



**Growing Resistance to International Institutions
The Interplay between Authority and Politicization at the
International Criminal Court (ICC)**

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Abstract

Two decades have passed since the creation of the International Criminal Court (ICC). After initial enthusiasm and high expectations, disappointment and frustration of some state parties have become even greater. Motivated by the will to understand resistance against international institutions, this contribution sets out to explore conditions under which examinations by the ICC lead to increased politicization. Drawing on politicization theory and the concept of authority and legitimacy, the formal requirements to initiate an examination at the ICC are analysed. This contribution tests hypotheses whether methods of delegation matter for the legitimacy and politicization of the institution. The empirical examination is guided by the impact of state-referral, proprio motu investigation and referral by the United Nations Security Council (UNSC). Evidence suggests that state referrals lead to lower resistance than referrals by the UNSC, implying that state interests were more decisive than conflicting international humanitarian rights norms between impunity and peace.

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Chapter 1: Introduction

The history of modern international justice dates back to the Nuremberg and Tokyo Trials after World War II. Not until after a fifty-year hiatus during the Cold War, international justice gained new impetus after the genocide in Rwanda and the war in Yugoslavia. As a consequence of the tribunals the idea of a permanent international criminal court gained momentum and came to its logical conclusion in the historical creation of the International Criminal Court (ICC) in 1998. The ICC was created in a uniquely permissive environment for international justice, driven by predominantly African, European and South American countries, and a coalition of non-governmental organizations (Coalition for the ICC, CICC).

In the ground-breaking founding document, the Rome Statute, the ICC vowed to end impunity for the most heinous international crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression. Assuming the enforcement of international law, the universal prosecution of international crimes would have monumental implications on international relations. However, in practice, some of the major powers (namely the United States, China, Russia) never ratified the Rome Statute. Consequently, those major powers lost ownership of international justice to NGO's and supporting states in contrast to previous trials of international justice that were created and implemented with the support of major powers (Bosco 2014, p. 23).

However, initial enthusiasm faded when dissatisfaction grew over the inequality that international law was not universally applied. In 2009, driven by discontent over the referral of the situation in Sudan to the ICC by those major powers in the United Nations Security Council (UNSC), the African Union (AU) decided that "the AU Member States shall not cooperate [...] for the arrest and surrender of President Omar El Bashir of The Sudan" (African Union 2009). Additionally, in 2010 the ICC Prosecutor, for the first time, charged perpetrators on his own volition ("in proprio

motu”) in the situation in Kenya as permitted under the Rome Statute. Looming discontent over the practice of the Prosecutor and the Court culminated in the announcement of withdrawal of South Africa, Burundi and the Gambia in 2017. Furthermore, the African Union adopted the ICC Withdrawal Strategy in calling on African countries to abandon the ICC (African Union 2017). In 2018, the first non-African state decided to leave when the Philippine government decided to withdraw from the Court as a reaction to the announcement of preliminary examination proprio motu by the Prosecutor.

20 years after the signing of the Rome Statute the ICC appears to be at crossroads. What will the future bring for international justice? Consequently, this paper aims to analyse reasons for the growing resistance against the ICC as an international institution. Therefore, the research question of this paper will be: *under which conditions do ICC examinations lead to increased politicization?*

Drawing on Zürn et al.’s conceptualization of politicization (2012), this contribution argues that the ICC’s interpretation of the Rome Statute and the practice of the Prosecutor have led to an increase in claimed authority that required additional stocks of legitimacy. This paper contributes to politicization theory by explaining variance and identifying scope conditions. In specific cases state parties actively ran a strategy of delegitimization against the ICC. Through the lens of principal-agent theory, the method of referral of a court case is identified as an important variable for legitimacy, depending on a state referral, a proprio motu examination or a referral by the United Nations Security Council (UNSC). This paper adopts a mixed methods approach, by utilizing a case study of the ICC claiming authority by following activities through official reports and a discourse analysis of key statements by government officials and diplomats supported by secondary literature.

Chapter 2 will review the appropriate literature for the research question and an overview of main debates will be critically evaluated. In chapter 3 the theoretical argument is developed, followed by the explanation of research methods in chapter 4. In chapter 5 empirical findings are presented and interpreted, followed by the conclusion in chapter 6 discussing limitations of the research and possible future avenues for research.

Chapter 2: Literature Review

Authority, Legitimacy and Politicization

Although discussions about the ICC, as a young organization, are logically very recent, they nevertheless reflect longstanding debates in international relations (IR) about the salience of international institutions and human rights in the global political order. According to traditional IR theory, international organizations are either tools of powerful states or not meaningful at all. Compliance and effectiveness are secured by either coercion or self-interest of states, as neo-realist or rationalist/ neo-liberal scholars would contend (Mearsheimer 1994; Keohane 1995). Authority, as the “ability to use institutional and discursive resources to induce deference” is an ability only states possess (Barnett and Finnemore 2004, p.5). In contrast, constructivist theory suggests that international organizations possess authority in their own right and cooperation can be achieved not only by coercion or self-interest but also by the legitimacy of the rule (Hurd 1999; Barnett and Finnemore 2004).

Hurd claims that legitimate authority can be an efficient mode of social control, and he sees the international system as a society of states that believe in the same norms. According to Barnett and Finnemore, international organizations (IOs) are actors who define norms of good behavior and guide legitimate social action and therefore construct social reality (2004). Zürn et al. argue

that claiming authoritative power on normative grounds must be built on sufficient stocks of legitimacy in order to ensure utilization of an IO and prevent resistance against it (2012). Claiming authority triggers a process of politicization through which legitimacy is decided and will lead to either resistance or utilization of IOs.

This raises questions about the nature of “legitimacy”. In philosophy power is legitimate if it conforms with “the right” and “the good”. In political science however, power is legitimate “if it is acknowledged as rightful by the involved actors, following Max Weber’s definition of legitimacy as the belief in legitimacy (Beetham 2013, p. 7).

Within principal-agent theory Alter argues that international courts possess a high degree of autonomy since traditional tools of controls, such as monitoring or re-legislating of decisions, are not practical when judges are tasked to make independent decisions (2006, p. 315). According to principal-agent theory, states may delegate authority to international organizations and give them certain levels of discretion and autonomy (Hawkins et al. 2006). In order to control international courts, Alter expects that states would use rhetorical and legitimacy politics instead of re-contracting or monitoring to control an IO (Alter 2006, p. 315). According to the separation of powers, courts typically do not have coercive enforcement powers, and must rely on their legitimacy to ensure cooperation with police authorities. The same principles apply to the international level. Because of the inefficiency of re-contracting, Alter argues that PA theory would not be very useful in studying control mechanisms for international courts (2006, p.316).

Instead, literature has looked at legitimation strategies by IOs such as the UN to foster cooperation (Zaum 2013), however delegitimization strategies by states to justify non-compliance have been neglected. IOs claim to carry out their task in a rational, technocratic and impartial manner and derive legitimacy from that political impartiality (Barnett and Finnemore 2004).

According to Zürn et al. legitimation challenges arise as a consequence of claiming authority (2012). Alternate explanations that contribute to politicization but presuppose the existence of authority are the national backlash perspective, resistance to Western dominance perspective, and the increased capacity perspective. National backlash roots the cause for politicization in a changed political environment, for example a change in government leadership. The Western dominance perspective explains resistance as a counter movement to the dominating influence of Western governments and neo-colonialism on international institutions as illegitimate and unfairly biased. The capacity perspective argues that increased utilization of IOs can be attributed to a changing cognitive capacity and increased sensitivity for international norms, mainly through improved education.

In contrast to those isolated approaches, Zürn et al.'s conceptualization of politicization sees authority as the underlying cause for politicization and legitimacy as the intervening variable. From an academic standpoint, the next step in researching politicization should then identify trends and explain variation (Zürn et al. 2012, p. 96). The ICC is a promising case to study variation. There are three different modes to initiate an investigation and cases vary from strong resistance against the ICC to the point of withdrawing from the ICC to increased utilization by non-state actors who submit information for examination. How authority, legitimation and politicization vary extensively among those cases will be explained in chapter 5.

The ICC: Between Expectations and Reality

Current academic literature about the ICC can be grouped into three broad categories: the analysis of politicization or contestation in specific situations, the analysis of effectiveness of the ICC in relation to various goals and legal dilemmata arising from the implementation of the Rome Statute.

Literature has measured effectiveness of the ICC thus far in ratifications of the Rome Statute (Chaudoin and Chapman 2012), state commitment to the ICC (Dutton 2011) or the deterrence effect to commit atrocities and human rights violations (Appel 2018, Jo and Simmons 2016) and conflict prevention (Malu 2017). Notwithstanding that it would be desirable to prevent and deter conflict, measuring the effectiveness solely on those effects creates colossal expectations. As a court of justice that does not possess coercive powers in line with the separation of powers but instead relies on legitimacy for compliance, it would most likely be an unattainable goal to single-handedly prevent conflict for any legal institution when facing actors that do not care for legitimate authority but aim to rule by force. Instead, the Rome Statute mandates that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured”. Keeping in mind the limitations of a legal institution, it would be more sensible to expect of the ICC to guarantee just and fair trials for the most serious crimes in search of the truth. The mandate of the Court delegates authority for the investigation, prosecution and judgment of international crimes, focussing on the legal process.

Legal dilemmas arising from the establishment of the Rome Statute, as a legal framework sui generis, revolve around the issue of political immunities, complementarity and how political or apolitical the practice of the ICC is (Roach 2013; Bosco 2014; Thiemesen 2014).

Political immunities reveal the dilemma of peace versus justice (Krzan 2016, Scharf 1999; Ginsburg 2008). Since the ICC does not allow political immunities or any statute of limitations for international crimes, the indictment of government officials is controversial. Publishing an arrest warrant against the head of state might incite violent protest or rebellion. Whereas it is important for deterrence and justice not to allow impunity of international crimes, investigations might hinder the peace process by heads of state clinging to power in fear of prosecution.

The principle of complementarity also states that as long as the domestic judicial system is willing and able to conduct prosecutions, the legal process shall remain on the domestic level and the ICC would have no jurisdiction (Schabas 2011, p. 290). In practice, the ICC has the authority to interpret and monitor whether or not the domestic judicial system is willing and able to prosecute international crimes truthfully. Opposing interpretations on complementarity and other legal norms can easily lead to contestation (Newton 2009, Robinson 2015).

In effect, many decisions by the ICC will have to weight up different legal principles against each other and come to a compromise to be produce controversies arising dilemmas arise from (Robinson 2015)

Prompted by the announcement of withdrawals from the ICC by South Africa, the Gambia and Burundi, academics put a strong focus on explaining African resistance discursively (Vilmer 2016, Boehme 2018; Mills and Bloomfield 2017; Austin and Thieme 2016). Additionally, isolated cases were examined in detail for the situation in Kenya (Malik 2016; Mueller 2014), South Africa (Maklanron 2015), Sudan (Mills 2012), Gambia and Burundi (Ssenyonjo 2018) and the Central African Republic (Glasius 2008). However, literature does not conceptualize the exercise of authority as the underlying cause for contention. The withdrawal of the Philippines could be an indication that an alleged African bias might not be the causal explanation for contestation of the ICC but rather the exercise of authority that is conflicting with the authority of government officials.

Gap in the literature

The observed resistance has not been put in context of increased claims of authority yet. The discursive analysis of causes for resistance, such as an alleged African bias by the Court or a lack of legitimacy in specific situations, presuppose that authority must have increased. Therefore,

the application of Zürn et al.'s model of politicization looks promising in order to analyse the trajectory of an international organization and answer the broader question under which conditions examinations lead to increased politicization. According to that framework we would expect politicization most strongly when an IO exercise political authority but cannot build on sufficient stocks of legitimacy (Zürn et al. 2012, p.96). Additionally, little attention was put on the conditions where the ICC manages to exert authority successfully in contrast to cases where the ICC is struggling to fulfil their mandate.

The following theoretical framework will elaborate on the main theories and hypotheses that will be tested to answer the research question:

RQ: Under which conditions do ICC examinations lead to increased politicization?

Provided that resistance and increased utilization are the result of authority and its legitimation in accordance with theoretical expectations connected to politicization theory two scenarios are examined:

SQ1: Does political authority based on insufficient stocks of legitimacy lead to resistance?

SQ2: Does political authority based on sufficient stocks of legitimacy lead to increased utilization?

Chapter 3: Theoretical Framework

To determine conditions that lead from ICC examinations to increased politicization, this thesis draws on three interrelated concepts: authority, legitimacy and politicization.

The Composition of Authority

Traditionally, the Westphalian conception of sovereignty underscores the principle of non-intervention in domestic affairs and the consensus principle. (Zürn et al. 2012). That means that the leader of a state exercises the only authority over the territory, that states are equal in front of

the law and that state parties cannot be subject to laws they did not consent to. *Authority* is defined differently in literature. For the purposes of this contribution “an international institution has *authority* if the direct and indirect addressees recognize in principle or in practice that the institution can make competent judgments and binding decisions” (de Wilde and Zürn 2012, p. 142). Therefore, an authority is granted competences by delegating the right to make decisions and judgments (Zürn et al. 2012, p. 83). In principle, ratifying the Rome Statute means that a state delegates the authority to make competent judgments and binding decisions for the prosecution of international crimes to the ICC by giving the ICC jurisdiction over their citizens and their territory (Schabas 2011, p. 62-81). However, in practice it gets more complicated. There are three ways to trigger the ICC’s jurisdiction: by state-referral, United Nations Security Council (UNSC) referral and proprio motu authority of the Prosecutor (Schabas 2011, p. 157-182). By these means, the Prosecutor initiates a preliminary examination. During this preliminary examination the Prosecutor must rely on external information and has no investigative powers. Nevertheless, once initiated the Office of the Prosecutor has the right to independently and impartially make the case whether the conditions for an investigation are met. The judges of the pre-trial chamber will then decide if a request to move into investigation phase will be granted. Once a preliminary examination is started, the influence of states on the decision-making process will prove very difficult since judges and the prosecutor are appointed with the mandate to be impartial. According to the Rome Statute, judges are supposed to be independent and the mandate of the Prosecutor is to establish the truth instead of achieving convictions. As Alter argues (2006, p.315), re-contracting of judicial verdicts by state interference do not seem very likely as it would go against the mandate of the judges and it would be hard to legitimate. The way the ICC exercises authority is by initiating a preliminary examination, starting investigations, then issuing arrest warrants or

summons to appear and delivering a judgment. While state parties formulated the rules how the ICC operates, they delegated the authority to interpret the implementation of legal principles to the judges. Especially contested is the principle of complementarity when ICC judges are tasked to decide whether the domestic judicial system is willing and able to handle judicial proceedings for international crimes and if they are conducted truthfully, meaning that the same crimes are investigated, that there are no political immunities or statute of limitations for international crimes.

According to literature, there's a differentiation between political and epistemic authority and politicization is triggered predominantly by political authority (Zürn et al. 2012, p. 71). Political authority is when an institution is delegated the interpretation of facts and norms. Epistemic authority rests on the reputation of the institution built on knowledge and expertise. Since the ICC is creating legally binding decisions that cannot be easily reverted, it exercises political authority that asserts to be epistemic authority (Zürn et al. 2012, p. 93). Bosco categorizes the behaviour of the Prosecutor in pragmatic, mutual accommodation with major powers, strategic or apolitical (Bosco 2014, p. 20). Bosco concludes that the Prosecutor was predominantly finding ways to accommodate to major powers such as the US who was initially heavily contesting the ICC. Literature has concluded that the work of the Prosecutor contains elements of political authority in choosing which cases to pursue and which cases to drop even though the Rome Statute emphasizes impartiality (Roach 2013, Bosco 2014, Nouwen and Werner 2011, Thiemessen 2014).

For the purpose of this paper, the exercise of authority is therefore defined as claiming jurisdiction, initiating examinations, issuing arrest warrants and delivering verdicts.

Legitimizing International Institutions

While *authority* is “the first layer of recognition” (Zürn et al. 2012, p. 83), when states acknowledge the *functional necessity* of an IO for a greater good, *legitimacy* is a second layer of

recognition when *the rightful exercise* of authority is acknowledged in relation to normative beliefs of a community.

While legitimacy always has a discursive element of subjective perception, there are a set of typical legitimation challenges that IOs face (Zaum 2013, p. 222). Those are challenges to decision-making structures and practices, non-compliance of member states with an IO's decision and attempts to limit the existing authority and autonomy of IO's. In contrast to legitimation challenges, there is a set of supporting legitimation practices (Zaum 2013, p. 224). First, the very creation of new institutions and adding structures to them is an expression of legitimation by states. Second, seeking external validation through involving external actors such as great powers and other important organizations is legitimating an IO. Third, rhetorical affirmation can legitimate practices and is often voiced publicly or in political opportunity structures.

Politicization – between Resistance and increased Utilization

Politicization is a process of increasing public awareness of IOs. Politicization can either be expressed in resistance to the authority and legitimacy of an IO or an increase of transnational utilization of IOs to achieve specific policy goals (Zürn et al. 2012, p. 89). In the case of the ICC, politicization in form of resistance would manifest in rhetorical refutation of ICC's legitimacy, non-compliance with their decisions, and withdrawal from the Rome Statute. Increased utilization would be expressed by rhetorical affirmation, compliance with decisions, additional ratifications of the Rome Statute and an increase in examinations referred to the ICC or initiated proprio motu because of an increase of information submitted to the Prosecutor.

Hypotheses

This contribution argues that the way how an examination is initiated makes a difference for their legitimation. According to the national backlash perspective, state referrals should amount to low resistance by state parties because authority is directly delegated, giving the ICC legal jurisdiction and therefore legitimacy.

H1: State referrals are legitimated directly by the states and result therefore in low resistance.

In the case of state referrals, cooperation with the Court should be high and should yield indictments, arrest warrants and convictions. Rhetorical affirmation of the work of the ICC by states is expected and that states continue to utilize state referrals for the prosecution of international crimes that are too complex to handle on the domestic level.

According to the increased capacity perspective, proprio motu examinations should proliferate because of the diffusion on instrumental knowledge. As the Court establishes itself, non-state actors can acquire the knowledge on how the political opportunity structure works. The political opportunity structure in this case, are formally institutionalized channels of voice such as consultation procedures on how to submit evidence to initiate an examination (de Wilde and Zürn 2012, p. 138). Since proprio motu examinations are initiated without the explicit consent of the state party that is affected, an increase in resistance would be expected. Legitimacy is drawn from the quality of evidence and the reputation of the sources of evidence. Therefore, rhetorical refutation and non-cooperation would be likely in proprio motu examinations.

H2: Proprio motu examinations challenge the authority of states and are an expression of increased capacity of non-state actors, thus they lead to more resistance than delegation of a situation through state referrals.

The last method of referral is a United Nations Security Council referral that has the power to refer a situation within the territory of a country that has not ratified the Rome Statute. Therefore, legitimacy is drawn from the members of the UNSC and the legitimacy of their decisions. Traditionally the UNSC is seen as a cornerstone of the international security architecture (Zaum 2013, p. 66) Although much effort has been put into legitimating the Council, literature has identified serious legitimation challenges. The absence of any African or Latin American member has been a point of contention (Zaum 2013, p. 4). In the context of politicization at the ICC, Western dominance would be a disadvantage for the legitimacy of this method. Colonial history of many African countries could lead to the rejection of the decision of major powers in the Security Council. The legitimacy of those decisions would have to rely on the legitimacy of the norms of the Rome Statute. However, decision making in the UNSC is inherently political instead of epistemic.

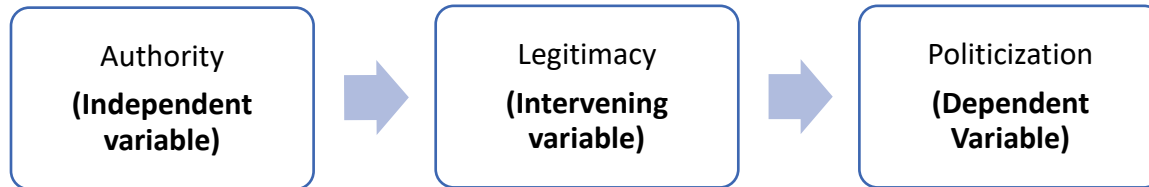
H3: UNSC referrals challenge the authority of states and reflect major power dominance, therefore they lead to high amount of politicization.

In the case of delegation of authority from the Security Council, legitimation would then have to be strongly justified as it would go against the Westphalian notion of consent, non-intervention and equality of states.

Chapter 4: Methodology

Operationalization Strategy

The operationalization follows the theoretical argument that politicization occurs most strongly when an IO exercises political authority but cannot build on sufficient stocks of legitimacy (Zürn et al. 2012, p.96)



Therefore, authority constitutes the independent variable, legitimacy the intervening and politicization the dependent variable.

Independent variable – Authority

Authority can either be epistemic or political. This contribution argues that authority is delegated to the ICC by ratification of the Rome Statute. The way the ICC exercises authority is by initiating a preliminary examination, starting investigations, and then issuing arrest warrants or summonses to appear and delivering a judgment. While state parties formulated the rules how the ICC operates, they delegated the authority to interpretation of legal principles to the judges.

Intervening variable – legitimacy

According to the Rome Statute there are three legitimate ways to initiate an examination. Through state referrals legitimacy is directly delegated through consent by the government. This reflects Westphalian notions of consensus, equality and non-intervention which explains why all referrals were self-referrals. The Rome Statute derives legitimacy from the principle of universal and unbiased application of the norm of impunity for the most heinous crimes on the international level. Therefore, the Rome Statute legitimates the Prosecutor to initiate an examination proprio

motu. A referral of the UNSC gains legitimacy by maintaining international peace and security as stated in the preamble of the UN Charter. Legitimacy is challenged by challenges to decision-making structures and practices, non-compliance of member states with an IO's decision and attempts to limit the existing authority and autonomy of IO's. In contrast to legitimation challenges, there is a set of supporting legitimation practices (Zaum 2013, p. 224). Conversely, rhetorical affirmation and compliance legitimates authority.

Case Selection

The ICC has been selected because it offers a wide variety in degrees of politicization depending on the situation under examination. Some cases face heavy resistance, others see increased utilization. With the withdrawal of multiple state parties, the trajectory of international criminal justice seems uncertain. Therefore, this case study is useful to advance research on variance in politicization and to identify general overarching trends. Thus, the complete history of examinations at the ICC has been chosen during the timeframe 2002 – 2018. In order to focus on answering the research question, extreme cases are discussed in further detail based on the level of measurable compliance and politicization. Since politicization and the absence of politicization are interesting for analysis, cases to focus on are not preselected deductively. Instead, cases to focus on were selected inductively.

Research Method: mixed methods

Having described the theoretical foundations of this contribution, this section outlines the methodology used to conduct empirical research and answer the research question. The chapter covers the case selection and operationalization of measures.

For the analysis of authority, a rational methodology for a qualitative case study is applied (Yin 2009). Based on the assumptions of the literature review, this contribution looks at the various

cases and analyses the decisions that have been made. In order to analyse legitimacy and politicization a constructivist methodology is applied according to Foucault's discourse analysis (Foucault 1972). Legitimacy and international norms are social constructs. In order to analyse social reality, the ontological position of subtle realism is applied: An external reality exists but reality can only be understood through human perception and socially constructed meanings. Additionally, secondary literature is consulted to support collected evidence for politicization. The epistemological approach chosen is a top-down approach according to deductive logic. Drawing from theory we derive hypotheses and apply those hypotheses to observations about the world (Ritchie et al 2003).

Data Collection

Official documents published by the ICC, the Assembly of State Parties (ASP), the UN and the African Union (AU) between 2002 and 2018 provide the framework for analysis for the empirical research. The sources selected include preliminary examination reports, case information sheets, reports by the ICC to the UN, diplomatic statements and official UN and AU documents. Additionally, decisions and declarations by the African Union are analyzed as well as documented statements of state officials during Assembly of State Party (ASP) sessions. The researcher of this paper has spent four months as an intern in the Public Information and Outreach Section of the ICC which sparked the idea for this paper. I'm aware that representing the Court in front of the public, specifically to give presentations to visitors on the work of the Court, may influence results biased towards a positive perception of the Court since work included answering critical questions in line with official ICC public information. However, the aim of this paper is not to make a normative judgment of the ICC's failing or success – the aim is to explain variance in politicization of international organizations depending on the circumstances.

Chapter 5: Empirical Research

How is authority constituted for the ICC? States have delegated jurisdiction for international crimes. Additionally, states may directly refer a case to be investigated. State referrals constitute active consent by the ruling government and therefore cooperation with local authorities doesn't pose a problem to the investigation. State referrals delegate authority and legitimacy. For proprio motu investigations it is different. The ICC is claiming authority over the situation and is either actively delegitimized by governments (Kenya) or opposition (Cote d'Ivoire), depending on which side is investigated. During the second half we see that state referrals remain relatively constant, however proprio motu investigations increase, meaning that the ICC is claiming more authority through cooperation with none state actors, which requires legitimation. In these cases, we can observe increased use by nonstate actors and increased resistance by states.

When looking at the history of situations brought before the ICC it is striking that most of the state referrals occurred during the first years of the ICC (2002-2010). In later stages the ICC increasingly relied on the power of the prosecutor to start an investigation on her own accord with evidence provided by non-state actors and NGOs. The situations that sparked the largest controversies was the situation in Kenya which was the first case the prosecutor started on her own accord, and the situation in Sudan which was referred to the ICC by the UN Security Council. The situation in Kenya was controversial because government officials were investigated. Bring citations of Kenya. The situation in Sudan was especially controversial when the Court issued an arrest warrant against the President Al-Bashir and South Africa did not comply with the fulfilment of that arrest warrant. The difference between the first generation of state-referrals to the ICC and proprio motu investigations and UN referrals is that state-referrals are endorsed by the government

of the situation country, whereas the investigations in Kenya and Sudan were specifically investigating the ruling government. Complementarity principle, decision not to prosecute, immunity of heads of state.

H1: State referrals

The first cases in front of the ICC were state referrals of African countries namely Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR). According to the Rome Statute any signatory of the Rome Statute is allowed to refer any other situation.

However, all those cases were self-referrals. Therefore, delegation of authority and legitimacy comes directly from the state. In this regard, typically investigated rebels against the ruling government such as Joseph Kony's Lord Resistance Army (LRA) in Uganda, Jean-Pierre Bemba's Movement for the Liberation of the Congo (MLC) in CAR, and Thomas Lubanga Dyilo's Union of Congolese Compatriots (UPC) in the Ituri conflict (ICC 2017a). Therefore, it is not surprising that none of those cases were causing much resistance against the ICC. Warring parties in Uganda have used the ICC as a weapon in political struggles, by branding the other side as "enemies of of mankind" which shows the political dimension of the work of the ICC (Nouwen and Werner 2011, p. 961). The belief in the legitimacy of the norms of the Rome Statute, to prevent atrocities and war crimes is strongly voiced. According to politicization theory, when authority is legitimate it should result in more utilization of the ICC.

Consequently, the second generation of state referrals after 2010 came from Mali, the Central African Republic (for a second time) and Gabon. Through efficient cooperation with state authorities the ICC is currently handling the second case in the situation in Mali. For example, the suspect Al Hassan was surrendered to the ICC four days after the arrest warrant was issued in

March 2018. Mali proves to be the one of the most cooperative governments. While there are several suspects in Uganda and the DRC still at large, the Malian authorities have been swift in implementing arrest warrants. The situations CAR II and Gabon have not progressed to the stage of indictments yet. However, it shows that state parties continue to use state referrals, albeit the majority of cases were started as proprio motu cases by 2018. The majority of warrants of arrests, trials and convictions at the ICC are from cases referred to by state parties. During the General Debate of the 15th Session of the Assembly of State Parties (ASP) representatives of governments which have referred cases to the ICC have strongly reiterated their support for the ICC while acknowledging concerns about the situation in Sudan, that will be handled later in this chapter (ASP 2016a). This is in line with research conducted on state rhetoric about the ICC which concludes that there's a high level of loyalty to the ICC and its underlying norms of accountability and impunity (Boehme 2018, p. 439).

Odd cases are the situation in Ukraine, Palestine and Comoros. Ukraine and Palestine were not parties to the Rome Statute when they lodged a declaration under Art. 12(3) to accept jurisdiction of the ICC (ICC 2017b, ICC 2017c). Although these cases are not formally state referrals, states delegate authority by allowing the ICC to have jurisdiction. In Ukraine, crimes potentially committed during the Maidan Protests were examined. However, as the conflict evolved the scope was extended to Eastern Ukraine and Crimea. In Palestine crimes in the context of violence in the West Bank and East Jerusalem are considered. Both Palestine and Ukraine have in common that investigating international crimes are complicated by the fact that government authorities do not fully possess control over the territory where crimes are allegedly committed. Additionally, potential involvement of Russia and Israel may complicate any indictments and collection of evidence. Therefore, the OTP has not been able to collect enough evidence to request

a move into investigation phase. Without cooperation with Israel or Russia, the collection of enough evidence is unlikely. Even if there is enough evidence, it would be difficult to find cooperation partners who would execute an arrest warrant. Therefore, the ICC claims jurisdiction over these two situations but stronger forms of exerting authority such as indicting suspects could not be observed.

To conclude, the evidence presented speaks in favour of H1 that state referrals are drawing their legitimacy directly from states and result therefore in low resistance. States continue to use state referrals on a constant level.

H2: Proprio Motu

According to Article 15 of the Rome Statute, “the Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.” For this purpose any actor may send information regarding alleged international crimes, including victims, witnesses, non-state actors from civil society or non-governmental organizations (NGOs). Additionally, the prosecutor may seek additional information from States, organs of the United Nations and intergovernmental and NGO or “other reliable sources that he or she deems appropriate.” Therefore, proprio motu cases rest heavily on the willingness of non-state actors. Thus, this mode of considering a case relies heavily on the capacity perspective that emphasizes “the diffusion of instrumental knowledge of values akin to the Western model” (Zürn et al. 2014, p. 79). Outreach activities of the ICC are instrumental in order to empower victims and witnesses to organize information in the appropriate manner. Because the Office of the Prosecutor (OTP) has no investigative power in preliminary examination stage, the Prosecutor is heavily reliant on external information.

The first case proprio motu was the situation in Kenya in 2010. This situation deals with the violence after the presidential elections in 2007/2008 (ICC 2016a). Additionally, it was the first time for the ICC to indict government officials. Among major powers the investigation was largely uncontroversial (Bosco 2014, p. 160). In domestic politics, the investigation of the ICC became a highly politicized issue. During the 2013 election campaigns the accused Uhuru Kenyatta and William Ruto made strategic use of the proceedings against them to gather support for their coalition (Malik 2016, p. 48). Although both complied with summonses to appear in front of the judges in the Hague, the case against Ruto was terminated and charges against Kenyatta were withdrawn due to insufficient evidence (ICC 2015; 2016). The prosecutor was unable to prove beyond reasonable that the accused were guilty of the crimes. Literature has argued that contestation moderates the effects of international justice because the politicization of judicial proceedings leads to pro- and anti-compliance domestic groups. Through delaying tactics and other pressures, the trial was delayed until after the elections. In Kenya, the anti-compliance campaign won the election and was therefore able to use their political power to halt or delay proceedings to a great degree (Mueller 2014, p. 25). Nevertheless, the elections in 2013 saw no post-election violence in comparison to 2009. Even though Kenya has not declared to leave the ICC, rhetorical refutation of the ICC's legitimacy and resistance to their authority is displayed strongly during the ASP meeting (ASP 2016a). The delegation of Kenya criticized other state parties for unjustly accusing Africa while neglecting other states who have not signed the Rome Statute. Contrarily, representatives of civil society (Kenyans for Peace with Truth & Justice, KPTJ) criticised the Kenyan government for alleged witness bribery, intimidation and failure to cooperate with the Court (ASP 2016a). It can be argued, that politicization in Kenya is very high.

In contrast, the investigation in Georgia for the Russia-Georgia conflict 2008, that falls into the same timeframe as the Kenya case, has only been started in 2016 and has not yielded any indictments or trials yet (ICC 2017d). Bosco argues that the Prosecutor used his discretion to focus on pursuing the case in Kenya instead of Georgia and cites a prosecution official who acknowledge that the involvement of major powers in Georgia “loomed large” (Bosco 2014, p.174). Politicization in this case remains remarkably low: neither representatives of Georgian authorities nor civil society published an official statement at the General Debate of the Assembly of State Party session in 2016.

Similar to the situation in Kenya, post-election violence happened in Côte d'Ivoire in 2010. Currently, the trial against the former President Laurent Gbagbo and his Minister of Youth Charles Blé Goudé is in progress since 2016. Unlike in Kenya, the incumbent government lost the election and the accused were arrested and surrendered to the Court by the Ivorian authorities under new leadership (ICC 2016b). Therefore, Ivorian authorities voiced strong rhetorical support at the ASP for the ICC (ASP 2016a). Representatives from civil society (Ivorian National Coalition for the ICC) voiced concerns however, that only the losing party of the election was investigated thus far. Interestingly, the examination in Côte d'Ivoire was not referred by the state, however it still yielded cooperation with authorities, potentially because former government officials are investigated instead of incumbent.

Despite the proliferation of proprio motu examinations (13 examinations initiated proprio motu vs. 6 state referrals), there are only the situation in Kenya and Côte d'Ivoire that yielded trials. Notably, 3 proprio motu examinations were dismissed (Venezuela, Honduras, South Korea), and several have been stuck in preliminary examination phase for many years, namely Iraq/UK since (2006), Afghanistan (2007), and Nigeria since 2009 (ICC 2017d). In contrast, no state referral has

been dismissed yet. While non-state actors seem to be able to play a part in initiating an examination, those examinations do not seem very likely to yield indictments without the cooperation with domestic authorities. Without the exercise of authority, theory would suggest that politicization remains low in those cases. During the ASP sessions, there is no evidence found of any major discussions about those cases.

The most recent cases started *proprio motu* are the cases in the Philippines in the context of the “war on drugs” and in Venezuela following demonstrations and political unrest in 2017. Although those cases have only been initiated in 2018, the reaction of the Philippines authority followed promptly. In March 2018 the Philippines handed in a notice of withdrawal from the ICC. The process of withdrawing takes a year to take effect and the jurisdiction of the ICC for crimes committed between the date of ratification of the Rome Statute by the Philippines in 2011 until the time of final withdrawal in 2019 (UN 2018). Withdrawing from the ICC in order to avoid indictment is therefore not possible. However, through non-cooperation the legal process can be seriously obstructed. Before the Philippines there were three other countries that announced their withdrawal. South Africa, Burundi and the Gambia justified their withdrawal because of controversies over the UNSC referral of Sudan and an alleged African bias of the Court (UN 2016a) which are handled in the next section.

In conclusion, it can be stated that *proprio motu* challenges saw increased utilization and involvement of non-state actors is present. There are many dysfunctional examinations that do not lead to indictments or trials. The highest resistance and politicization seem to occur if there is a realistic possibility that government officials might be held accountable and an indictment might be possible. However, this is difficult to measure as the Philippines withdrew immediately before any indictment was published. Kenya did not withdraw from the Rome Statute and cooperated

with the legal proceedings, however the accused managed to avoid conviction. The take-away would be that resistance can come in different forms. Using the example of Georgia, it shows that the Court does have to prioritize cases and considers the influence of major power influence. Despite the fact that the intricacies of a specific situation have to be put in context, when considering all cases, a general trend of higher politicization through resistance as well as increased utilization can be observed in comparison to state referrals. While state referrals are predominantly complementary to national jurisdiction and authority is directly delegated, the result of proprio motu examination shows more variance. State referrals did not lead to indictments of government officials and did not lead to withdrawals from the Court.

H3: UNSC referrals

The third mechanism to refer a situation is a United Nations Security Council referral. Two situations were referred this way: the situation in Darfur, Sudan in 2005 and the situation in Libya after the fall of the Gaddafi regime in 2011 (ICC 2018a, 2018b).

In its resolution the UNSC legitimated the referrals due to “its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations” (UN 2015; 2011). After the indictment of President of Sudan Omar

Al Bashir in 2009, the African Union (AU) questioned the legitimacy of this decision. In their resolution the African Union “criticized the unfortunate consequences that the indictment has had on the delicate peace processes” which have undermined a swift resolution of the conflict in Darfur (African Union 2009, p.1). In total, six arrest warrants were issued, most notably for El Bashir and several of his ministers. El Bashir is the first indictment of genocide in front of the ICC. To this day, the arrest warrant has not been executed.

Therefore, the AU decided that “the AU Member States shall not cooperate [...] for the arrest and surrender of President Omar El Bashir of The Sudan” (African Union 2009, p.2). Additionally, the AU demanded the situation in Sudan to be deferred by the UNSC in accordance with Art. 16 of the Rome Statute. However, the UNSC did not oblige. While this disagreement between the AU and the UNSC remained unresolved, President El Bashir travelled to several state parties for summits of the African Union. According to the Rome Statute, state parties are obliged to cooperate with the Court. In the following years, this has led to five reports of non-cooperation (ICC ASP 2016b). Amongst others, Uganda, Kenya, Djibouti, South Africa, Chad and CAR did not comply with arrest warrants by the ICC between 2012 and 2016. In sum, the controversy around Bashir was dividing the AU (Mills 2012). The latest escalation of this looming conflict occurred in 2016 when South Africa, the Gambia and Burundi decided to hand in their withdrawal from the Rome Statute (UN 2016a; 2016b; 2016c). Furthermore, the African Union adopted the ICC Withdrawal Strategy in calling on African countries to abandon the ICC (African Union 2017). The Gambia has since withdrawn from the ICC after it elected a new President and it is unclear if the withdrawal of South Africa will be constitutional. After Burundi announced its withdrawal, the Prosecutor started an examination *proprio motu*, investigating crimes allegedly committed in the context of violence against the opposition after elections in 2015 (ICC 2017e). At the general debate of the ASP South Africa reiterated its commitment to international justice and the impunity norm but justifying their non-compliance with conflicting obligations between the Rome Statute and “customary international law pertaining to immunity for sitting heads of state and government” (ASP 2016a). Burundi claimed that their domestic legal system is willing and able to take on any cases arising from post-election violence in 2015 and that according to the principle of complementarity the ICC would not have jurisdiction. Additionally, the Prosecutor

was acting on fabricated reports by fugitives that would face charges in Burundi. Even Uganda, a strong supporter of the ICC voiced concerns over the way the first UNSC referral was handled. In conclusion, evidence supports that the delegation of authority by the UNSC was highly contested and has led to enormous resistance against decisions of the Prosecutor and judges of the ICC.

In Libya, 5 arrest warrants were issued against Muammar al-Gaddafi, his son and government officials (ICC 2018b). According to the Rome Statute the accused must be present at trial to ensure a just and fair defence against the accusations, as the accused are innocent until proven guilty (Schabas 2011, p. 304). Since Muammar al-Gaddafi deceased the charges were thus withdrawn. In contrast to the situation in Sudan, the referral has attracted much less politicization, even though the justification stated by the UNSC for the referral were the same (UN 2011). Due to the loss of authority of the former government, the investigation seems to be more legitimate since the ICC has jurisdiction if domestic courts are unwilling or unable to prosecute international crimes. Without domestic cooperation partners to execute arrest warrants, it remains uncertain in which direction the investigation in Libya will head.

Conclusion

In conclusion, the ICC operates in a highly politicized environment. The need to prioritize some cases over others and keeping the prospect of conviction in mind, makes the work of the Prosecutor a highly political authority. Evidence supported the hypothesis that state referrals benefit from state legitimacy and UNSC referrals were highly contested. Proprio motu cases show a wider variation. While some cases entice cooperation, others seem to be stuck. Especially challenging is the prosecution of sitting heads of state and governments, as they exert high political influence. The principle of complementarity seems to be a strong decider for politicization. If cases were complementing the authority of states, appeared more legitimate and were therefore supported. If

investigations were questioning the capability of the government to bring justice, the proceedings were resisted. Even though all state parties rhetorically affirmed the importance of the impunity norms for international crimes such as war crimes, crimes against humanity and genocide, to prevent atrocities, it seems that the interest of the government is more decisive for the outcome of politicization. While this would support a functionalist approach to international relations, the existence of international norms still matters. In the case of ICC investigations different international norms seem to collide. Human rights violations and atrocities cannot be committed with impunity. The immunity of heads of state to ensure a stable government must be maintained in order to preserve peace and order. Westphalian principles such as consent, non-intervention and equality of states and the universal unbiased application of international law matter.

Chapter 6: Conclusion

Looking at the bigger picture, the ICC and international justice seem to be trending towards a reflective stage. While enthusiasm and expectations for the ICC were initially enormous, the disappointment and frustration of some state parties have become even greater. Time will tell if the Court will manage to stabilize and go through a process of adjustment or if the Court will cease to exist. Through the lens of constructivism, the perfect balance between the legitimacy of conflicting norms such as impunity, universality, complementarity, equality, consensus, peace, stability and justice has not been reached yet.

The empirical research has yielded insights in scope conditions how authority leads to politicization. The most remarkable trends identified by this contribution are that the indictment of government officials without consent leads to the highest resistance and that major power involvement and control over coercive power can seriously hinder international justice. The

legitimacy of the UNSC in Africa also appears to be very low. The ICC seems to face the lowest resistance when it is complementing domestic authorities instead of contesting them. In terms of IR theory, that could imply that state authority and the interests of states have stronger influence than constructivist norms – yet. The role of nonstate actors seems to increase exemplified by the amount of examinations initiated proprio motu.

Despite proliferation of international norms, some level of coercive power remains necessary to fulfil arrest warrants. Those in power can seriously obstruct criminal justice. In order to arrest suspects in high positions, it appears that the best course of action would be to wait until regime change occurs. However, delayed justice might be denied justice.

Limitations

Discourse analysis is reliant on the trustworthiness of the actors. While humanitarian norms were accepted and solely the practice of the ICC was criticized, this contribution has not considered that discourse could be strategic. Additionally, the discourse analysis is limited in scope and relying on the support of secondary sources. Politicization is also constituted through public opinion and media agendas, while this contribution has focussed on diplomatic statements by government officials. When identifying general trends, a high level of abstraction and generalization is necessary as well as a focus on certain details of an examination while leaving out others. By considering a large quantity of cases, there are a few outliers that are hard to consistently explain in line with politicization theory. Why does the politicization of the situation in Sudan appear so much stronger than the situation in Libya? Apparently, the identified scope conditions are too limited to answer that question and focus too heavily on the regulatory framework how an examination is initiated while disregarding other possible conditions for politicization. In

hindsight, an analysis led by the power of the accused or the level of democratization in a country could be conceivable scope conditions.

Additionally, certain legitimation practices were not considered such as the role of adding the crime of aggression to the jurisdiction of the ICC at the Kampala Review Conference as an expression of legitimation by states by adding structures to the institution.

Possible avenues for future research

Currently, there is no lack of resistance to multilateralism and international institutions. To further explore variance in politicization of international institutions, the analysis of US withdrawal from UNESCO, resistance to the UN Human Rights Council, the Paris Climate agreement, Brexit, UNHCR, UNESCO or the WTO would lend itself to advance the understanding of politicization.

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