.¹⁶

Arguments in favour of the Court can also be made in terms of its operational features. Trials are underway, investigations are well-progressed and the UNSC, States Parties and non-party states alike are referring situations to the Court or requesting preliminary examinations to begin. Work towards the Court and its status as a permanent and well-resourced institution have also had positive benefits to domestic jurisdictions and to other international criminal tribunals. The Bureau of

¹⁴ Article 27, Rome Statute of the International Criminal Court

¹⁵ Article 33, Rome Statute of the International Criminal Court

¹⁶ See Ainley (2011 forthcoming) for discussion of how the Rome Statute, while still maintaining an expansive view of modes of liability for international crimes, is more circumspect in its treatment of Command Responsibility and liability via indirect perpetration than have been the judgments of the *ad hoc* tribunals.

Stocktaking of the Assembly of States Parties noted in March 2010 that:

experience with assistance to national jurisdictions in combating impunity for war crimes, crimes against humanity and genocide shows that such assistance can have significant and substantial spill-over effects on the entire judicial system of the State receiving assistance. Furthermore, international cooperation in combating the most serious international crimes can lead to cooperation with regard to other forms of transnational criminal activity.¹⁷

Perhaps the biggest success claimed by the OTP in this respect is Colombia. When Ocampo was appointed, he regarded the situations in the DRC and in Colombia as the most pressing.¹⁸ However, Colombia has reacted to ICC pressure (and pressure from the US) by establishing the Justice and Peace laws, and has recently claimed impressive results: ‘i) around 50,000 demobilized individuals; ii) over 18,000 weapons given up and destroyed; iii) the main leaders of the self-defense groups and their accomplices behind bars awaiting trials; iv) more than 280,000 people recognized and registered as victims; v) more than 36,000 criminal actions, previously unknown, being investigated.’¹⁹ The Colombian government credits the OPT with promoting national proceedings by:

‘Facilitating contacts with independent experts...; Publicly denouncing the recruitment of child soldiers...; Requesting periodic information about the progress in the justice and peace investigations...; Conducting visits to Colombia to meet with State officials, judges, prosecutors, NGOs, and victims...; Making public the decision to analyze the allegations of international networks supporting armed groups committing crimes in Colombia.’²⁰

The ICC Review Conference, held in Kampala in June 2010, affirmed its commitment to supporting domestic capacity building through a process of ‘positive complementarity’:

‘[the Review Conference] [*e*]ncourages the Court, States Parties and other stakeholders, including international organizations and civil society to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern ... and [*r*]equests the Secretariat of the Assembly of States Parties ... to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions’.²¹

¹⁷ Assembly of States Parties Report from the Bureau of Stocktaking: Complementarity. Available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf

¹⁸ Pursuing International Justice: A Conversation with Luis Moreno-Ocampo. Available at: http://www.cfr.org/publication/21418/pursuing_international_justice.html

¹⁹ Colombia and the Stocktaking Exercise of the ICC, Colombian official publication. Available at: <http://colombiaemb.org/docs/Government%20Results/Brochure%20CPI.pdf>

²⁰ *Ibid.* The International Center for Transitional Justice is much less optimistic about the domestic accountability process in Colombia. See http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/V-M.3.ICTJ_CO_RSRC-Impact.pdf

²¹ RC/Res 1 ‘Complementarity’ http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf

The ICC has also proved of practical benefit in offering a venue for the Special Court for Sierra Leone's trial of Charles Taylor, a trial judged to be impossible to hold in Freetown due to concerns over security and potential political unrest.

Finally, the Prosecutor and judges at the ICC have shown real courage in their initial actions. Ocampo has used his office not only to focus world attention on contemporary human rights violations by speaking at public events, and to begin preliminary examinations of situations in states such as Afghanistan, Georgia, Cote d'Ivoire, and Chad, without the States Parties involved having referred themselves to the Court. He has also, somewhat sensationally, requested an arrest warrant for Sudanese President, Omar al Bashir, on charges of genocide, crimes against humanity and war crimes in Darfur. His request was granted by the Court in March 2009 (for a warrant on the basis of war crimes and crimes against humanity) and in July 2010 (for a warrant on the basis of genocide). Bashir, a sitting Head of State, is now a wanted man. Whether or not charging Bashir with these crimes was prudent will be touched upon below, but it was certainly brave for the first Prosecutor of a new Court to pursue a President.

But it is not just those who breach the law who need to beware the Court – those who practise it are under scrutiny too. The Trial Judges caused an outcry in June 2008 by suspending the first ever ICC trial (of Lubanga) on the basis that a fair trial would not be possible as the Prosecutor had not disclosed potentially exculpatory evidence to the defence team, then by ordering the release of the defendant (an order which was suspended on appeal)²². The Judges suspended the case again in July 2010 after the Prosecutor refused to identify a key witness, and again ordered the release of Lubanga (an order again suspended on appeal). The Trial Chamber lifted the initial stay of proceedings in November 2008, but the second is still in place, demonstrating not only that the Court has in place internal checks and balances, but also that the judges are determined to apply the highest legal standards to the operation of the Court.

The case in defence of the Court therefore rests on robust structural claims about the move the Court seems to signal towards more ethical and law-based international relations, on the improvements it offers to an *ad hoc* system and on the provisions in the Rome Statute to end impunity. The operational claims are somewhat less far-reaching, but they do suggest that the early operation of the Court has brought positive benefits in the field of complementarity in particular. So, a solid case, one might judge, for the defence of the Court. But how does it weigh against the case for the prosecution?

The Case for the Prosecution

²² The reasoning of the Judges is set out in their Decision on the Consequences of Non-disclosure of Exculpatory Materials, available at: <http://www2.icc-cpi.int/iccdocs/doc/doc511249.PDF>, and their Decision on the Release of Thomas Lubanga Dyilo, available at: <http://www.icc-cpi.int/NR/rdonlyres/3A01D0E2-39A2-47A9-82EB-012725EBF91E/277765/ICC010401061418ENG.pdf>

The case against the Court suggests it either has negligible or negative impact in international affairs and on the lives of those it seeks to protect. The case can be constructed using two conceptual oppositions that discussions of the Court, and international criminal justice in general, are often framed around: law versus power politics, and justice versus peace. The Court is supposed to be the missing link in the chain of human rights enforcement, aiming to deter atrocity and bring about both peace and justice. It will do this, its supporters claim, by rising above the dirty business of international politics and by prosecuting any and all individuals guilty of the worst atrocities. In this way, it is supposed, the Court will help to end conflict. Sceptics of this project suggest that there are structural problems with the Court both because it has to find a place for itself alongside powerful political bodies in the international system without becoming one itself, and because of the assumption made in the pro-global justice discourse that peace and justice are necessarily positively linked. Operational criticisms concern the overbearing attitude of the current OTP in its dealings with other actors, and the judgments made by the Prosecutor over which cases to pursue and the manner in which these are pursued.

International law has long been viewed by liberals as a solution to the deficiencies of international politics. Politics, particularly the power politics of sovereign nation-states, are seen as having a tendency to turn violent, evidenced throughout the twentieth century, which leads to the conviction that politics must be controlled by law (Kahn 2003; Rivkin & Casey 2003; Rivkin & Casey 2007). There is a romantic view, prevalent among UN and NGO advocates of the Court, that the ICC is the instantiation of a global moral code – an institution that rises above power politics. But the circumstances of its establishment and the first years of its operation have shown how bound up the court is with political power and political processes. Criticisms of the Court concern the extent to which it is itself a political body and the extent to which it is a tool of powerful states. The accusation that the Court is political suggests that decisions are taken, particularly by the OTP, that reflect not just legal considerations but power- or strategic considerations about which situations or cases certain states would like the Court to pursue or refrain from pursuing. It also concerns the extent to which the Court is undertaking a political task – disciplining some states while insulating others – using the language of law.

The ICC has had to find its place in the international arena alongside political bodies reluctant to lose any of their influence – most significantly the UNSC and the US – and its relationships to these bodies will do much to determine its future success. The Court was not automatically gifted with either authority or legitimacy in the system – the Rome Statute was not adopted by the hoped-for consensus in Rome, but after the majority of states at the Conference voted in favour of it. That majority did not include the US and China (which voted against it), nor India (which abstained). Even though more than half of the 191 member states of the UN are now States Parties to the statute, the big players in global politics are either absent or actively opposed. The three most powerful states with permanent seats on the UNSC, the US, China and Russia, have not ratified the treaty, nor have any non-European nuclear powers, nor any Middle Eastern states bar Jordan (the Palestinian National Authority (PNA) has accepted the *ad hoc* jurisdiction of the Court in respect of acts committed on the territory of Palestine since July 1st 2002, but has not ratified the Rome Statute). The Assembly of States Parties is dominated by European, African and Latin American states – evidence of widespread support for the Court, but hardly indicative of global

consensus which would guarantee both power and legitimacy to the Court. The Court, therefore, and seemingly in opposition to its identity as a legal institution, must build good working relations with political bodies.

The UNSC, one of the most powerful political institutions in the contemporary international system, is charged with the maintenance of international peace and security.²³ As such, it took responsibility, until 2002, for ensuring that (some) individuals who committed crimes under international law were brought to justice, through the mechanism of *ad hoc* tribunals. There was much discussion at Rome about the role the UNSC should play vis-a-vis the ICC. Non-permanent members of the Council did not want the UNSC to be able to interfere with the Court, through fear of the international legal process being politicised. But four of the five permanent members (P5) – all except the UK – thought the Council should retain significant control over the operation of the Court. In the end the majority of states in Rome agreed to give the Council the power to defer Court investigations and prosecutions, but only by positive vote. This means that the Council is not in a position to approve or veto the actions of the Court. Rather, it can defer investigations or prosecutions, but only if none of the P5 vetoes such a resolution, and only if the Council is acting pursuant to Chapter VII of the UN Charter in deferring, that is, the UNSC must determine the existence of a ‘threat to the peace’, a ‘breach of the peace’ or an ‘act of aggression’ before it can defer.

The Court may be able to prosecute without UNSC approval, but it needs the Council to refer cases to it when atrocities have taken place in which the perpetrators are neither nationals of a State Party, nor have committed the acts on the territory of a State Party. Counter to the wishes of the ‘Like-Minded Group’ (the most powerful caucus in Rome, composed of delegates from more than 60 of the participating states and from a well organised coalition of NGOs), who wanted the Court to have inherent jurisdiction over the crimes set out in the Statute, the Conference, in a failed attempt to gain US support, agreed that the Court should only have inherent jurisdiction over the territory and nationals of States Parties. Situations in which the crimes committed took place on the territory of a non-party state and were (allegedly) committed by nationals of a non-party state must be referred to the Court by the UNSC, unless the non-party state has accepted the jurisdiction of the Court. The UNSC’s referral power, while much less than the P5 wanted, still has significant political implications. Because the Court cannot exercise automatic jurisdiction over atrocities, it is effectively prevented from prosecuting crimes allegedly committed by nationals of non-States Parties who are either members of the P5 or protected by the P5 (unless those crimes take place on the territory of a State Party). No binding judgement, for example, is likely to be made on Israeli leaders’ seeming contempt for international law on proportionality and civilian protection in their attack on the population of Gaza in 2008-9 as Israel is not a State Party to the ICC, and the US would veto any resolution suggesting that the Council refers the case to the Court. The Court is currently considering whether the PNA acceptance of the *ad hoc* jurisdiction of the Court gives it authority to prosecute for crimes committed in the Occupied Territories, though it is unlikely to risk the wrath of the US by actually doing so.

²³ Article 24:1 of the UN Charter

Another power retained by the Council is the power to determine when acts of aggression (i.e. the illegal use of force) have taken place (Article 39, UN Charter). Aggression, the ‘crime of crimes’ at Nuremberg and Tokyo, was noted as a crime in the Rome Statute, but it was not until the ICC Review Conference in Kampala in 2010 that a definition of the crime was agreed. The key disagreements revolved around whether or not charges of aggression could be prosecuted at the Court if the UNSC had not made a prior judgment that aggression had taken place. The P5 wanted to retain significant power to make such determinations. But proponents of the Court argued that decisions over the material facts of a case, especially whether a crime being prosecuted has actually taken place, should be made by the Court itself rather than by an explicitly political body. In the end, a complicated compromise was reached that is unlikely to satisfy either side. A definition of the crime was agreed, along with procedures for prosecuting it, but only at the price of giving the P5 significant protection.²⁴ Only nationals of a State Party can be charged with aggression, unless the UNSC refers the situation to the Court (referrals, of course, can be prevented through use of the veto), and States Parties to the Rome Statute can opt out of the Court’s jurisdiction over aggression. If the Prosecutor wishes to investigate alleged aggression in the absence of a prior UNSC resolution establishing that aggression has taken place, he must notify the Council and wait up to six months for such a resolution to be passed before he can proceed. The UNSC can defer investigations and prosecutions of aggression in the same way they can defer for other crimes. Finally, the new aggression provisions must be passed by the Assembly of States Parties by a two-thirds vote no earlier than 1st January 2017, plus 30 States Parties must ratify the amendments, before the Court’s jurisdiction over aggression becomes active. Van Schaack notes that the concessions made to state consent attest to ‘the extreme—if not irrational—antipathy felt by many states toward the Council’ (Van Schaak 2010, 8). The problems of aggression and the roles of the ICC and the Council in deciding whether it has taken place, have been deferred for now, but could have significant political ramifications in the future. A UNSC judgment that aggression has taken place gives both the state that has been attacked, and other states that wish to assist in repelling the aggressor (i.e. to participate in collective self-defence), rights under the UN Charter to use military force. An ICC finding of aggression could be used to infer such rights and to claim legitimacy for the retaliatory use of force. Such a use would be incorrect, as only the UNSC can authorise force, but such rhetoric could nevertheless be influential given the moral authority many claim for the ICC.

The Review Conference may have succeeded in limiting UNSC power in the Court (though only by increasing state power), but there is another problem likely to emerge if and when the OTP can prosecute aggression. Fear of prosecution for aggression will make force more politically difficult to use to resolve disputes. While this may, in general, be a good thing, such an outcome would also have victims, as the US among others would be reluctant to answer calls to intervene in crisis situations such as in Kosovo. The ICTY was in place when the atrocities in Kosovo began and does not seem to have had any deterrent effect. Thus we need to be sure that justice is better served by attempting to prosecute those who commit atrocities rather than trying to

²⁴RC/Res 6 ‘The Crime of Aggression’ http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf

stop them doing so via the use of force.²⁵ The structures of power in international relations and the constraints upon it are undoubtedly being influenced by the Court, but it is not clear that the influence is either substantial, or positive. The UNSC is still in a position to be able to frustrate the operation of the Court if it wishes to do so, but it has much less leeway than the permanent members of the Council desire.

In order to be effective, the Court needs not just the support of the UNSC, but also the support of States Parties and non-party states. Unfortunately, this need for state support threatens the Court's independence. The operation of international criminal justice has long relied on the ideological and material support of states – for instance, the US made the offer of a significant economic aid package to Serbia conditional upon the extradition of Milosevic to the ICTY – and there is no reason to think it will not do so long into the future. The ICTY relied on SFOR (the NATO-led peacekeeping force in Bosnia) to protect its investigators and enforce its decisions, and the ICTR relied on the ruling Rwandan Bizimungu/ Kagame regime. The ICC has no standing military or police force and relies entirely on goodwill and international co-operation. States must arrest suspects, protect the Court's investigators and enforce its decisions. There is, therefore, a structural problem in that the court is incentivised to treat those states upon whom it relies most heavily with undue lenience or favour. Sceptics argue that it is no coincidence that NATO and RPF members have escaped prosecution at the ICTY and ICTR respectively – without funding and logistical support from the NATO states in the case of Yugoslavia the ICTY would have foundered. Without cooperation from the Rwandan government over issues such as access and visas for witnesses, the ICTR would have been rendered incapable. With regards to the ICC, while the Court does not rely on any particular state or group as heavily as the Tribunals did, it still is too reliant on US approval or at least acquiescence to be truly neutral. If the US supports the Court, then Sudanese or Ugandan intransigence or opposition (see below) can be overcome. It should be no surprise, therefore, that the Court has done little so far that is counter to US interests, even while the US (under the first Bush administration) was undermining the Court at every opportunity.

The Bush administration's attitude to much international law is well-known (though often caricatured). Bush didn't quietly oppose or ignore the ICC in the way that India and China tend to. Rather, he 'unsigned' the Rome Statute, cajoled an estimated 102 states (including many State Parties) into signing 'bilateral immunity agreements' which protect US citizens and officials from the Court and forced through UNSC Resolution 1422 which guaranteed that non-party states contributing to peacekeeping missions were immune from the Court. His stance eventually softened and the US abstained in order for the UNSC to refer the situation in Sudan to the Court in 2005, but the US under Bush both feared and resisted the independence of the Court. Despite widespread excitement at the replacement of Bush with Obama and some promising rhetoric, there are few concrete signs that the new administration will look significantly more favourably upon the court than the Bush administration did in its later years. But of much greater concern, the structural position of the US as not just any hegemon but a *liberal* hegemon that can take much of the credit for the spread of

²⁵ See Rudolph (2001) for a discussion of whether prosecuting international crimes is a way that states can be seen to be 'doing something' in the face of human rights abuse, without having to pay the domestic costs of preventing abuse or atrocity using military force. See Simpson (2008) on the difficulties and inadvisability of making war a crime.

international justice since 1945 means the Court is not taking the kind of action against the behaviour of the US and its allies in the War on Terror that critics believe it should.

The Obama administration's rhetoric has been relatively positive towards the Court, but only when the Court is seen to act in US interests, fundamentally defined in terms of national security. Obama has stated that

‘[t]he court has pursued charges only in cases of the most serious and systematic crimes and it is in America's interests that these most heinous of criminals, like the perpetrators of the genocide in Darfur, are held accountable. These actions are a credit to the cause of justice and deserve full American support and cooperation.’²⁶

This view has led to a commitment that the US should cooperate with the Court, but only ‘in a way that reflects American sovereignty and promotes our national security interests.’²⁷ In response to written questions by the Senate Foreign Relations Committee in January 2009, US Secretary of State Hillary Rodham Clinton stated that “we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote US interests by bringing war criminals to justice”. In March 2010, in the most detailed statement yet on the Obama administration's position, Harold Koh, Legal Adviser of the U.S. Department of State, announced a policy of ‘principled engagement with the Court’ and offered US cooperation with the Court in those prosecutions that are already underway (Koh 2010). At a Press Conference after the ICC Review Conference in 2010, at which the US had ‘observer’ status, Stephen Rapp, US Ambassador-At-Large for War Crimes Issues, confirmed that the US was offering assistance such as ‘information sharing...., witness protection and diplomatic support, and support and efforts to arrest suspects’ to the ICC, but only where the ICC ‘is pursuing the same kind of cases that we prosecuted through ... international institutions in Rwanda and Sierra Leone’ (Rapp 2010).

This may sound positive, but Obama's position is not necessarily an improvement on his predecessor's. Bush eventually realised that the Court could work in US interests, and therefore allowed the situation in Darfur to be referred to it, subsequently declaring that the US would veto any UNSC resolution requiring the ICC to defer the case once the arrest warrant for Bashir had been issued. The Obama administration is also prepared to assist the ICC in prosecuting others, but is still a long way from allowing the Court jurisdiction over US territory or nationals. The President may have changed, but the US has not, and a seismic shift leading to US ratification of the Rome Statute is unlikely given the US belief in the ultimate authority of its own Constitution and traditional US reluctance to be bound by international law.²⁸ The hopes of many Democrats that Obama would seek domestic or international prosecution for those who allegedly committed war crimes under the last administration have been dashed and the new administration has expanded the policy of using unmanned aerial vehicles (drones) to carry out what look like extra-judicial

²⁶ Quoted from report available at http://www.globalsolutions.org/in_the_news/analysis_obama_vs_mccain_icc

²⁷ *Ibid*

²⁸ See Kahn (2003) and Ralph (2007) for further discussion of the US position on the Court.

executions in the War on Terror.²⁹ The ICC is in the invidious position of coveting support from a state that largely rejects the authority of international humanitarian and criminal law with respect to its own actions. The reluctance of the Court to open investigations in cases involving US allies such as Colombia and Israel, and even more so the US itself, leads to the Court effectively ‘avert[ing] attention from war crimes [of the powerful]’, to return to the quote used earlier about Nuremberg (Simpson 1997, 9). Mamdani has argued that the Court has already lost any veneer of impartiality:

‘[t]he fact of mutual accommodation between the world’s only superpower and an international institution struggling to find its feet on the ground is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic, and Congo. All are places where the United States has no major objection to the course chartered by ICC investigations. Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are U.S. adversaries and ignored actions the United States doesn’t oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.’ (Mamdani 2008)

There are structural barriers to the Court acting as an independent, non-political but still impactful institution. But there are also operational criticisms of the way the court staff, in particular the OTP, has responded to its role. In its initial investigations, the OTP has been perceived by its partners and the Trial Chamber as arrogant and difficult: Phil Clark reports that the ICC has behaved not as one institution working alongside others to achieve the common goals of peace and justice in the DRC, but as ‘the lead organisation to which all others are answerable’ (Clark 2008a). Clark’s research shows that the Court irritated MONUC (the UN peacekeeping mission in the DRC) and the Congolese army to such an extent, in refusing to acknowledge their assistance in gathering evidence and arresting suspects, that MONUC has been reluctant to work with the ICC to arrest the LRA leaders based in north-east Congo. His work also suggests that the breakdown of relations between MONUC and the ICC is the main reason that the UN initially refused to let the defence team see evidence it had gathered against Lubanga, leading to the near collapse of the trial. Clark concludes that ‘the Court has generally failed to foster meaningful relations with UN peacekeeping missions and other ground-level institutions that are vital to its cause’ (Clark 2008a). There is no structural reason for this failure, and in fact UN bodies should be well-disposed towards the Court: the animosity that now exists was entirely avoidable.

Through hard negotiation and majority votes, states as a group have afforded the Court significantly more power than commentators expected, given the slow process

²⁹ Koh (2010) defends such strikes as legal. For analysis and critique of the position he set out, and discussion of US use of targeted killing in general, see <http://www.crimesofwar.org/news-obama2.html>; <http://opiniojuris.org/2010/04/14/the-koh-speech-and-targeting-an-american-citizen/>; <http://opiniojuris.org/2010/06/03/kens-not-yet-response-re-drone-warfare-and-targeted-killing-and-professor-alstons-report/>; <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090204463.html>. The careful but critical position of Philip Alston, the UN’s Special Rapporteur on extrajudicial, summary or arbitrary executions, is available here: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/137/53/PDF/G1013753.pdf?OpenElement>. See paragraphs 85-6 in particular.

of reaching consensus on a Statute to create the Court. However they have not established it as a truly independent institution. The Court is too much reliant on the UNSC, in particular the P5, making the probability of prosecution at the ICC of crimes alleged to have been committed by some of the most powerful actors in the system almost nil. The situation is made even worse by the growing belief among a range of state and non-state actors that the Court is worse than ineffectual – it is actually threatening to peace.

The ICC was established in part because it was believed that a permanent international court would help to end conflict. Peace and justice tend to be assumed in pro-ICC discourse to be complementary: ‘few topics are of greater importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today's world.’³⁰ But it is the seeming opposition of peace and justice that is receiving most attention from analysts of international criminal law at present. The ICC has issued arrest warrants for a sitting President, Bashir of Sudan, at a time when not one but two delicate peace processes were under threat (in the South and in Darfur), and the initial Sudanese response to the warrant seems to confirm fears that pursuing justice in the region will be at the expense of peace. After the first warrant was issued on 4th March 2009, 13 international aid agencies, including Oxfam, Save the Children and Medecins Sans Frontieres, were expelled from the Darfur region. Peacekeepers have been attacked, an aid worker has been killed and at least 13 aid workers have been kidnapped since March 2009.³¹ Ocampo’s request for a warrant, and the agreement to this request by the Pre-Trial Chamber of the ICC, have drawn widespread criticism from within Sudan, from other African and Arab states, and even from UN representatives. In November 2008, Assistant Secretary-General for Peacekeeping Edmond Mulet told the Security Council that Ocampo’s attempts to charge Bashir could potentially derail the 2005 Comprehensive Peace Agreement in South Sudan, and lead to serious security threats to UN peacekeepers in Darfur. Many UN members have indicated support for suspending ICC action if Bashir co-operates in bringing peace to Darfur – they assume that peace will not be possible if justice is done. The Arab League and the African Union called at the time of the first warrant for the UN Security Council to use its powers, under Article 16 of the ICC constitution, to suspend the case against Bashir and Security Council members Burkina Faso, China, Libya, Russia, Uganda and Vietnam were believed to support the plan.³² China has been particularly outspoken about the charges against Bashir, stressing that justice threatens peace, and that peace should be prioritised. A statement from the Foreign Ministry in March 2009 stated that ‘China expresses its

³⁰ <http://untreaty.un.org/cod/icc/general/overview.htm>

³¹ It is not clear whether the government of Sudan is directly involved in these actions, whether they are the responsibility of groups sympathetic to Bashir or, in the case of kidnappings, the responsibility of groups seeking to earn money through ransom demands. It is clear that the surge in kidnappings and attacks on aid workers came soon after the first arrest warrant for Bashir was issued, with five members of Medecins Sans Frontieres kidnapped on March 11th 2009. Sudanese Foreign Ministry spokesman, Ali Yousseff is reported to have commented: ‘[a]nything that goes wrong [since the warrant] onwards I personally attribute to the ICC decision.’ http://www.huffingtonpost.com/2009/03/12/darfur-doctors-without-bo_n_174206.html

³² <http://www.sudantribune.com/spip.php?article30165>. NB There is currently no mechanism in the Rome Statute for the warrants to be withdrawn. Article 53 makes clear that the OTP can decide not to pursue an investigation or prosecution if it is judged not to be in the interests of justice to do so, but there is no procedure for actors external to the OTP to force the withdrawal of arrest warrants already issued.

regretfulness and worry over the arrest warrant for the Sudan president issued by the International Criminal Court. China is opposed to any action that could interfere with the peaceful situation in Darfur and Sudan. At the moment, the primary task of the international community is to preserve stability in the Darfur region.’³³ The US published a ‘Sudan Strategy’ in October 2009 that affirmed US support for ‘international efforts to bring those responsible for genocide and war crimes in Darfur to justice’ but emphasized the importance of ‘locally-owned accountability and reconciliation mechanisms that can make peace more sustainable’ and made no mention of whether it supported the ICC in its case against Bashir. It also offered ‘incentives’ if the Bashir government ‘acts to improve the situation on the ground and to advance peace’.³⁴ Analysts suggest that the strategy gives the US significant ‘wobble room’ to do a deal with Bashir to try to get the warrants withdrawn if Bashir cooperates to bring peace.³⁵

There is much irony in this situation – the UNSC referred the case to the ICC in the first place as Sudan is not a Party to the Rome Statute, so the Court would have had no jurisdiction without the UNSC granting it. But it is also unclear whether the attempt at justice in investigating the situation in Darfur and issuing arrest warrants for high level government figures (on 2nd May 2007 arrest warrants were issued for Sudanese humanitarian affairs minister Ahmad Muhammad Harun and Janjaweed militia leader Ali Kushayb) contributed to bringing about the ceasefire the Sudanese Government announced in November 2008. There is strong feeling that the ceasefire was called by the Sudanese government in an attempt to persuade the UNSC to suspend the ICC investigation. Payam Akhavan (2009) has argued that ICC involvement pressured the government to distance itself from atrocities committed by its proxy fighters the Janjaweed, which has led to many Janjaweed defecting from the government, thus increasing the likelihood of peace in the region. Clark (2009), in response, argued that ICC involvement just changed the way the Sudanese government carried out violence, attacking civilians more often itself now instead of through the Janjaweed. The position of African states is also unclear: the African Union has split over its opposition to the ICC, with State Parties such as Uganda, South Africa and Botswana claiming that they would arrest Bashir if he was found on their territory. In addition, the High Level Panel led by Thabo Mbeki, tasked by the AU in mid 2009 to find a way to resolve the conflict in Darfur, did not condemn the ICC warrant and recommended a hybrid court and changes to Sudanese laws to enable the accused (potentially including Bashir) to be tried. Peace is seen in the panel report as dependent on justice. However, Chad had also claimed that it would arrest

³³ Quoted from

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/4940876/China-calls-for-ICC-case-against-Sudan-president-Omar-al-Bashir-to-be-dropped.html>

³⁴ Sudan Strategy available at <http://www.state.gov/r/pa/prs/ps/2009/oct/130672.htm>

³⁵ See, for instance: <http://opiniojuris.org/2009/10/19/the-obama-strategy-on-sudan-how-to-downplay-the-icc/>. The Obama administration has vacillated on Sudan, sometimes seeming to take a hard line (for instance Obama’s response to Bashir’s visit to Kenya in August 2010 was a clear rebuke to Kenya for not arresting him: ‘I am disappointed that Kenya hosted Sudanese President Omar al-Bashir in defiance of International Criminal Court arrest warrants for war crimes, crimes against humanity, and genocide ... we consider it important that Kenya honor its commitments to the ICC and to international justice’. Statement available at <http://www.whitehouse.gov/the-press-office/2010/08/27/statement-president-obama-promulgation-kenyas-new-constitution>) and sometimes preferring carrots to sticks (for instance making no mention of its support for the ICC in the ‘Sudan Strategy’). This vacillation apparently reflects a split in the administration as to the correct policy. See http://www.nytimes.com/2010/08/29/opinion/29kristof.html?_r=2&ref=opinion.

Bashir if he was found on its territory, but in July 2010, Bashir attended a meeting of regional leaders in Chad. It was his first visit to the territory of an ICC State Party since the first warrant for his arrest was issued in March 2009. He subsequently visited Kenya, another State Party, to attend the ceremony of the signing of Kenya's new constitution. Neither state made any attempt to arrest him. The AU justified the actions of Chad and Kenya as follows: 'both Chad and Kenya, being neighbours of Sudan, have an abiding interest in ensuring peace and stability in Sudan and in promoting peace, justice and reconciliation which can only be achieved through continuous engagement with the elected government of Sudan.'³⁶ There is no agreement on what the effect of the ICC in Sudan has been, and with killing in Darfur continuing, the stakes are very high if we subsequently find out that peace, in this instance, is threatened by attempts to bring justice.

The dilemma of how to respond to claims that justice is an obstacle to peace is also faced by the ICC over the situation in Uganda. President Museveni referred the situation in Northern Uganda to the Court in 2003, reportedly after lobbying from Ocampo (Clark 2008b, 43). The ICC was quick to take up the case, issued arrest warrants for five of the commanders of the Lord's Resistance Army for war crimes and crimes against humanity and claimed the Court could help to end the 20-year conflict in six months (Apps 2005, cited in Clark & Waddell 2008, 45). However, none of the suspects have been arrested to date, and, in 2008, when movement was finally made towards peace talks in the region, the involvement of the ICC seemed to derail the process. Museveni refused to execute arrest warrants for LRA commanders, and instead worked, with UN support, to negotiate a ceasefire with the group. However, Joseph Kony, head of the LRA and therefore a key figure in making sure that any peace deal is carried through, refused to sign an agreement in November 2008 unless the ICC lifted the outstanding arrest warrants for LRA leaders. As with the situation in Sudan, the OTP has taken the position that it is an organ of justice: it has found good reasons to think that serious breaches of international law have taken place, and it is therefore intending to go ahead with prosecutions.³⁷ The Court has reminded all States Parties, which includes Uganda, that they have a duty to arrest any person that the Court has issued a warrant against. However, the Court has also toned down its rhetoric, claiming not that it can help end the conflict, but that justice is necessary to punish the LRA leaders for their crimes and to undermine Uganda's culture of impunity.

As in Sudan, it is far from clear whether the Court is having a positive, negative or negligible effect on peace efforts in Uganda. Some commentators are convinced it is negative, others are less certain.³⁸ Again, justice and peace may have been positively linked when the Court first began investigating the situation: the initial ICC referral and the fear of prosecution seem to have been instrumental in bringing the LRA to the negotiating table in the first place, and the ICC's investigation seems to have restricted the flows of arms and resources to the LRA from Khartoum (O'Brien 2007).

³⁶ African Union Press Release N° 119/2010, 29th August 2010.

³⁷ In a policy paper on the 'Interests of Justice' issued in September 2007, the OTP states that 'there is a difference between the concepts of the interests of justice and the interests of peace and ... the latter falls within the mandate of institutions other than the Office of the Prosecutor.' Paper available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>

³⁸ See, for instance, Dowden (2007) and Clark (2007)

Additionally, in an attempt to get the ICC to withdraw, a special division of the Uganda High Court has been set up to try those charged by the ICC – a significant about-turn as Museveni proposed amnesties for the LRA leaders as recently as 2006.³⁹ The proposed solution is still somewhat lacking - soldiers from the Ugandan armed forces, the Uganda People's Defence Forces (UPDF), accused of atrocities during fighting in the north will not stand trial, but it is more than could have been expected without ICC involvement. However, critics argue that the effects of the Court are more insidious, for instance Clark (2009) notes that ICC involvement has displaced LRA violence to north-eastern DRC. The Court has also been accused of prolonging conflict in Northern Uganda by issuing warrants only for LRA leaders and ignoring atrocities committed by UPDF personnel, thus lending legitimacy to violence by government forces in the region rather than deterring it (Clark 2009).

The Court, again, is in an invidious position. It was assumed by many ICC supporters that peace would follow as a natural consequence of justice, particularly once a permanent Court had been established. In fact, in two of the situations the ICC is involved in, its involvement may be preventing peace. It is not clear what the effect on the credibility of the ICC would be if it had to suspend or even abandon its investigations in Sudan and Uganda in order to enable peace deals, given that part of the rationale for prosecutions is to help bring about peace. It may be that the Rome Statute needs to be revised to force the Prosecutor to take the interests of peace into account as well as the interests of justice when deciding which situations and cases to pursue. However, doing this would both bring the Court into further conflict with the UNSC, and would make it a much more obviously political institution than it is at present. The perceived shift of the Court away from being an impartial legal body towards the machinations of power politics is already too pronounced for some commentators: 'African states were keen supporters of the Court in the early years. Now, they seem to be turning against the Court. This is not a good development. At the same time, the United States is warming up to the Court. Personally, I like the court better when it had the support of African States and was disliked by the US.'⁴⁰ The structural arguments against the court, supplemented by criticism of the early actions of the OTP, constitute a strong case for the Prosecution.

The Verdict

Tempted as I am to argue that the jury is still out, it is possible to draw tentative conclusions about the Court and the first decade of its operation. The ICC is, in structural terms, a tremendous achievement, with significant potential to permanently alter the vocabulary and processes of international politics. States have created a Court with more insulation from political power than was expected, given that the UNSC cannot veto prosecutions and the Prosecutor can initiate investigations *proprio motu*. The Court is also exerting its authority in the international realm (too much so according to its critics), by refusing to bow to pressure to suspend the pursuit of justice for the cause of peace. However, the effects of the Court on the situations it is investigating, and the effects of the international power political structure on the

³⁹ See Quinn (2009) for detailed discussion of peace negotiations in Uganda.

⁴⁰ William Schabas, in interview available at: <http://iccobservers.org/2009/03/26/icc-observers-exclusive-interview-william-schabas-professor-of-human-rights-law-and-director-of-the-irish-centre-for-human-rights-at-the-national-university-of-ireland-galway/>

Court, are cause for concern. The charges against Bashir have only fuelled the view that the ICC is a neo-colonial project in which Westerners prosecute Africans. Ocampo is examining a variety of non-African situations, and a non-African investigation and cases would certainly help the Court to appear more global in its reach.⁴¹ But any investigation that the Court pursues is likely to be mired in the same kinds of difficulties faced in Uganda and Sudan. The ICC can only prosecute crimes committed after the Rome Statute came into force in July 2002, so its early cases are often going to be situations in which conflict is still ongoing, or only recently ceased, and as such the Court will necessarily be mired in further controversy.

It is worth reflecting on the reasons (listed in the Introduction) given for the establishment of the Court. Some of the more straightforward reasons to establish such a Court have been vindicated. The Court is able to remedy at least some of the deficiencies of the *ad hoc* tribunals. Structurally, the Court is a significant improvement because of its permanence. No longer is international justice directly at the mercy of the UNSC, which may or may not decide to set up *ad hoc* tribunals in particular cases. The Court has, in theory and under strict conditions, jurisdiction over any atrocity committed anywhere in the world. Operationally, as the initial set-up costs decrease, the Court should become both cheaper and more efficient than the Tribunals. The Court has also shown itself able to take over when national criminal justice institutions are unwilling or unable to act, most clearly in the case of Kenya. But there are few signs that the Court is attempting to procure cases – the policy of ‘positive complementarity’, or enhancing domestic justice systems to mitigate the need for an ICC, enjoys broad support. It is also the case that this policy can be abused if used to avoid opening ICC investigations into situations which would prove unpopular with the US and its allies, such as Colombia and Israel.

The more utopian reasons to establish an ICC are not so obviously upheld. The Court is not achieving justice for *all*, nor is it likely to. It does, however, have the potential to achieve justice for *more*. This justice, delivered according to a Statute which has been ratified by 113 states and in a permanent and publically accessible institution presided over by judges who seem keen to hold the various organs of the Court to high standards, should be *better* justice than has been possible in the past. Similarly, impunity is significantly reduced by the wording of the Rome Statute and the rejection of the idea that public office brings immunity is undoubtedly a positive step. However, if State Parties to the Court continue to entertain instead of arrest a man charged with genocide, crimes against humanity and war crimes, the message sent is that being a President makes you untouchable. Equally, if states such as the US, China and India stay outside the Rome Statute system, it will appear that impunity can be bought with power.

The Court is also claimed to deter future war criminals. There is some anecdotal evidence that making commanders criminally responsible for the acts of their subordinates deters atrocity (Akhavan 2001; Wippman 1999). But deterrence is much less likely when committing Rome Statute crimes does not always lead to being charged by the Court and when being charged does not lead swiftly to arrest and trial. If there is little likelihood of political leaders facing trial, there is little likelihood of

⁴¹ To choose to investigate a situation on the basis of its location is, of course, a political rather than a legal decision. Purists would have to reject such a choice, even if it did help to dispel the idea that the Court is an anti-African project.

them being deterred from employing illegal violence in pursuit of their interests in the future. Thus, instead of helping to end conflicts, the Court may have little or no effect on them. Most concerning of all, ICC involvement in situations such as Darfur and Northern Uganda may actually prolong conflict.

The verdict on the ICC is therefore mixed, and the most important conclusion to draw from the foregoing analysis is the impossibility (yet) of knowing whether the Court is either an unambiguously positive or an obviously negative addition to international relations. It is neither an apolitical expression of global moral consensus, staffed by saints, nor a court of victors' justice controlled by the US to work in the interests of hegemony. The Court has significant power over, and independence from, states and state-actors such as the UNSC. Yet they still have more influence on the Court than ICC supporters would wish. And the power of the Court translates, inevitably, into political power. The Court is a political institution that does its business using the language of law; a project of 'legalistic politics' in which politics and law are inevitably intertwined, because '[u]ltimately, war crimes trials pursue political ends through jurisprudential means' (Simpson 2007 23-24). Those ends may be admirable, for instance, the Court may work to prevent those with political power from abusing it and attacking their own citizens or the citizens of other states. The ends may be regrettable, for instance the Court may discipline weak states and bolster strong ones. But they are always and inevitably political. And the political power of state actors will always and inevitably impact upon the Court: it is one institution among many in the contemporary international system, and as such must interact with and sometimes defer to others. The particular contribution of the Court is not that it is apolitical, but that it uses the structures, language and methods of law to change the way that politics is practised.

Equally, the Court has great potential to do good through reducing impunity and increasing the spread of criminal justice. But it is not *the* solution (it may not even be *a* solution) to the problem of ending atrocity. There is reason now to stop judging the Court on whether it works in the interests of peace, and task it only with achieving justice. The Court is not well-suited to the role of peacemaker – it is not a tool of diplomacy and compromise. States, the UNSC and other UN bodies are far better placed to work towards peace. If justice is a worthy goal, it must be pursued on its own terms rather than with the utopian justification that trials can end wars. Few believed an international criminal court possible until just over a decade ago. It is important now to temper both the optimism and the cynicism surrounding the institution and frame the debate around what there is evidence to suggest such a Court can achieve. The potential of the Court to make better justice available to more people is reason enough, for now, to support it.

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