

# Paradox of Authority and the International Criminal Court

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## Abstract

The creation of the International Criminal Court (ICC) has been one of the boldest progressive moves in the history of international relations. At the heart of the Rome Statute is a commitment to the spirit and principle of international criminal justice. States under the jurisdiction of the ICC agree to cede sovereignty over individual perpetrators suspected of genocide, crimes against humanity, and war crimes unless they are able and willing to prosecute perpetrators of these crimes at home. Even heads of state have not been immune from the formal legal authority of the ICC.

Given the reach of its ambitions, it is unsurprising that the ICC has struggled to achieve some of its goals. It has, though, become a focal point for a vibrant and committed network of international advocates, lawyers, and civil society organizations committed to advancing international criminal justice. States also recognize the ICC's importance. This article focuses on the impact of backlash on the authority of the ICC and on the status of international criminal justice.

**Keywords:** International Criminal Court, Rome Statute, War crimes, Authority

## Introduction

No fewer than 123 states have ratified the Rome Statute. Among both states and, especially, non-governmental organizations (NGOs), the International Criminal Court's authority is derived from what it is, especially the principles it embraces and the commitments it espouses.

What the ICC does, though, has elicited mixed reactions. In many instances, ICC investigations or arrest warrants have provoked a backlash, casting a shadow over not only the situations it investigates, but also over the Court. States that remain outside the ICC have protested vehemently when they come under its jurisdiction. Sudan, for example, has waged an active campaign against the ICC. This took on a new dimension in 2009 when the Chief Prosecutor, Luis Moreno Ocampo, announced an arrest warrant against the President of Sudan, Omar al-Bashir. Russia and China have rejected the ICC's authority from the outset and have continued to protest that the ICC violates national sovereignty. The fact that both Russia and China are protected from the purview of the ICC by their power to veto Security Council resolutions has failed to mute their critiques of the Court.

The United States has been a strong proponent of international criminal justice and yet has also refused to become a member of the ICC. Instead, it has engaged selectively with the ICC, sometimes serving as a staunch supporter and at other times mounting a vocal challenge to its authority. This challenge took on a dramatic form when Palestine announced its intention to join the ICC. The United States attempted to block Palestine's membership, threatening to cut aid to the Palestinian Authority if it did not abandon this effort. More remarkable though, is the fact that several member states, each of which has voluntarily

ratified the Rome Statute, have also challenged the ICC's authority. After arrest warrants were issued for Kenya's political elites, Kenya protested vehemently. Later, the government took its struggle to the African Union. In September 2013, the African Union held a summit to discuss the possibility of a collective African withdrawal from the ICC. When this failed, they unified to contest the Court's authority, voting sitting heads of state in Africa immunity from the Court's jurisdiction over genocide, crimes against humanity, and war crimes.

Scholars debate the impact of backlash on the authority of the ICC and on the status of international criminal justice. Some human rights scholars have argued that backlash is a regular occurrence, even a natural step, in the development and consolidation of new norms. Others argue that the consequences of a backlash from powerful spoilers can be far more pernicious, especially in contexts where existing institutions are weak. Alter, Helfer and Madsen, 2016, propose an alternative framework for evaluating the ICC. They compare the formal authority of international courts to their authority in practice. At a practical level, they suggest that authority may vary significantly across distinct audiences. A court's "narrow" authority is defined in terms of its authority with respect to those that are directly involved in a particular case. They find that it is more common for courts to have "narrow authority" than to have "extensive authority" over a broader set of actors, including international legal scholars or international civil society. Courts also rely on partners to help enforce their mandates. These "compliance partners" constitute a court's "intermediate authority".

The ICC challenged the above finding. Recognition of the ICC's authority has been stronger among international NGOs, civil society organizations, and international human rights lawyers than among actors that are directly implicated in specific situations and cases. To aid this transnational network of justice proponents, ICC authority is intrinsic to what the Court is, and is underpinned first and foremost by a moral, legal, and institutional commitment to accountability for crimes against humanity, genocide, and war crimes. At the heart of this commitment is the belief and expectation that international criminal justice must be independent from politics.

By contrast, material support from states has been contingent on what the ICC does, rather than what it actually is. State support has been harder to rally when the ICC's investigations impinge on states' political interests or threaten to impede peace talks. But the ICC has been hard pressed to secure critical resources and state backing when a state's leaders or those of its allies come under scrutiny.

The upshot of this is that the ICC faces an "authority paradox." On the one hand, its authority among civil society organizations and transnational advocates is intimately wrapped up in what the ICC is, and especially, in the assumption that justice must be independent from politics. On the other hand, the ICC is structurally dependent on states to enforce its mandate, most especially to help arrest perpetrators of international crimes. This dependence undercuts the ICC's flexibility to manage the conflicting interests of its different constituencies. Actions that help secure the support of powerful states threaten to alienate civil society. Non-governmental organisations have challenged the ICC for applying "double standards"; for example, when it targets rebels and fails to acknowledge state crimes, or, in the case of Security Council referrals, when powerful states write in clauses that exempt their own nationals from ICC authority.

This article proceeds in three parts. First, it reviews the categories of authority that Alter, Helfer and Madsen, 2016, set out to frame their study of international courts. For these scholars, authority refers to the steps actors take to acknowledge and support international courts. This article suggests that politics have shaped the extent of the ICC's authority among state actors. Next, it considers implicit claims about

the ICC's authority in contested areas. More specifically, it evaluates the oft-heard claim that self-referrals by African states of crimes on their own territory, together with the large number of African states that have joined the ICC, suggest that the ICC has strong support in Africa. Third, this article suggests that UN Security Council (UNSC) referrals are not a robust indicator of the ICC's authority among major powers. State support of referrals has frequently proved to be an empty gesture with little subsequent follow-through. Too often, states have provided only minimal support to ensure the success of investigations, arrests, and trials. Finally, this article concludes by underscoring the paradox of authority at the heart of the ICC.

### **Authority as a measure of ICC success**

International relations scholars have suggested several explanations for states' failure to support international institutions and norms. Börzel and Risse argued that especially in areas of limited statehood, states may simply lack the capacity to comply with human rights norms. But the Rome Statute was designed specifically to overcome this problem. The complementarity principle differentiates states that are willing and able to hold trials for the perpetrators of mass atrocities from those that are not, granting the ICC authority over crimes that take place in those states in this latter category. Hafner-Burton and Tsutsui argue that human rights treaty commitments offer a relatively low-cost mechanism for soliciting positive feedback in the international arena. Support for a referral may simply be one additional and comparatively cheap step that states can take to demonstrate their role as good world citizens. If this is the case, it is not necessarily surprising that states fail to follow through. Regardless of whether states have good intentions or bad intentions, they enjoy a relatively cost-free membership in joining and even referring situations to the ICC. Danner and Simmons have suggested that the decision to join is sincere and may demonstrate an intention. States join the ICC to tie their hands and make a credible commitment to reducing civil violence. More recent work by Jo and Simmons argues that states that have ratified the Rome Statute have indeed killed fewer civilians.

While each of these explanations offers some insights into state behavior before international courts, politics has played a crucial role in shaping the authority of international courts. In states with limited institutional capacity, politics has been integral to states' decisions to support or challenge ICC investigations. The same has been true in states with consolidated rule of law institutions that have been called on to support the ICC's work in third party states. Politics, especially state's political interests in peace, security, and stability, has been a strong driver of states' choices to recognize or withhold support from the ICC. When the ICC's pursuits undermine states' interests, they have been quick to defer or even evade ICC justice.

### **Self-referrals, Africa and ICC authority**

The ICC celebrated its ten-year anniversary in 2012. Scholars and practitioners have taken an active interest in evaluating the impact of the Court's activities. At first glance, the ICC appears to have been remarkably successful. In a little over a decade, it has opened nine situations and has undertaken nearly as many preliminary investigations. At 123 members, a majority of the world's states have ratified the Rome Statute, in effect voluntarily agreeing to delegate authority for prosecution of genocide, crimes against humanity, and war crimes to the ICC, unless a state is willing and able to prosecute these perpetrators at home.

There are also other signs that the ICC's authority has increased. The U.S. stance toward the ICC appears to have softened. Although it initially was a strong proponent of a permanent international criminal court, the United States later refused to sign or ratify the Rome Statute. The decision to support an independent prosecutor combined with the failure of the United States to secure an exemption from ICC justice for its citizens secured its fate as a non-member. The U.S. government proceeded to negotiate bilateral immunity agreements with individual state members of the ICC. These agreements required states to declare that no American nationals would be turned over to the ICC. If a state refused to agree to this, then it would forgo military aid from the United States.

The U.S. efforts to restrict the ICC were initially seen as a major hindrance to its success. Even when the United States supported the ICC, it did so through a strategy of passive acquiescence rather than active support. When the Security Council voted to refer Darfur to the ICC, the United States abstained from voting. This effectively enabled the Resolution to pass. This has been at least partially remedied during the Obama administration.

Despite this appearance of increased authority, the ICC's record has been bleak on other dimensions. The U.S. has more actively supported the ICC, but it has done so as a seemingly permanent non-member. The Court has also struggled to achieve the goals it sets for itself. Of the roughly thirty-six indictments, the ICC has issued publicly, less than one-third of those indicted have come before the ICC. By autumn of 2015, the ICC had convicted only two individuals. In several cases, most notably Sudan, Libya, and Kenya, states had simply ignored requests to deliver indicted war criminals to The Hague. Some of the bleakest but least surprising defeats have come from states that have blatantly rejected the ICC's authority. After an arrest warrant for President Al-Bashir of Sudan was issued, Sudan became one of the ICC's most vocal critics. President Bashir openly flouted the ICC arrest warrant against him. Human rights advocates had hoped that an arrest warrant would marginalize Bashir politically. Instead, Bashir reconsidered his plans to step down and decided to extend his tenure as president.

### **Great powers and the politics of ICC authority**

Politics have also shaped the propensity of major powers to acknowledge and support the ICC. In some cases, politics have created an opportunity for human rights advocates to push accountability forward.

### **The paradox of authority**

In his book, *Rough Justice*, Bosco argues that the ICC has accommodated powerful Western states, and especially the U.S. This accommodation tendency threatens to undermine the ICC's authority among many of its most steadfast proponents. The ICC's proximity to state power, and especially to the Security Council, is directly at odds with those among its constituents who value the neutrality and impartiality of international justice norms in theory as well as in practice. The challenge of balancing power and independence was most palpable in the aftermath of NATO's war in Libya, where the proximity between the Security Council, state interests, and international criminal justice seemed uncomfortably close for many of the ICC's proponents. Allegations that the ICC had become too closely associated with a Western policy of regime change quickly surfaced. In February 2011, the Security Council referred Libya to the ICC. Within days, then Chief Prosecutor, Luis Ocampo opened a formal investigation and by June, Ocampo issued an arrest warrant for the leader of Libya, Qaddafi, his son Saif and the intelligence minister, Al-Senussi. The speed with which the ICC moved in Libya intensified perceptions that power and justice were too closely aligned.

In the aftermath of NATO's intervention in Libya, ardent supporters of the ICC openly questioned and even challenged the role of the Security Council in referring cases to the ICC. Louise Arbour, one of the most prominent supporters of international justice, argued that international justice and international politics must be kept on "separate tracks". In Mali also, events gave the impression, possibly unfairly, that the ICC had failed to keep a healthy distance from policies of western military intervention. The government of Mali referred itself to the ICC in 2012. In January, France intervened with military force. Five days later, the ICC announced its decision to open a situation in Mali.

In the aftermath of Libya, Russia, and China have also become more assertive in their critiques of the ICC. Each of these powers vetoed the resolution calling for Syria to be referred to the ICC. When North Korea came before the General Assembly for its record of human rights abuses, Russia and China once again voiced their opposition to an ICC referral.

The ICC's authority paradox may not be unique. Many international institutions recognize the realities of power by granting special privileges to a small number of powerful states. This creates an obvious tension with a sovereignty norm that prescribes equal status to all states. It is also not unusual for this inbuilt hypocrisy to create tensions in civil society. In the domain of international criminal justice, civil society has embraced pragmatic compromises. The ad hoc tribunals for the former Yugoslavia and Rwanda were products of Security Council Resolutions that directly linked justice to peace and security. This proximity between the Security Council and international justice was secured in Rome when it was agreed that the Security Council could not only refer cases to the ICC, but also defer them. Still, ICC authority depends crucially on the pretense, supported by practice, that justice will remain free from political interference.

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