For the People or for Power? Wielding the ICC Gavel in a World of Power Politics

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Global justice has been a defining issue of international politics in the post-World War II era, following the establishment of international criminal tribunals with the Nuremberg and Tokyo Trials. As a central and fascinating pillar in the efforts of international justice, I will here utilise the International Criminal Court (the ICC or 'the Court') as a contemporary indicator of the quest for dispensing justice internationally. Since its inception, public and academic debate alike has fluctuated between enthusiastic optimism, celebrating the potentiality of the Court, and scathing criticisms of the Court's 'utter failure' in its twenty years of existence. A commonly repeated argument cautions against the fact that the ICC is not only embroiled within, but also inevitably compromised by, international power politics.

Curious as to the extent of this claim, in the following account I will interrogate examples of how the Court's activities continue to be stymied by way of two central problematics: (a) the role of the United Nations Security Council (UNSC) and the Permanent Five (P5) in shaping the Court's selection of Situations for investigation, including the particular influence granted to the United States (US); and (b) the practical misuse of the 1998 Rome Statute principle of 'complementarity', as witnessed in Sudan and Uganda. I will tease out this argument through first introducing the Court and the 1998 Rome Statute on which it is founded, before discussing the extent to which the P5 – focusing on the US – governs the Court's activities. I end with challenging the claim that the ICC is simply a playground for international Great Power politics, by discussing the experience of the Court in Sudan and Uganda.

Instead of solely being the result of such Great Power struggles, I find that the Court's attempts to implement global justice suffers from its situation within international *state* politics writ large. This becomes visible in the dynamics shaping the ICC's involvement in Darfur and Northern Uganda, given African governments' own ways of navigating ICC decisions. Whether the Court is guilty of a neo-colonial 'African bias' has to be reimagined in light of its utility for African state actors in manoeuvring ongoing conflicts and asserting their international standing. Overall, the answer to the successes and failures of the Court, and so its ultimate potential, is thus far more complex than a simple nod to the self-interests of Great Powers.

Introducing the Court and the Rome Statute

In 1995, the UN General Assembly began formal negotiations on the establishing of a permanent criminal tribunal, resulting in the 1998 Rome Statute. First signed by 120 states, the Statute was then ratified in 2002. The Court's jurisdiction covers the categories of crimes against humanity, war crimes, genocide and the crime of aggression (Article 5). It responded to long voiced pledges for a global mechanism to end impunity for mass atrocities and provide justice on behalf of humanity (Sikkink 2012, 33). To this end, the Court would transcend the jurisdictional boundaries of nation-states and their reliance on absolute sovereignty to protect state actors from prosecution. This transgression of sovereignty however, would only be viable as a last resort – a supranational means for justice when all other judicial processes were failing (Clark 2018, 64).

To ensure this, the principles of *distance*, *complementarity* and *admissibility* were built into the Rome Statute and associated discourses. Distance, on the one hand, underscores the Court's function as an impartial and formally

independent body untainted by the history and politics of the Situations into which it intervenes (Bosco 2014, 2; Clark 2018, 34). Complementarity, on the other, rules that the Court should only function as complimentary to, rather than seeking to outdo or interfere with, existing national systems. This entails a significant emphasis on interdependence between State Parties parallel to the independence envisioned by the principle of distance (Clark 2018, 25-26). Admissibility, furthermore, contains the legal provisions deriving from the principle of complementarity determining when Situations are either admissible or inadmissible before the Court, especially stressing the ICC's non-interfering wherever there is "genuine State action" (2018, 25; Article 17).

In practice however, the valorisation of distance and its accompanying depiction of the Court as a superior form of justice, has seemingly far exceeded the Court's respect for complementarity – which in turn has resulted in the compromising of the principle of admissibility (see Clark 2018). The extent to which the ICC, as a central cog in the quest for global justice, is jeopardized by international power politics can consequently be discerned from the professing of these principles on the one hand, and the contradictory nature of their implementation on the other.

Global Justice and Great Power Politics: The Court and the P5

Since its inception in 2002, the Court has endured significant criticism relating to its susceptibility to Great Power interests. Given the lack of executive powers of its own, the consequent reliance on State participation and the role of UNSC referrals and deferrals of possible Situations, many have situated the ICC within the structures of a global politics of hegemony. Specifically, the fact that only two of the total number of Situations under investigation since 2002 concern locations outside of the African continent, has triggered a proliferation of literature viewing the Court as yet another piece in the contemporary machinery of neo-colonialism (Clark 2018, 51). Before problematizing the presentation of major powers as somehow omnipotent wielders of the Court, the following section explores the relationship between the ICC and 'states with global interests and influence' (Bosco 2014, 1) – with a notable emphasis on the US.

To date, the only Statute signatories of 'weight' globally speaking, comprise the United Kingdom (UK), France, Germany, Japan and Brazil. By contrast, the US, China, Russia, India, Israel, and Saudi Arabia, amongst others, remain at arm's length from ratifying the Court. Interestingly, throughout the ICC's case history – including both opened and rejected investigations – it is seemingly *non*-members, with an emphasis on the US, China and Russia, who have enjoyed a large say in shaping ICC outcomes (see Mamdani 2008). This is so because of Article's 13(b), 15 and 16 of the Rome Statute endowing the UNSC with the power to both refer and defer Court Situations. Apart from State Party referrals or Prosecutor initiatives, the UNSC Permanent Five (P5) thus together hold the third and remaining avenue for ICC case selection. Referrals have taken place twice, in Sudan (Darfur) 2005 and then Libya 2011 (Jalloh 2017, 181). As both Situations were outside of ICC jurisdiction given neither state are Statute signatories, the Security Council's referrals were first celebrated as proof of a new international regime of accountability superseding both sovereign authority and Great Power politics in the name of victims of mass atrocity (Jalloh 2017, 181). Soon however, the double-standards of P5 influence over Court activities were to surface.

As a first example, the Council's inability to refer the Situation of Syria is highly illustrative of the tug-of-war between P5 (thus Great Power) interests in determining UNSC and ICC relations. Despite deaths in Syria far outreaching estimations from Darfur and Libya, no political agreement was reached enabling a Council referral (Jalloh 2017, 196). Because Syria is not a Statute signatory and given the Syrian government's own involvement in the conflict, a UNSC referral would be the only way to seek international criminal justice for the atrocities of the civil war raging since 2011. Competing interests in maintaining the Syrian president Bashar al-Assad in power or having him removed, led Russia and China (in the president's camp) to veto France's (supported by the UK) request for a UNSC referral to the ICC Prosecutor *(ibid.*, p.195). The US has been equally reluctant to refer the Syrian Situation, possibly in fear of inadvertently shedding light on the Israeli occupation of the Golan Heights which the US is backing (Aoláin 2013).

By way of a second example, to be able to abstain instead of placing a direct veto against UNSC Resolution 1593 that requested the referral of Darfur to the ICC in 2005, the US ensured that the Resolution incorporated the so-called 'bilateral immunity agreements' (BIAs), whereby 'signatory states pledged *not* to surrender US persons, including

citizens and foreign contractors employed by that state, to the ICC' (Jalloh 2017, 191). Furthermore, 'in yet another Council nod to the concerns of the United States' (*ibid.*), Resolution 1593 avoided imposing the full legal obligation on all UN members to collaborate with the Court. By placing the responsibility of full cooperation solely on the Sudanese government and the other remaining parties involved in the conflict, this served to further obstruct both scrutiny of and help from other states or organisations in effectuating the ICC's work in Sudan.

There is a long list of cases exemplifying the US' role in shaping – either impeding or facilitating – ICC activity, that warrant particular attention. The most recent example is aptly illustrated by the Pre-Trial Chamber's rejection of the Office of the Prosecutor's (OTP) request to begin official investigations into war crimes and crimes against humanity in Afghanistan, a decision reached by the Chamber judges in April 2019 (ICC-02/17; Saeed 2019). Allegations to be investigated included 'War crimes by members of [the US] armed forces on the territory of Afghanistan' and 'by members of the US Central Intelligence Agency in secret detention facilities in Afghanistan' (OTP 2017). The Prosecutor's request was issued in 2017. Before long, the Trump administration made sure it would not cooperate in facilitating investigations into the Afghan Situation (Evenson 2018). The administration further sought active strategies to hinder inspection into either US or US' allied nationals, including visa bans for ICC staff, threatening with prosecutions and financial sanctions against ICC personnel or any State Party involved in potential investigations of US or allied citizens, as well as potentially reopening bilateral immunity agreements' lobbying (HRW 2019).

Consequently, in light of the US' aggressive response to the Prosecutor's request to open official investigations into Afghanistan, the Pre-Trial Chamber decided to reject it given the lack of State Parties' cooperation and the inevitable loss of resources and political will. Launching investigations 'at this stage', the judges argued, would only disappoint the victims in question and thus not serve the 'interests of justice' (ICC-02/17, 32). This 'decision translates [into the fact] that political considerations trump legal requirements', potentially elucidating the extent to which 'the international justice regime conveniently tolerates impunity in order to safeguard the interests of the hegemonic powers and their political priorities' (Saeed 2019).

'African Bias' or 'Weak' States Pulling the Strings?

The above section underscores the widely-held claim that the Court is little but a power political tool with a specific function in perpetuating colonial legacies of the global distribution of power, notably regarding questions of who is entitled to the sovereign right of non-interference and whose sovereignty is made malleable in the name of 'responsibility' and 'justice' for 'humanity' (see: Çubukçu 2013). I agree with the notion that major powers enjoy a significantly more influential role in shaping ICC activities, especially relating to UNSC Situation referral abilities in accordance with the specific interests of the P5, along with the ability of superpowers like the US to safeguard the impunity of American and allied nationals. Nevertheless, stopping at this conclusion amounts to a critical simplification or reduction of the scenario into which the ICC was introduced and has been forced to navigate ever since. Theories of an inherent 'African bias' – such as Mamdani (2010, 66) arguing that 'the ICC is turning into a Western court to try African perpetrators of mass crimes' – lose some of their clarity when juxtaposed to countering views which instead illuminate the degree to which the Court depends on state cooperation writ large, rather than falling prey to a handful of global influencers. This predicament of the Court can be gaged through its involvement with both Sudan and Uganda.

When Resolution 1593 was passed, referring the Situation of Darfur to the ICC, it decided to intervene where several other conflict resolution efforts were already in place – in particular the United Nations-African Union (AU) hybrid peacekeeping mission of UNAMID, and alongside significant AU participation in facilitating peace negotiations between the Sudanese government and Janjaweed rebels. Upon the Court's issuing of an arrest warrant for Sudanese president Omar al-Bashir, the AU 'repeatedly called on the UNSC to apply article 16 to "defer the process initiated by the ICC"' (Jalloh 2017, 202). Supported in part by China and Russia, the AU argued that Sudan required 'a comprehensive political solution' which ICC interference would only undermine (2017, 203).

Reiterating the ICC Prosecutor's concern for building cases and proving the Court's worth – underpinned by the sense of superiority emanating from the discourses of 'distance' on which the OTP based its rationale for intervening

in Darfur – the UNSC decision not to force a deferral of ICC proceedings against Bashir is telling of what Clark (2018, 302) calls the 'complacency of complementarity'. Instead of paying attention to *de facto* needs on the ground and root sources to the conflict, the UNSC in conjunction with the ICC Prosecutor paved way for a 'distanced' form of justice, more detrimental than constructive to Darfur's prospects for peace (Clark 2018, 17; Mamdani 2008; Krever 2014, 84). Importantly, however, the AU did not simply acquiesce to UNSC and ICC decisions. Instead, the Council's refusal to defer the Darfur Situation led to a veritable backlash in ICC operations and legitimacy. To date, voted on in 2009 and thus applying to all fifty-four AU member-states, the AU has cooperated in keeping al-Bashir from ICC capturing (Jalloh 2017, 182). Burundi, the Gambia and South Africa furthermore formally withdrew from the Statute in 2016 as a response to the Court's insensitivity and problematization of ICC interventions, and, equally, the 'UNSC problem', in particular, continues to be a central issue on the AU agenda (Jalloh 2017, 186).

The ICC presence in Uganda further underlines the failure of the principles of *inter*dependence and admissibility in the Court operations in the field. In 2003, Ugandan President Musevini self-referred the Situation in Northern Uganda with regards to the Lord's Resistance Army (LRA) to the Prosecutor. If the ICC had fully respected the Statute principle of complementarity, Branch (2007, 186) argues, Museveni's referral would not have been legally admissible before the Court. This is so, given that the Ugandan state 'was not "unable" to prosecute certain LRA commanders, except that it had failed to capture them; and it was not "unwilling" to prosecute, except that it wanted the ICC's intervention to delegitimate peace talks and the Amnesty Act' (Branch 2007, 187). As seen again in Darfur, given that the Rome Statute had come into full force only a year earlier, the OTP was in desperate pursuit of a first case through which to prove the institution's potentiality (Clark 2018, 64). Consequently, Museveni could utilise this predicament to 'settle [his own] scores' (Krever 2014, 83). Most importantly, through referring the LRA to the ICC, Museveni ensured the immunity of his own state staff and armed forces from international prosecution despite their equal participation in the violence facing the civilian populations of Acholiland (Branch 2007, 188).

The Ugandan context thus illustrates two problematics. Apart from countering the claim that the Court will solely operate as a back-stop to national institutions, Uganda is a key example of how the US uses its global political influence to either impede or facilitate ICC activity as it pleases. In contrast to Afghanistan and Syria where US nationals or allies risk indictment (resulting in the US impeding ICC investigations), or to Libya and Darfur comprising two heads of state antithetical to US' regional interests (resulting in the US facilitating ICC investigations), Museveni enjoy close political ties to the US government. Any action that could serve the interest of the Ugandan state in its military and political struggle against the rebel insurgents (labelled as a terrorist organisation by the US Department of State) would thus enjoy US support (Krever 2014; Mamdani 2010). Nevertheless, Uganda also shows how '[instrumentalization of] the Court for political purposes' (Krever 2014, 83) is not limited to Great Power concerns, but is equally revealing of the ability of 'weaker' states to utilise the Court for political gains. If the AU's response to ICC intervention in Darfur represents resistance to the notion of the Court as neo-colonial, 'the ICC's shortcoming [in Uganda] has rather been its failure to insulate itself from political manipulation by African states' (Clark 2018, 99).

Conclusion

Sudan, Libya, Uganda, Syria and Afghanistan respectively illustrate the sculpting of global justice efforts according to Great Power concerns. Uganda and Sudan especially underpin the ICC's tendency to prioritise its own institutional development over *de facto* implementation of justice for victims. All five examples reveal the extent of particularly US influence over ICC measures. Conversely, Uganda also demonstrates the reversal of this process through underpinning the ability of 'weaker' states to make active use of the Court to win domestic political struggles. Musevini's referral of the Ugandan situation discloses the Court's inevitable dependency on State Parties and so its consequent malleability by diverse and parochial interests within the nation-state system writ large. Sudan furthermore highlights the influence wielded by less clout-heavy states when standing together against major powers' usage of the Court.

The ICC remains guilty of a 'complacency of complementarity', wherein the Court heralds the dispensing of *distanced* justice over respecting existing national processes, often simplifying necessarily complex responses to conflict and violence into a one-sided judicial solution of individual criminal accountability. The Darfur case makes this especially clear: attempting to establish its own credibility as a newly fledged institution, the ICC required a head

to roll so as to signal the potency of the Court – all at the expense of already intricate domestic struggles for accountability and reconciliation.

Nevertheless, the ICC's complacency-complex continues to take place within the Court's inevitable dependency on state cooperation. Instead of an omnipotent exercise in hegemonic power, the International Criminal Court (re)appears as a body made pliable to a diverse range of state objectives. As much as this confirms the large degree to which the search for global justice is compromised by international power politics, my analysis contests reductionist understandings of power as solely residing with the hegemons of the international order. Instead, though still granted its uneven application, it locates power as dispersed across 'major' powers to the large array of 'minor' states. What this means for the efficacy of the Court and its prospects to ever be fully at the service of the actual people under its (alleged) protection, will have to be judged by its activity in the coming decade. An interesting case to keep an eye on to this end, will be the Court's reaction to a call made in 2020 demanding that the ICC begins an investigation into the European arms traders and government officials' complicity in the war crimes in Yemen. What an opportunity for the Court to show its true colours.

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