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Research Paper No. 9

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The International Criminal Court as a Political Tool

Utilizing a Constructivist Perspective to understand how the ICC can be reasonably viewed as a Political Tool to subjugate African States

Introduction

In light of the controversial title of this essay, the author considers the clarification of the ideas proposed within this essay to be of paramount importance, so as to ensure that one can be expected to tolerate the controversial nature of the aforementioned title.

The International Criminal Court (ICC) on one hand, is an international organization, which one should assume, embodies the aspirations of states which are determined to "end impunity for the perpetrators of...crimes and thus to contribute to the prevention of... [Such] crimes".¹ As an international organization, the ICC was created to serve as a permanent structure wherein the political communication between various actors in the International Political System was possible,² on issues and cases of prime concern to international criminal justice. The proposed aim of the ICC was to ensure that its existence serves as a guarantee for "lasting respect for, and the enforcement of international justice."³

Constructivism on the other hand, is not necessarily a theory of international relations, as it is more of a broader social ontology which then informs how we might approach the study of security.⁴ The author believes that, in regarding constructivism as an ontology, Constructivism clarifies a set of assumptions with regards to our world and human agency.⁵ Essentially, Constructivists such as myself, examine how the human world and occurrences therein, are socially constructed.⁶ "Constructed by the very ideas that actors share with themselves and others about the world they

¹ *Rome Statute*, 2002. , https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf : the International Criminal Court. Art. 1.

² BAYLIS, JOHN and SMITH, STEVE, 2001, *The globalization of world politics*. Oxford : Oxford University Press. P.337

³ *Ibid*

⁴ MCDONALD, MATT (ed.), 1. London : Routledge.

⁵ SLAUGHTER, ANNE-MARIE, 2017, Max Planck Encyclopaedia of Public International Law.

<http://scholar.princeton.edu> [online]. 2017. [Accessed 1 August 2011]. Available from:

http://scholar.princeton.edu/sites/default/files/laughter/files/722_intlreprincipaltheries_slaughter_20110509zg.pdf

⁶ ARMSTRONG, JAMES DAVID, FARRELL, THEO and LAMBERT, HÉLÈNE, 2015, *International law and international relations*. Cambridge : Cambridge University Press.

live in, and (given these ‘things’) what they can and should do.”⁷ These *ideas* which the author refers to, do not consist entirely of ideas within people’s minds. Rather, these ideas refer to those identified by Durkheim, which exist tangibly in the social world, in the form of ethical norms, language and religious beliefs amongst others.⁸

A Constructivist Perspective of the ICC

In highlighting the role of ideas and social structures which consist of identities and norms,⁹ the utility of a constructivist insight lies in its ability to provide meaning to social configuration. The proposition that “Constructivism recognizes the importance of ‘inter-subjective structures which give the material world meaning” enables us to identify these inter-subjective structures as socially constructed concepts such as “norms, culture, identity and ideas” which give meaning to the identities of humans, their roles in human organization, the implication of organizational behaviour and by extension, state behaviour as a whole.¹⁰ The unique ability of constructivism to challenge the rationalist framework that undergirds international security theory, as well as other theories in international relations grants it great importance as an ontology, and relevance as the ontology that guides this debate.¹¹

A general understanding of the application of international justice by the ICC, is based on the assumption that the ICC enacts an unbiased application of law in *all* instances where the perpetrators of crimes -specified in the Articles of the Rome Statue are brought to book. The "following of an international treaty that a state has signed and ratified would be an [ideal] example of justice" to the realist¹². However, I reiterate that International justice in this essay assumes the understanding that ALL serious violations and crimes that fall under the jurisdiction of the ICC will be pursued, investigated and subsequently punished according to the penalties spelt out in Articles 77 and 78 of the Rome Statutes.

ARMSTRONG, JAMES DAVID, FARRELL, THEO and LAMBERT, HÉLÈNE, 2015, *International law and international relations*. Cambridge : Cambridge University Press.

⁸ RUGGIE, JOHN GERARD, 1998, What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge. *International Organization*. 1998. Vol. 52, no. 4, p. 855-885. DOI 10.1162/002081898550770. Cambridge University Press (CUP)

⁹ ARMSTRONG, JAMES DAVID, FARRELL, THEO and LAMBERT, HÉLÈNE, 2015, *International law and international relations*. Cambridge : Cambridge University Press.

¹⁰ KATZENSTEIN, PETER, KEOHANE, ROBERT and KRASNER, STEPHEN, 1998, *International Organization and the Study of World Politics*, P. 679

¹¹ SLAUGHTER, ANNE-MARIE, 2017, Max Planck Encyclopaedia of Public International Law.

<http://scholar.princeton.edu> [online]. 2017. [Accessed 1 August 2011]. Available from:

http://scholar.princeton.edu/sites/default/files/slaughter/files/722_intlrelprincipaltheories_slaughter_20110509zg.pdf

¹² PENNA, 2009, *International Justice and International Politics: Intertwined Paths*. Human Rights and Human Welfare. <http://www.du.edu/korbel/hrhw/volumes/2009/penna-2009.pdf>

The application of justice by the ICC has been the subject of much scrutiny and the ICC has been accused of unfairness and bias by various parties to the ongoing conflicts which the court has presided over. One fundamental cause of this scrutiny stems from the fact that critics rightly express the expectations of the application of justice in domestic legal systems, where the pressures of politics are usually not tolerated, or allowed to greatly influence the application of the law.¹³ It must however be taken into consideration that, in the international system, the horizontal nature of international law, makes it a legal system which lacks a supreme authority which embodies the centralization of the use of enforcement and administration of justice. The importance of state consent in international criminal law has to be recognised before one can clearly observe why a closer relationship between the application of justice, and the influence of international politics in the ICC, is essential in order to ensure some level of compliance with the aims and objectives of the court¹⁴.

It would be naïve to assume that the actions of any court, with the inclusion of the ICC can be devoid of political influence in its pursuit to ensure lasting respect for the enforcement of justice. But, with regards to the ICC, it is difficult to ignore the very nature of the court and its relationship with the United Nations (UN)¹⁵, the nature of the crimes within the jurisdiction of the court¹⁶, the preconditions to the exercise of the court's jurisdiction¹⁷, political considerations around the initiation of investigations and prosecutions¹⁸, and the roles of states in the enforcements of rulings by the ICC,¹⁹ as means through which the influence of politics hover above the application of justice.

In-depth analysis of the Rome statute, reveals a plethora of considerations and exercises of the court that could possibly be termed as 'political' and these considerations could be individually explored to identify how the pressures of world politics repeatedly infiltrate and indeed alter the procedures of the ICC. However, to practically understand the gravity of political influence on the ICC's legal process, it would be most efficient to look at the peculiarities in some of the cases that are currently being presided over by the court, from a constructivist's perspective.

The key actors in the ICC are States, International organizations and Members of Staff of the ICC's Secretariat. The interests and capacities of the various actors that interact with the ICC vary significantly, but are in line with the actors' subjective perceptions of their relationship with the

¹³ *Ibid*

¹⁴ MALANCZUK, PETER, 1997, *Akehurst's Modern Introduction to International Law*. New York : Routledge.

¹⁵ *Rome Statute*, 2002. , https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf : the International Criminal Court. Art. 2

¹⁶ *Ibid* art.5

¹⁷ *Ibid* art.12

¹⁸ *Ibid* art.53

¹⁹ *Ibid* art.103

court, and the rights and obligations which are accorded to them. As a constructivist, it is reasonable to state that the normative structure of the ICC is one which has so far conditioned the attitudes of states and non-state entities towards the idea of a transnational court with a global reach, which can independently prosecute criminal acts which fall under the jurisdiction of an existing statute.²⁰ Whether this normative structure has been successful in constraining the behaviour of member states is unquantifiable. However, the actions of the ICC to date, do not adequately represent the collective will of the signatories of the Rome statute, but rather implicitly represents the preferences of the great powers in international politics, as I shall explain further.

Political Justice by the ICC

As at September 2014, a total of 122 states were parties to the Rome Statute of the ICC. In over a decade of the ICC's existence, the Court has received complaints about alleged crimes in at least 139 possible cases²¹. The ICC has so far pursued 21 cases, in 9 situations.²²we should be aware that Cases are brought to the ICC on the basis of referrals, as stipulated in Articles 13, 14 and 15 of the Rome Statute. According to this statute, there are three ways in which a case may be brought to the attention of the court. The court may exercise its jurisdiction if:

"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;

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

*The prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."*²³

In line with the aforementioned referral procedures, one would ideally expect that the prosecutorial service of the ICC would have a universal reach, pursuing all instances where breaches of the Articles of the Rome statute have occurred. However, considering the staggering rate at which breaches of Article 5 of the Rome statute occur, one can draw the conclusion that so far, the ICC has not been a very efficient institution. The situations currently being pursued by the ICC, are namely:

- Uganda

²⁰ *Ibid*

²¹ International Criminal Court, 2017. *En.wikipedia.org* [online]

²² Situations, 2017. *icc-cpi.int* [online]

²³ *Rome Statute*, 2002. , https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf : the International Criminal Court. Art.13. Para C

- The Democratic Republic of the Congo
- Darfur, Sudan
- Central African Republic
- The Republic of Kenya
- Libya
- Côte d'Ivoire
- Mali
- Central African Republic II
- Georgia

Preliminary Examinations underway, are:

- Afghanistan
- Burundi
- Colombia
- Gabon
- Guinea
- Iraq/UK
- Nigeria
- Palestine
- Registered Vessels of Comoros, Greece and Cambodia
- Ukraine²⁴

By virtue of the cases being pursued by the ICC, one would either be led to imagine that breaches of the Rome statute have occurred only in Africa, or that the ICC is a court that was specifically set-up to prosecute African cases exclusively, with the exception of an infinitesimal number of cases. With the realisation that neither of the aforementioned explanations for exclusive African prosecution of crimes are plausible, why then, has the ICC only prosecuted cases from Africa? Realists invoking the ideas of E.H Carr, could describe this imbalance in the pursuit of justice, as a revelation that the ICC exists in an international system in which "there was little harmony of interests and much power-play"²⁵ and from an Austinian perspective the ICC would appear to be just another tool with which superior actors in the international system impose their political will on inferior entities.

²⁴ Situations, 2017. *icc-cpi.int* [online],

²⁵ ARMSTRONG, JAMES DAVID, FARRELL, THEO and LAMBERT, HÉLÈNE, 2015, *International law and international relations*. Cambridge : Cambridge University Press.

Perhaps since the creation of the ICC, breaches of the Rome statute have only occurred in Africa and the insinuations of prejudice levied against the court are unrealistic and misleading. However, the failure of the prosecutorial service of the ICC to exercise its powers in Article 13(c) and Article 15, to independently pursue and investigate the perpetration of crimes committed by more powerful states such as the United States of America, and to investigate allegations raised against US military personnel exposing breaches of the Rome statute in their operations in Iraq since 2003, or the crimes so far committed by both sides in the Israel-Palestinian conflict, with the prevalence of torture in at least 16 states,²⁶ among 130 other complaints pending, has proven that the ICC has been indirectly instrumental in the denigration of inferior states, and is a representation of the current order of the international system. From the perception of many, the ICC has little interest in stimulating the notion of universal accountability for war crimes, irrespective of the nationality of the perpetrators²⁷ and these perceptions help to shape the attitudes of the actors that approach the ICC.

Influence of Individual Actors

The influence of the prosecutor of the ICC as an actor, is also of significant interest to the constructivist, as the powers vested in the prosecutor to independently pursue cases of interest to the ICC is subject to the influence of political pressures. For example, if the prosecutor of the ICC exercised his *Proprio motu* powers to bring Kenya, and Côte d'Ivoire to book, and in the situations like Sudan and Libya, where perpetrators of crimes were not parties to the Rome statute the cases were referred by the United Nations Security Council (UNSC) in accordance with Article 13(b) of the Rome Statute and Chapter VII of UN Charter, then the inexcusable failure of the prosecutor to exercise these powers in other regions of the world where breaches of the Rome statute have occurred, clearly suggests the presence of external political influences hindering the court as a whole from pursuing international justice. This is to say that to some degree, the political inclinations of the prosecutor of the ICC as a person, can filter into the decision making processes of the ICC as there is some level of discretion applied in the utilization of the *Proprio motu* powers, and it is reasonable to argue that in the hands of another individual, these powers might be exercised in a different manner.

Nature of Compliance with International Law

Another explanation for the actions of the ICC with the constructivist lens, identifies the nature of conformity of states with international criminal law, in two ways. The first being a kind of pre-emptive conformity and the other being a subjective conformity. Firstly in most liberal democracies,

²⁶ *Ibid*

²⁷ NICE, P, 2012, The Permanent International Criminal Court and Africa. . Lecture. 2012.

we can see the development of legislation to adjudicate crimes spelt out in the Rome statute, in their domestic legal systems, as a way of conforming to international law. This manner of conformity suppositionally eliminates the possibility of the state's subjugation to international intervention, by invoking the principle of complementarity, (which is embedded in the Rome statute in Article 17) after international criminal law has been internalised, which is a prime example of Michael Barnett's ideas on the internationalization and institutionalization of norms²⁸ and it is this manner of pre-emptive conformity, that shapes the liberal democracies perception of itself as abiding by the tenets of international criminal justice.

Secondly, in less developed states, lacking the sophistication of a legal infrastructure that can internalise the norms of the ICC, the absence of domestic legislation in congruence with the Rome statute, causes individual actors (usually heads of state) or groups with specific interests to push for self-referral to the ICC, to preside over issues which their home states lack the ability, or willingness to resolve. These states, which make up a vast majority of the cases which the ICC has presided over, perceive themselves as being subject to a transnational court which presides only over cases from 'inferior' countries, and thus explains why the attitudes of these category of states (with less sophisticated legal systems) towards the ICC suggests that they view the ICC as a political tool that represents the current order of the international political system, and imposes the preferences of the great powers in the international system.

Conclusion

Although the ICC was created to ensure the application of justice where necessary, the actions of the ICC are not devoid of the influence of world politics. The ICC ought to represent its member states' commitment to the enforcement of international justice, but as we have seen, the idea of international justice cannot be attained without the political participation of the signatories of the Rome statute. The very nature of the ICC makes it impossible for its actions to be free of political influence, and its exercise of jurisdiction has clearly shown the influence of world politics at work. Conceptualising the relationship between the key actors and the ICC is a task which a constructivist can realistically achieve, to understand the reasons for the decisions which the ICC has taken so far. The ICC's track record has shown the extent to which the influence of world politics can affect the attitudes of state and non-states' actors towards the ICC. The extent to which a single individual can influence an international organization such as the ICC has been shown by analysing the actions of the prosecutor of the ICC, this idea is contrary to the realist belief that states are the principal actors in international relations. The principle of reciprocity and the uneven application to this principle to

²⁸ BAYLIS, JOHN and SMITH, STEVE, 2001, *The globalization of world politics*. Oxford : Oxford University Press.

relevant situations also highlights another instance where world politics has influenced the application of justice by the ICC, as well as the increasing role of NGOs in the international system. These are a few of the factors in the ICC which a constructivist can reasonably highlight, to spark the debate wherein we can achieve an in-depth understanding of the dynamics associated with application of international criminal law, in the current international political system.

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