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Assessing the Legitimacy of the International Criminal Court

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Assessing the Legitimacy of the International Criminal Court

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Abstract

The legitimacy of the International Criminal Court is often contested, scholars and practitioners pointing out its ineffectiveness, politicisation and questionable judicial performance. However, attempts to assess the legitimacy of the Court do not provide sufficient resources for a comprehensive and definitive assessment. Such assessment could help shift the discourse from merely questioning the Court's legitimacy to proposing solutions to improve its legitimacy. This thesis explores a wide definition of legitimacy, going beyond the delegation of authority and employing additional criteria including integrity, comparative benefit, and effectiveness, to assess whether the ICC passes the binary legitimacy test and can be rendered legitimate. Both normative and sociological considerations are taken into account. It is argued that the mandate of the Court highlights its unique place in the field of international criminal justice and forms the foundational basis for its legitimacy.

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Introduction

In a recent interview, asked what would happen to the Belarusian president Lukashenko in light of the anti-government protests, Stepan Putilo, founder of the main Belarusian opposition media outlet said, "I believe the most reasonable course of action for him is to run, because it is really unlike him to surrender and be tried in The Hague" (vDudi, 2020). This passing remark reveals something about the symbolism of the International Criminal Court (ICC, or the Court) beyond The Hague. Discussions among close observers of the Court usually revolve around issues such as the fairness of prosecutorial strategies, the quality of judicial decisions, or management deficiencies. Caught in the complex web of proceedings and court records, it is rare for commentators to stop and think back at why there is an ICC in the first place. Yet for Putilo, it seemed natural to place Lukashenko at "The Hague Court", leaving aside the likelihood of this scenario. Why? Probably because the ICC was created for that specific reason Putilo had in mind - to try individuals who committed grave crimes when it is not possible to do so before domestic courts.

When deliberating on the legitimacy of the ICC, scholars denounce that the institution is politicised, responding to power instead of principle (Dannenbaum, 2020; Carcano, 2020), former presidents of the Court's Assembly of States Parties (ASP) say they are disappointed by its judicial performance (Zeid et al, 2019), and states parties believe it lacks adequate prosecutorial strategies (Murdoch, 2018). The authority of the ICC is further questioned in light of allegations of ineffectiveness, failure to properly communicate with local communities, and poor case prioritisation. In fact, as one author puts it, "most legal scholars and political theorists who address the issue believe that the Court is defective from the standpoint of legitimacy" (Buchanan, 2019, p. 323).

In light of the above, it would be useful to have a comprehensive and definitive assessment of the Court's legitimacy, looking at all relevant aspects that would render it legitimate or illegitimate. Should it be deemed legitimate, then it deserves support, and discourse should shift from merely listing deficits to solutions to address those. I will argue here that despite outstanding issues, the ICC has an important and unique mandate, which together with its wide jurisdiction and its symbolic place in the field of international criminal justice, serves as a foundational basis for its legitimacy.

This thesis will first discuss the concept of legitimacy and its relevance. Then, I will consider whether a legitimacy assessment should be a binary exercise, merely indicating whether the institution is legitimate, or scalar, explaining to what extent it is legitimate. Further, it will be discussed whether legitimacy should only be concerned with delegation of authority, or whether other criteria, such as integrity, comparative benefit, and effectiveness, are also relevant. A model assessment will be proposed, and based on it, the legitimacy of the ICC will be considered. The assessment will combine

normative considerations with sociological, examining also how attitudes of the main stakeholders of the Court, including states parties, victims, and civil society, might inform and alter the ICC's objective authority. I will argue that the Court passes the binary legitimacy test and hence deserves the support of those who believe in the importance of its mandate, to be able to bridge its remaining legitimacy deficits.

Chapter I: On legitimacy

1.1 The concept of legitimacy

Broadly speaking, the term “legitimacy” refers to the “justification of authority” based on various factors including legality, rationality, or democracy, where “authority” in turn means “the right to command, or give an ultimate decision” (Bodansky, 1999, p. 601). Justified authority comes in opposition to effective or *de facto* authority, which is the actual capacity to command, or to make and enforce decisions. Whilst effective authority can simply be backed by coercion or threats, legitimate authority is backed by a justified right to command, based on certain norms, rules, or the consent of a concerned public. Legitimacy can refer to entities such as governments, institutions, decisions or procedures. This thesis will mostly consider legitimacy in the realm of international institutions. As such, legitimacy will be regarded as the justified right of an international institution to make and enforce decisions.

Before diving into a discussion on the potential bases of legitimacy and how it can be assessed, it would be useful to briefly consider why legitimacy is relevant, and what it means for an international institution to have or to lack legitimacy. It seems quite intuitive that illegitimate institutions are undesirable and that institutions are always pursuing to achieve more legitimacy, but why does it matter if an institution is legitimate? An entity is deemed legitimate in the hope that a relevant public will accept its authority, and it is criticized for being illegitimate in order to erode its authority (Bodansky, 1999, p. 601). A public’s acceptance of an institution can manifest itself as compliance with the norms promulgated by it and even support for its purpose and activity. Thus, determining that an institution is legitimate means that it is worthy of support and that it is likely, although not necessary, that its decisions will be complied with.

1.2 Normative and sociological legitimacy

Legitimacy can be normative or sociological. Despite being conceptually distinct, the two approaches are closely related, their relationship being described as “conceptually parasitic” (Bodansky, 2012, p. 327). Normative legitimacy, also called objective, denotes whether the claim of authority can be objectively justified. If the claim of authority is based on reasonable and fair grounds, be their nature legal, moral or rational, then the entity is normatively legitimate. Sociological legitimacy, on the other hand, also called descriptive, substantive or subjective, depends on popular perceptions of relevant audiences about the justification of authority (deGuzman, 2009, pp. 1437-1438). For some, sociological accounts of legitimacy are misconceived as they focus too much on the opinions of subjects rather than examining the authority of the institution itself (Simmons, 1999, pp. 749-750). However, if normative legitimacy is objectively justified authority and that authority is tested by

enforcing its decisions on a certain public, then how can the public's attitude be irrelevant? Could an institution have legitimacy if none of its stakeholders acknowledges it? I believe not. Only the reaction of the public will show the existence of that authority in the first place, and although there are rare cases when authority is justified but not publicly accepted, or accepted but not justified, popular opinions about legitimacy are often based on objective reasons.

Normative legitimacy is itself partly informed by popular beliefs, although other criteria such as fairness and rationality are also relevant. For instance, an objective assessment of the authority of the Special Tribunal for Lebanon should be informed among others by perceptions of Lebanese victims, the Lebanese government and other organisations monitoring its work. Perceptions of relevant audiences might also help improve normative legitimacy. In case an institution lacks objective legitimacy due to some unfair procedures, for example, its audiences will likely signal the unfairness of said procedures which might contribute to their amendment, thus helping to enhance the institution's objective legitimacy.

For a comprehensive appraisal of an institution's legitimacy, it would be valuable to go beyond the separate examination of the two approaches. Based on Takemura's suggestion to incorporate procedural legitimacy into sociological resulting in an interactive approach (Takemura, 2012, p. 9), I propose to combine the assessment of objective legitimacy with perceptions of relevant audiences. Namely, I believe reviewing the sociological aspects which inform and alter normative legitimacy will paint a fuller picture on the objective considerations.

1.3 Types of legitimacy assessments

Would it suffice to determine whether an institution is legitimate or not, or would it also be useful to determine the extent to which it can reach or enhance its legitimacy? Assessing the legitimacy of an institution can be a binary exercise, rendering an institution legitimate or illegitimate *tout court*, or scalar, determining the extent to which the institution is legitimate (Buchanan, 2019, p. 330). Scalar assessments are pertinent when comparing which of two institutions that have reached the legitimacy threshold prevails in legitimacy, understanding whether an institution, despite having reached the legitimacy threshold, is working towards rectifying some of its remaining deficiencies, and determining whether an institution that has not reached the threshold is going in that direction (p. 331). I believe that comprehensively assessing the legitimacy of an institution should start by understanding whether an institution has passed the binary threshold, since this would reveal whether said institution is worthy of support. This should be followed by a scalar assessment, to examine the extent to which the institution is either moving towards the threshold of legitimacy or is exceeding it. Such assessment would reveal not only whether the institution's authority is justified or not, but also what it should do to become legitimate or to improve its legitimacy.

1.4 Bases of legitimacy

The debate on legitimacy originated in domestic politics. As states have entered into treaties and formed international institutions, they have transferred some of their authority, albeit usually a small part of it, to the newly created entity. In turn, as international institutions such as the UN Security Council (UNSC) or the European Union gain more authority and depart from the narrow consent given by states, the question about their own legitimacy arises. The traditional view is that state consent is necessary and sufficient for international legitimacy, states playing the same role in the international sphere as citizens do in the domestic one. In fact, as treaties are the main source of international law and as they come into force based on the explicit agreement of states, it could be argued that the legitimacy of international institutions is predominantly based on state consent.

There are however various difficulties with this account. For one, the legitimacy of states on their own is problematic, generally because no state has the appropriate tools to acquire the consent of all of their citizens (Buchanan, 2002, p. 700), and more specifically because some states do not respect the rights of their citizens (Buchanan and Keohane, 2006, p. 413). Moreover, since their own legitimacy is called into question, why should states be allowed to transfer legitimacy to other institutions? Further issues calling into question the traditional account are the existence of peremptory norms, which are norms that enjoy legitimacy despite not relying on explicit state consent, and the fact that state consent can be an obstacle to the protection of important rights in international law and are not always an adequate mechanism in advancing much needed international norms, such as in the fields of environmental law or disarmament.

Based on the above, it transpires that state consent is not sufficient for international legitimacy, but is it necessary? In theory, accounts of political legitimacy are proposed that do not rely on consent. For instance, Buchanan suggests that legitimacy can be based on the "moral obligation to help ensure that all persons have access to institutions that protect their basic human rights" rather than consent (Buchanan, 2002, p. 703). Given the difficulties posed by the traditional account, it would be worth exploring alternative bases of international legitimacy and see how they can be applied in practice. In the current international framework however, I believe state consent indeed holds a monopoly in making and enforcing international norms and it is difficult if not impossible to imagine intergovernmental international institutions, which customarily rely on cooperation of their member states, to exist and operate without some form of consent from states. Hence, for the purpose of this thesis, it will be assumed that state consent is the first necessary layer on which other legitimacy criteria must be added.

Some alternatives to state consent are consent of democratic states and global democracy, but the two are not without difficulties themselves. In the case of the former, it has been argued that the

participation of even democratic states is not always voluntary since absence from some institutions like the WTO will be in their serious detriment, and that the representation of the popular will from citizens to governments and then to international institutions becomes rather attenuated (Buchanan and Keohane, 2006, p. 414). Moreover, institutions such as international tribunals, created for the purpose of countering some violations, would be futile if only states which uphold norms and respect rights would join. If states where the violations take place would not lend some of their sovereignty to international courts, the courts would have no authority to counter or respond to the violations. As for global democracy, there is neither a global demos, nor is there an agreed upon form of deliberation or expressing popular will for a global democracy to be possible (p. 416). What is more, none of the alternative accounts present an inclusive set of factors which would allow for an all-encompassing assessment of an institution's legitimacy, not only explaining the delegation of authority but also looking at some of the intrinsic features of the institution which could convey legitimacy on their own. An inclusive assessment will give more context on an institution's legitimacy, especially given the above-mentioned problems with state consent.

One attempt at such set of factors is the "complex standard of legitimacy" (the *Complex Standard*) by Buchanan and Keohane. They propose five criteria to assess the normative legitimacy of an institution, namely: (1) *acceptable origination*: that there has not been major injustice in creating the institution; (2) *comparative benefit*: that it is better to have the institution as opposed to the non-institutional status quo; (3) *non-discrimination*: that the institution's main procedures do not engage in systematic unfairness against certain individuals or groups; (4) *minimal moral acceptability*: that the institution does not violate basic norms and rights; and (5) *institutional integrity*: that the institution's activity is consistent with significant procedures, policies and goals (Buchanan, 2019, p. 327). The *Complex Standard* is also imperfect for an "all-things-considered assessment", mainly because it does not guide how to weigh the different proposed criteria for a definitive assessment (Buchanan, 2019, p. 330). It also fails to incorporate a consideration of the effectiveness of the institution, which is an important factor for the relevant public of the institution and is closely connected to the relative benefit of the institution in its field.

Despite these limitations however, the *Complex Standard* provides a more particularized account for reviewing the legitimacy of an institution than others, looking not only at how the delegation of authority took place, such as the accounts of state consent or consent of democratic states, but also assessing some important aspects of the institution itself – whether it brings added value to its field, whether it has integrity etc. As international institutions have different mandates and operational frameworks, it seems unfeasible to propose a weighing mechanism for these criteria that could have general applicability. It would nevertheless be useful to address the proposed criteria individually, to

see by what standards they should be assessed and to determine which might be more relevant for what type of assessment, which can add to the discussion on ICC legitimacy and the legitimacy of international institutions in general.

1.5 Criteria for assessing legitimacy

Starting with *acceptable origination*, in assessing whether an institution fulfils this criterion, one has to determine that the processes by which it was established did not involve a major injustice, which may refer to a violent dissolution or disintegration of another institution or to a constituting treaty that violates international law (Buchanan, 2019, p. 328). Looking at the way the institution was delegated authority is relevant because if the delegation poses some problems, the institution's authority is also disputable. It should be mentioned that this criterion differs in its application to old institutions versus new ones. As remarked by Buchanan, disputable origination might be very damaging for a new institution but might not matter for an old one (Buchanan, 2019, p. 328). An old institution might have proven its legitimacy through alternative means thus making up for its controversial origination. As such, I believe that for a new institution, acceptable origination must be taken into account to determine whether the institution can pass the binary threshold for legitimacy, whilst for an old one it might inform a scalar assessment or might be irrelevant.

Moving on to *comparative benefit*, this criterion pertains to the relative benefits which an institution can bring to the non-institutional status quo (Buchanan, 2019, p. 327). In other words, it informs whether having the institution would be better than not having it. I believe that if an institution possesses some unique features which are irreplaceable by other institutions, this is arguably essential for a positive binary assessment, having significant weight in rendering the institution legitimate. If the standard is however lower than this, such as an institution bringing added value to a specific field but not being the only entity which can bring that value, then comparative benefit could inform a scalar assessment. It is relevant to consider why the standard of comparative benefit is chosen over the more demanding standards of sufficiently or even maximally good. International institutions often have complex mandates, the implementation of which depends on a series of factors, including most prominently the cooperation of states. While the aim of achieving maximally good results is customarily enshrined in the preambles of foundational documents, in practice the more realistic goal is to bring added value to a certain field. Setting high expectations that might be unfeasible to meet may result in disillusionment in international institutions, and thus less support for their activity.

The criteria of *non-discrimination* and *moral acceptability* can be examined together. If one thinks of the right not to be discriminated against as a basic human right, and moral acceptability is compliance with basic norms and rights, then non-discrimination can be examined in conjunction with moral

acceptability. As these criteria entail non violation of basic rights, how can a negative test be applied to verify it on a certain institution? A starting point could be to look at the founding documents and main policies of the institution, to examine whether they incorporate any violations. Another way would be to address allegations of certain violations. There are different levels in which an institution can fail to meet these criteria. The first, which can be called foundational, is if a basic right violation is built in the institution's procedures, thus leading to systematic injustice. The systematic violation of basic rights should inform a negative binary assessment, rendering the institution illegitimate. The second level is if the violation was an isolated event. Such violation is also damaging to the institution's legitimacy. What is to be examined at that point is whether the institution possesses intrinsic features to adequately deal with the violation. Those features can be a system of checks and balances or a provision built in the procedures of the institution that would help identify, sanction and prevent such violation for the future.

A similar assessment is pertinent for the final criterion of *institutional integrity*, for which it has to be determined that the institution is in line with its declared goal and adopted policies. If the institution persists in acting in ways contrary to its policies and purpose, this will very likely inform a negative binary assessment, rendering the institution illegitimate. If, however, the institution engages in an isolated act which is inconsistent with its goal and procedures, then it has to be examined whether such act can be successfully rectified with the institution's own resources.

It was mentioned above that this set of criteria might not be all inclusive. One important missing aspect is *effectiveness*. How does the effectiveness of an entity enhance or undermine its justified authority? The link between the two is usually described as a "virtuous circle: the more effective a political order or institution is, the more legitimate it is, and the more legitimate it is, the more effective it becomes" (Schmelzle, 2011, p. 5). An ineffective institution will hardly be supported by its constituency, nor will the constituency have strong incentive to comply with its decisions. This criterion is closely related to comparative benefit as if an entity struggles with ineffectiveness, that will also affect the value it brings to a certain field. For a more comprehensive assessment of an institution's legitimacy, effectiveness should also be considered.

So far, we have seen that legitimacy is understood as justified authority and that the determination of legitimacy is important for an institution as it prompts the support of its stakeholders and encourages compliance with its decisions. It was also discussed that a comprehensive legitimacy assessment must on one hand combine the normative approach with the sociological and look at the way the two interact, and on the other, start from a binary assessment, and continue with a scalar one. Finally, it was mentioned that albeit having some limitations, the *Complex Standard* is the more

suitable account to capture the complex nature of international institutions and to inclusively assess their legitimacy.

Chapter II: On the legitimacy of the ICC

Legitimacy is a buzzword when it comes to the ICC. Legitimacy deficits of the Court are discussed in academic circles, governmental and non-governmental spheres alike, the issues raised the most including unfair selectivity in prosecution, political influence on the Court, and ineffectiveness. Some observers have even gone so far as to say that the ICC is an illegitimate institution. The way the Court is assessed in public discourse significantly affects its functioning. Not only it has to respond to attacks to its legitimacy, but also loses credibility in front of its stakeholders, which have a crucial role in its operation. Therefore, it would be important to reframe discussions, shifting from merely pointing out the Court's legitimacy deficits to focusing on constructive criticism on how to make it fulfil its mandate.

In order to provide constructive criticism however, one should know whether the Court deserves support at all. In case the ICC is illegitimate, it should be decided whether it can reach legitimacy. If it cannot, criticism might be futile. Otherwise, it would be useful to discuss how it can achieve legitimacy in the first place. In case the Court is legitimate, constructive criticism would be useful to guide it towards bridging the outstanding legitimacy deficits. For the remainder of this thesis, I will assess whether the ICC passes the binary test and is a legitimate institution.

2.1 Background

I will start by briefly highlighting why there was a need to establish an international criminal court and how the Court works, as these aspects might prove useful for the later discussion on the normative criteria for legitimacy.

2.1.1 *Need for a permanent international criminal court*

The idea to establish a permanent international tribunal which would prosecute individuals for grave crimes emerged even earlier than the Nuremberg trials, in the context of the 1912-1913 Balkan Wars and the First World War (Triffterer, 2008, p. 16). When the Nuremberg and the Tokyo tribunals, which dealt with atrocities committed during the Second World War, finalised their trials in 1946, it was clear that a concerted effort was needed to establish a permanent institution which could investigate similar crimes. In the 1990s, the conflicts in the former Yugoslavia and Rwanda resulted in the creation of specialised *ad hoc* tribunals given a mandate to respond to those specific events. Establishing them was a difficult exercise, not only because it depended on the political will of the international community at the time, but also because they required enormous resources. Their set-

up served as a final impetus to establish a permanent court with a broader mandate. The hope was that the ICC would serve as a central entity in efforts for international criminal justice, would bring more efficiency to the prosecution of grave crimes, and would be able to act promptly to emerging conflicts, without a special mandate from the UNSC.

2.1.2 Court framework

The ICC can be seen as a hybrid between a criminal court and an international institution, each side contributing with specific features to making the Court an institution with a complex but solid framework. This duality can give rise to contradictions which can lead to tension, but whilst the “dual nature of the ICC cannot be changed, employing this distinction can improve the clarity of reporting lines and improve cooperation” (Independent Expert Review of the ICC and the Rome Statute System, Final Report, 2020, p. 12).

As a criminal court, or more broadly as a judicial entity, the ICC must have judicial independence, must apply and interpret relevant law. The judicial side of the Court is comprised of the Registry, the Judicial Division with its 18 judges, the Presidency, tasked with overseeing the work of the Registry and the Judicial Division, and the Office of the Prosecutor (OTP), in charge of investigations and prosecutions. These different organs having separate functions can check and challenge each other’s work. For instance, if the OTP has presented a poor case in front of the judges, this will very likely be reflected in their decisions. Vice versa, if the judges take a questionable decision, it can be appealed by the prosecution. Such set up that allows for mutual checking can help prevent misuse or abuse of power and generally ensure that each organ’s responsibilities and authorities are well complied with.

As an international institution, the Court’s constituency are states parties that have acceded to the Rome Statute and gather regularly in the ASP, which oversees the management of the Court. In particular, the ASP is tasked with electing judges, the chief and deputy prosecutors and deciding on various issues including budget and contributions. The ASP has the opportunity to keep watch on the activity of the various organs of the Court and address any issues that might arise.

Another actor which adds to the continuous review of the Court’s activity is civil society, which has played an important role in assuring the ICC is a progressive and well-functioning body since its very beginning. In fact, the ICC is a unique institution in that it managed to coalesce the many NGOs monitoring its activity into a Coalition for the ICC. Through its continued engagement with the Court, the Coalition has developed a robust relationship with the various organs of the Court and its state membership, facilitating regular meetings between those and various concerned NGOs. Civil society closely monitors the work of the Court and engages with it on different themes, pushing for judicial developments, better governance and more legitimacy.

The brief background of the Court revealed that the various attempts at tribunals pursuing accountability after the Second World War and the 1990s conflicts culminated in the establishment of the ICC as a central entity in international criminal justice. Also, we have seen that besides the internal composition of the Court which allows for a system of checks and balances, there is also the ASP and civil society that continuously monitor the Court's work to ensure that it is in line with its mandate and to prevent potential violations.

2.2 ICC legitimacy assessment

In what follows, I will examine the legitimacy of the ICC based on the *Complex Standard* criteria, thus assessing the Court's normative legitimacy. I will also include a discussion on effectiveness, which is relevant for a more complete view on the legitimacy of an institution. In discussing the normative criteria, I will incorporate sociological considerations where relevant, looking at how the perception of concerned stakeholders, including states parties, affected communities and civil society, might have informed or influenced the objective legitimacy of the ICC. The sociological aspect is especially relevant for the ICC, as its activity is highly dependent on good cooperation with stakeholders. For instance, states take critical decisions on its behalf, such as deciding about its budget or agreeing to cooperate in investigations. If they believe the ICC lacks legitimacy, they will be less inclined to support it, which might result in the Court bringing less value to the field of international justice and thus damage at least one of the *Complex Standard* criteria, comparative benefit. Similarly, the way victims and affected communities perceive the Court is also crucial as if they think of the ICC as illegitimate, they might be less inclined to participate in trials as witnesses. This will in turn limit the access of the OTP to evidence and data to build a case, which will cumber the prosecution of cases and thus undermine the Court's comparative benefit and effectiveness.

2.2.1 On acceptable origination

In assessing whether the ICC has acceptable origination, it has to be determined that it was delegated authority and established in a just manner. The ICC was the first international criminal tribunal established by treaty. On 17 July 1998, after a six-week conference in Rome, the Rome Statute was adopted with 120 countries voting in favour, 21 abstaining and seven opposing (Scharf, 1998). At the conference, there was intense negotiation over the draft text among the 148 state delegations present, with the active participation of 450 representatives from 200 NGOs (Washburn, 1999, p. 367). Overall, the conference began as "traditional treaty making" but evolved into a "different kind of multilateral legislation by parliamentary diplomacy", showing that the international community can successfully negotiate extremely complicated international legal instruments (pp. 362, 375).

This process differed from the establishment of the *ad hoc* tribunals, which came to existence by UNSC resolutions. Although they were UN members and could participate in the process of establishing the tribunals, neither Rwanda, nor the former Yugoslav countries agreed to delegate authority to the tribunals, which later issued binding decisions that directly affected those states and their citizens, who in turn had to cooperate with institutions which they not necessarily accepted or thought positively of. This was especially difficult in the case of the tribunal for the former Yugoslavia, as the level of support for and confidence in the court was very low in some concerned countries (Ivković & Hagan, 2016). It cannot be argued that the establishment of the *ad hoc* tribunals was illegitimate because as Rwanda and the former Yugoslav countries were UN members, their membership warranted the UNSC to take decisions for the maintenance of international peace and security, which in this case had a direct impact on them. Nonetheless, the delegation of authority from the citizens of those states to their governments, of those governments to the UN, and finally of the UN to the tribunals, was much less straightforward than in the case of an institution set by treaty.

An international court set up by treaty, which was the case of the ICC, involved or at least sought the wide involvement of concerned states in treaty negotiation, hence giving them an opportunity to express their opinion on matters of jurisdiction, sanctions, management and budget. When the treaty was finalised, they decided whether the final version is one they would like to adhere to. The intense negotiating process of the Rome Statute exemplifies that interested states, which later became parties to the Statute, had ample opportunity to express their views on important matters for the functioning of the court.

In chapter I, it was mentioned that although state consent is not sufficient for the legitimacy of an international institution, it is nevertheless a necessary first layer on which other considerations of legitimacy can be added. Explicit state consent, such as that provided in treaty adoption, is preferable to and less contentious than delegation of authority through UNSC resolutions. That is because treaties are “validated through express consent of contracting states, [and] the respective obligations are self-imposed and more likely to be complied with” (Vasiliev, 2015, p. 20). In the case of UNSC resolutions, as the delegation of authority from citizens and their state to the respective institution might be perceived as too far stretched, this might result in questioning the legitimacy of the institution altogether. In the case of the ICC, the well-functioning of which relies heavily on its cooperation with states, establishment by treaty was more pertinent and contributed to its origination to be viewed as legitimate. This is a first example of how normative and sociological considerations on ICC legitimacy are intertwined. The fact that the ICC was created by treaty and states were given the opportunity to actively participate in its negotiation, contributed to them

having a positive view on its authority and thus accepting it, which in turn led to the ICC having a wide jurisdiction, a budget, and other support from states to be able to carry out its mandate.

The Court's legitimate creation can be challenged on two grounds. Firstly, it can be argued that the ICC and international institutions in general lack democratic legitimacy, mainly because there is no direct electorate at the international level and legitimate political authority can only be exercised through explicit consent of an electorate. In response to this, it should be mentioned that the decision of a government to join an international institution is similar to any decision made on behalf of citizens without their express consent, such as adopting or amending domestic laws. As there are issues that cannot be solved at state level, or that can be better solved by collaboration with other states in an international forum, governments can represent their citizens in international institutions.

It might also be said that the ICC lacks democratic legitimacy because its decisions might have an effect on nationals of non-parties, and this is problematic because neither those nationals, nor their governments have consented to the Court's authority. This objection can be countered with the idea that the right to freedom from grave crimes trumps the right to democratic governance. Individuals would normally be prosecuted by institutions other than the state only with its express consent. Nonetheless, in cases of allegations that such individuals have committed a grave crime against the citizens of another state and the state of the perpetrator has not tried him/her for the alleged crime, the state's consent is overruled because it has violated a peremptory norm by not prosecuting its citizen for a grave crime. The right not to be prosecuted by an entity different than one's own state is disregarded only because that individual has committed an even graver violation, deemed in international law as a violation from which there is no derogation.

Secondly, it can be claimed that while there was wide treaty negotiation for drafting the Rome Statute, key players, namely the US, Russia and China, did not ratify it, and that their absence from the ICC system undermines the legitimacy of the Court's creation. As these three states are part of the UNSC, which is one of the main actors referring situations to the Court, poor cooperation between the Court and the Council might undermine the work of the Court. Furthermore, as these states are influential on the international arena and as the Court relies on state cooperation for full implementation of its mandate, their interests might clash in the detriment of the Court. In response to this criticism, it should be mentioned that the ICC has engaged with states parties and non-parties alike over the years, including the US, Russia and China, as they participate as observers at ASP sessions. In fact, all three states have actively taken part in negotiations at the Rome Conference. Both Russia and the US have signed the Rome Statute, the former later withdrawing its signature and the latter never ratifying it. At the 2017 ASP session, the US acknowledged the Court's legitimacy

implicitly by mentioning the special role it plays in delivering justice to victims of gravest crimes (Wheeler, 2018). Thus, influential states which are not parties to the Statute are not in fact absent from discussions on the Court's functioning but engaged in a different way. In more general terms, what should count for the legitimacy of an institution is it giving an equal opportunity of participation to states that are interested to become members, and not their actual participation.

It can be concluded for this first criterion that having had the opportunity to participate in the negotiation of the Statute, states had more incentive to join the ICC, and lend it some of their authority. Establishment by treaty was more advisable for the ICC, especially as it relies on states parties to a great extent in order to fulfil its mandate. Having been delegated authority according to a legitimate process, the ICC has a positive score on acceptable origination. This conclusion stands with the caveat that being established through state consent is not sufficient for the overall legitimacy of an institution and is hence a first layer on top of which other legitimacy aspects must be added.

2.2.2 *On comparative benefit*

In chapter I, I argued that if an entity possesses some features which are irreplaceable by other institutions in its field, this is essential for a positive binary assessment. The ICC indeed possesses some features which grant it a special place in the field of international criminal justice and make it irreplaceable by other domestic or regional mechanisms. These features include its important and unique mandate, wide jurisdiction, symbolism, deterrent effect, and the status it grants to victims.

Important and unique mandate: The ICC is the only entity which can prosecute individuals, regardless of their position in a state, for grave crimes, when states are unable or unwilling to do so. As argued in a report by the International Federation for Human Rights (FIDH) and the Kenya Human Rights Commission (KHRC), because of the current political climate, "it is impossible to imagine an institution like the ICC being established today" (FIDH & KHRC, 2020). The mere existence of the Court is a powerful statement from the international community against the commission of egregious crimes and against impunity for them. As there are victims for which the ICC is the only place where they can seek accountability, it could be argued that even a flawed, less effective ICC would be better than no ICC at all.

Wide territorial and personal jurisdiction: States parties, currently 124, give rise to the ICC's wide jurisdiction. Unlike the *ad hoc* tribunals, which were created to respond to specific events in the past and had very limited territorial jurisdiction, the ICC can prosecute crimes committed on the territories of, or by nationals of member states, and states which voluntarily agree to its jurisdiction (Kirsch, 2007, p. 543). Thus, the Court can respond to a significantly higher number of crimes than any other

existing criminal court, not only retroactively, but also to crimes which take place presently. Moreover, the Court can rely on its cooperation with states but also work with them to develop and enhance national capacity to prosecute grave crimes.

Symbolism and deterrence: The permanence of the ICC highlights its benefit in two areas: it serves as a potential deterrent for grave crimes; and it serves as a symbol in international criminal justice, as any judicial successes can be trickled down and replicated nationally. For instance, the recognition of forced contraception as a crime by the Court can later be referenced by national prosecutors who can use it as a precedent in domestic courts since for many states the Statute has direct legal effect. Currently, 71 parties to the ICC have adopted domestic legislation that give effect to the Statute obligations in their national legal order (Parliamentarians for Global Action, 2020).

Victim participation: The ICC is the first international court to grant a special status to victims in the sense that they can participate in proceedings not only when called as witnesses but also through groups represented by counsel, separate from the OTP. This feature was incorporated to enhance the application of the rights of justice and truth victims have under human rights law, to assist the Court in contributing to the reconciliation of an affected community, and to facilitate some therapeutic effect by helping victims to come to terms with the crimes committed against them. The right of participation for victims of the ICC system is considered among the highest standards in international law, feature which was later incorporated in the statutes of other courts such as the Special Tribunal for Lebanon, and which cannot be replicated in some regional courts. The Court also has advanced procedures in the areas of witness security and outreach to local communities.

Stakeholders' perceptions are also valuable in terms of comparative benefit. Believing in the importance of the ICC mandate, civil society has engaged with the court on various themes and has served as a bridge between the court and states, but also between the court and affected communities. Over the years, NGOs monitoring the ICC have helped increase the Court's relative benefit in the field of international criminal justice. For instance, the Women's Initiatives for Gender Justice has advocated for the inclusion of progressive provisions on sexual and gender-based crimes in the Rome Statute and continues to monitor the development of jurisprudence on those crimes, but also that the Court integrates a gender perspective into its institutional affairs. Parliamentarians for Global Action works to mainstream the ratification of the Rome Statute across many legislatures of member states. These and other initiatives have helped not only advance the jurisprudence of the ICC itself, but also foster the progressive provisions of the Statute and the jurisprudence of the Court nationally, which in turn led to general better accountability for grave crimes.

The Court's comparative benefit can also be challenged on two grounds. The first would be to claim that despite the Court having comprehensive territorial jurisdiction, there are over fifteen states

which have claimed universal jurisdiction and have investigated and successfully tried individuals based on that principle. Thus, the Court's resources can be put to better use in advancing more universal jurisdiction trials by transferring these resources to other state institutions. In response to this, it must be first mentioned that the development of the principle of universal jurisdiction in some domestic courts is much indebted to discussions on the prosecution of international crimes around the adoption and implementation of the Rome Statute. Furthermore, state courts can be biased in prosecuting foreigners. The Court stands as an autonomous actor in prosecuting individuals of all nationalities similarly, especially as its impartiality is enshrined in the Statute and as any partiality might be promptly sanctioned by states, or by civil society.

The second ground would be to argue that the Court's relationship with states can serve as an impediment as it might become too reliant on their cooperation in investigations and arrest warrants implementation, thus losing its ability to function independently. To reply to this criticism, while some states might choose to be less cooperative with the Court, were it not for this relationship, the ICC would be unable to investigate grave crimes in so many jurisdictions, thus on balance there is comparative benefit.

It can be concluded for this criterion that the ICC scores significantly high in terms of comparative benefit. Its distinct mandate, backed by a wide jurisdiction, the symbolism the institution brings to the field of international justice and the special status granted to victims, carry significant weight for the overall legitimacy of the Court.

2.2.3 On non-discrimination and moral acceptability

The criteria of non-discrimination and moral acceptability will be evaluated together as they both relate to the violation of some basic norms and rights. To start with, the Rome Statute is one of the most progressive conventions in international law, affirming the responsibility of the international community to take measures in cases of grave crimes, but also recognising the special victimisation of certain groups who have been disproportionately affected by conflict. Provisions on non-discrimination and respect for international law and human rights are engraved in the Court's statute and principal policies. The Rome Statute reaffirms and encourages respect for cultural contexts, calls for the Court to apply and respect international law, international human rights, and not to discriminate "on grounds such as gender [...], age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status" (Rome Statute, Preamble and Article 21).

It is relevant to consider whether due to the distinctive nature of courts – as authoritative in matters of the law – these institutions must be held to higher standards than other entities? In other words, is

the violation of certain rights by a judicial entity graver than by others simply because it is tasked with the interpretation of the law? Although in principle all must be equal before the law and its violation must lead to the same sentence for all, there is a symbolic elevated responsibility for judicial actors. That is because when laws are violated, we turn to judicial actors to deliberate and give a verdict on the wrongdoing. When judicial actors themselves violate the law, it may appear as even those who are meant to uphold the law are not doing so and there is no higher authority to turn to for justice. Thus, there is a certain symbolism underpinning a heightened responsibility to uphold the law for the ICC, engraved even in its foundational statute, which says that states parties are “resolved to guarantee lasting respect for and the enforcement of international justice”, and that ICC high officials, including the judges, prosecutor and registrar must be “persons of high moral character, impartiality and integrity” (Rome Statute, Preamble and Articles 36, 42 and 43).

In its first years of work the ICC has been blamed of bias. The OTP case selection was met with criticism from some African states that believing that prosecutions were disproportionately focused on African leaders, threatened to withdraw (Jacinto, 2012). Ten of the ICC’s first eleven investigations did in fact concern African countries. This perception of bias does not take into account however the particularities of the situations. Of the ten situations mentioned, five were self-referrals meaning that states have themselves asked for an investigation, two were referrals by the UNSC, one was an acceptance of the Court’s jurisdiction, and in only two remaining cases the ICC Prosecutor has actually exercised the *motu proprio* (own initiative) right to start an investigation (Hart, 2018). Alternatively, it could also be argued that there was in fact bias against victims of other nationalities besides those from African states, as it was the interests of African victims that the Court tried to protect seeking the prosecution of the perpetrators who committed the atrocities, while the interests of victims of other nationalities were possibly neglected. To clarify its prosecutorial strategies and to avoid perceptions of bias, the OTP has since issued a *Policy paper on case selection and prioritisation*, advising that the general principles of independence, impartiality and objectivity be strictly followed in processes of case selection (ICC OTP, 2016). Preliminary examinations are also ongoing in Colombia, Iraq/UK, Palestine, The Philippines, Ukraine, Venezuela and Bolivia, and situations under investigations also include Georgia, Bangladesh/Myanmar and Afghanistan. This shows that the Court is willing to adapt and improve its procedures to be more in line with its declared purpose and principles.

It was discussed in chapter I that the criteria of non-discrimination and moral acceptability can be violated on two levels: on a foundational level, instilling violation of basic rights in the founding documents of the institution, and on an individual basis, involving particular violations. We have seen that respect for basic rights is firmly asserted in the Court’s documents, thus rejecting violations on

the foundation level, which could have rendered the Court illegitimate. We have also seen that in cases of alleged violations, the Court has worked towards rectifying those. It is useful to reaffirm at this point that the Court's framework makes up for a good separation of powers, allowing for checks and balances in cases of violations.

2.2.4 *On institutional integrity*

To determine that an institution has integrity, it has to be verified that its actions are not inconsistent with main policies and goals. Similar to the just mentioned criteria, if the inconsistent actions occur regularly, then the institution can be deemed illegitimate. If the inconsistency is an isolated event, it remains to be seen whether the institution has the capacity to rectify and prevent such events for the future.

An example of an issue with the Court's integrity is the recent decision on opening an investigation in Afghanistan. On 12 April 2019, Pre-Trial Chamber II of the ICC issued a decision in which it turned down the Prosecutor's request to open an investigation in Afghanistan, arguing that such investigation would not serve the interests of justice (Carcano, 2020, p. 11). This decision came after the US has imposed a visa ban on the ICC Prosecutor and threatened the Court and its states parties to apply more measures should an investigation concern any US military personnel. The Pre-Trial Chamber argued that a potential investigation would be doomed to fail. While it is true that the investigation would face numerous challenges including a complicated political and security environment, the judges should not base their decisions on chances of success or the resources needed to fulfil such investigation, and even less on political pressure coming from certain states. They should instead be concerned with the lack of accountability avenues for Afghan victims.

Another example is the lawsuit initiated by judges for higher pay. In early 2019, some ICC judges have sued the Court before the International Labour Organisation tribunal asking for a raise of 26 percent plus compensation due to not having received a salary increase since 2004 (Simons, 2019). This issue stroke sensitive chords for the integrity of the Court as while it is struggling with insufficiency of resources for outreach to local communities and for investigations for years, the judges, who enjoy tax free six-figure salaries and diplomatic perks, have decided to sue it for a pay increase.

It was discussed in chapter I that issues of institutional integrity are not so grave as to inform a negative binary assessment and render an institution illegitimate in case there is a solid institutional framework to rectify said inconsistencies. I believe there is such a framework in the case of the ICC. When the decision of the Pre-Trial Chamber was issued in April 2019, it was instantly met with criticism from the other components of the Court including states parties and the OTP, but also from civil society. The Prosecutor appealed the decision and with support from civil society – by means of

amicus curiae briefs – on 5 March 2020, the Appeals Chamber of the Court unanimously approved the opening of the investigation. In the case of the judges' lawsuit, it was met with criticism from the ASP and civil society, and it was addressed in a recent report by an Independent Expert Review (IER), with recommendations to be implemented by the ASP.

In fact, the IER that was proposed by civil society and mandated by the ASP, addressed this and other issues of the Court, related among others to integrity and effectiveness. Its report highlighted a series of problems including an unhealthy working culture, issues with case prioritisation and length of proceedings. The 380 recommendations of the experts stand ready to be implemented. This shows again that perceptions of stakeholders such as states parties and civil society have salience and can influence the Court's objective legitimacy. In terms of integrity, besides the recent review, civil society groups have also advocated for fair and less politicised elections of judges and the prosecutor and have over the years engaged with the Court extensively on issues of fair trial and rights of the accused. Thus, it can be concluded that while some instances do point out to the need for a more rights-based approach, it seems the Court's framework is capable to address them effectively.

2.2.5 On effectiveness

Measuring an institution's effectiveness implies determining whether it has accomplished its goals. The goals of the ICC – to hold perpetrators accountable for grave crimes, prevent such crimes for the future, and thus contribute to the global fight to end impunity – are quite broad, long term, and dependent on the financial and political support of states parties. It is for states to assess whether the results of the Court in terms of convictions, judicial developments, investigations etc. coincide with their expectations and are proportional to their aggregate contributions. The common view among states is that "the Rome project still falls short of the expectations of the participants at the groundbreaking conference in Rome" (Meron & Gardner, 2018, p. 155).

Other constituencies also believe there are several shortfalls in terms of effectiveness. It was recently highlighted in a consultation with victims that improvements are needed to overcome the lack of effective communication with and outreach to affected communities, the overly complex and bureaucratic procedures that undermine the meaningful engagement of victims, and the length of preliminary examinations, investigations and proceedings (FIDH & KHRC, 2020).

Despite the above-mentioned challenges, the Court has made significant progress in the field of criminal justice in less than 20 years of work. So far, the ICC has opened investigations in ten situation countries, indicted 44 people, issued 36 arrest warrants, issued verdicts against six individuals out of whom two are serving sentences and four have finished sentences, and has 22 ongoing proceedings (ICC, 2020). It should be mentioned that thousands of victims are currently involved in reparations

proceedings, which despite being long and cumbersome, allow them to be actively engaged in a procedure of accountability. For many victims, accountability is currently taking place at home, simply because the jurisprudential developments at the ICC were directly implemented in domestic courts, and their rights were by consequence, so recognized. Yet for others, progressive interpretation of international law, such as the recognition of the intersectional persecution based on gender and religion, of sexual violence that can occur within the own ranks of an armed group, of damage brought to the cultural heritage of a community, have meant the recognition of their victimhood and have added to their sense of justice.

As pointed out by some authors, "it is unsurprising that the ICC has faced challenges to its legitimacy in its early years; [...] it needs time to demonstrate that it can contribute productively to global justice, and there are good reasons to be optimistic" (deGuzman & Lockwood Kelly, 2019, p. 398). The Court should at all times strive to reach more efficiency and can start doing so based on the IER recommendations. Evaluating how its effectiveness will fluctuate over time will paint a clearer picture on whether the resources of states parties are well spent. Noteworthy is not only the young age of the ICC, but also its dependency on political and financial support. While some problems of efficiency could be dealt with by amending procedures, others are simply contingent on the limited resources provided by states.

It can be concluded that even if the Court struggles with issues of effectiveness, it is not failing to work towards its goals. The global fight to end impunity is an extraordinary endeavour and any effort however minimal towards accountability for grave crimes is valuable for victims, and for the pursuit of peace. Given the young age of the Court, and the fact that issues of effectiveness are constantly on the agenda, with recommendations on how to bridge them standing ready to be implemented, it seems promising that the ICC can address them in time.

Conclusion

Contrary to the mainstream discourse that merely points out the legitimacy deficits of the ICC, I have tried to develop a more nuanced analysis of its legitimacy, engaging the normative criteria of *acceptable origination, comparative benefit, non-discrimination, moral acceptability, institutional integrity*, but also effectiveness. I have also included sociological insights, where those have informed or influenced ICC's objective legitimacy.

The Court has a unique mandate, and the mere fact that it is possible to have a permanent court which can prosecute individuals for grave crimes in the current political climate is a compelling statement in the fight against impunity. This mandate, coupled with the wide jurisdiction of the Court and the symbolic place it has in the field of international criminal justice, forms the foundational basis of its legitimacy. Backed by other considerations such as a solid framework which allows for checks and balance, strong support by civil society which adds expertise on various themes and helps to maintain the relationship with victims and affected communities, this leads to the conclusion that the ICC passes the binary legitimacy assessment. A further scalar assessment would be pertinent, to determine what can be done to bridge the Court's issues with effectiveness and integrity. A starting point is the implementation of recent IER report recommendations.

The world needs an International Criminal Court. Otherwise, thousands of victims of grave crimes would have no means of judicial accountability. As an independent entity which can prosecute individuals for crimes that states cannot or are unwilling to prosecute nationally, its existence shows an important commitment to international peace and justice. Those who believe in the importance of its mandate should support its activity and propose solutions to enhance its legitimacy.

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