Arguing About the ICC: Non-Party Discourse and the Health of the International Criminal Court

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Word Count: 7488

How should we assess the institutional health of the International Criminal Court (ICC) given that many of the most materially powerful states in the international system have refused to join the Court? A vibrant research agenda has begun to consider the legitimacy of the ICC, and the ways in which its authority may expand or contract. Yet comparatively little of this scholarly work has sought to systematically consider the differing forms anti-treaty discourse may take, and the implications this holds for the broadening and deepening of the ICC's influence in the international system. In developing the theme of institutional contestation, I consider the various justifications employed by prominent non-parties to the Rome Statute. Through a systematic, empirical assessment of official statements in treaty fora, I develop a typology of challenges to the ICC and trace the evolution of these anti-treaty discourses. I then offer a conceptual framework for assessing how differing forms of contestation may impact the health of the ICC as an institution. For example, narrow or particularistic challenges concerning specific rules or procedures should be less threatening to the regime than those that question the underlying norms upon which the legal regime is based.

How can the International Criminal Court serve as a centrepiece of an expanding international criminal law regime when it is resisted by many of the most materially powerful states including China, India, Russia, and the United States? A vibrant literature has begun to explore the implementation of the Rome Statute in distinctly political terms, concerning how the Court will impact the practice of international relations and how, in turn, politics will influence the progress of international criminal justice.[1] Much of this writing implicitly or explicitly touches on questions of political legitimacy, especially how the Court can justify its role—to promote justice and perhaps peace via a globalized legal architecture—in an international system partially populated by deeply sceptical states.[2] These questions have been taken up by a number of authors, yet this rich research agenda has focused in large measure on the technical nature of non-party objections[3], and has less frequently explored the normative and political implications of these disputes.[4]

Focusing attention on the patterns of institutional endorsement and contestation offers a useful method by which to assess the impact of the Rome Statute on non-party states, and vice-versa. Contemporary constructivist scholarship is uniquely situated to address this task, and to demonstrate how both supportive and contested forms of actions may influence the health of legal institutions. Central to this conception is a notion of agents and structures as intersubjectively constituted: international institutions largely define the nature of actors and the range of their acceptable behaviours; yet the actors themselves may reshape the very institutions which constitute and regulate their existence.[5] This "implies that the meaning of norms… is embedded in social practice."[6] Existing studies of the ICC have considered the discursive agency of state and non-governmental actors, and the crucial role these interventions have had on the creation and (to a lesser degree) initial implementation of Court.[7] Yet few if any have explicitly sought to apply these insights in a systematic fashion to non-parties. In particular, the question of how non-party resistance may affect the normative and political prospects of the Court has not received sufficient theoretically-informed examination thus far. Undertaking this task is the chief aim of the present paper.

In assessing the authoritative potential of the ICC, I make two related theoretical claims. First, international legal institutions can be understood as normative structures, composed of a hierarchy of norms and rules, and connected to a broader web of prior constitutive principles. It

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[1] Steven C. Roach (2006) *Politicizing The International Criminal Court: The Convergence of Politics, Ethics, and Law*. New York: Rowman & Littlefield Publishers, Inc.; Benjamin N. Schiff (2008) *Building the International Criminal Court*. Cambridge: Cambridge University Press; Michael J. Struett (2008) *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*. New York: Palgrave MacMillan.
[2] Roach 2006, 3.
[3] See for example the excellent collection of articles presented in a special issue of the *Journal of International Criminal Justice* (2005). Many of the constituent articles are highlighted below. However, while extremely valuable in describing the jurisprudential basis of opposition to the ICC in a number of states, the symposium authors do not explicitly consider the implications these various forms legal reasoning and contestation may take.
[4] For one exception, see Jason Ralph (2007) "International Society, the International Criminal Court and American Foreign Policy" *Review of International Studies* 31, 27–44.
[5] Alexander Wendt (1987) "The Agent-Structure Problem in IR Theory" *International Organization* 41(3): 335-370.
[6] Antje Wiener (2004) "Contested Compliance: Interventions on the Normative Structure of World Politics." European Journal of International Relations. 10(2): 189–234, at 191.
[7] Nicole Deitelhoff (2009) "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case" *International Organization* 63, 33-65.

is this "nested" quality that gives international law its legitimate authority, and opens the prospect of extending influence over states outside of the formal legal agreement. This latter possibility is unanticipated by accounts that emphasize the consensual basis of law. Yet at the same time, international legal institutions are not static entities, and are subject to continual processes of support, critique, and reinterpretation. Much of this work is done via discursive processes, and attention to official state discourse can reveal patterns of endorsement and contestation that provide telling evidence concerning the health of treaties like the ICC. With this in mind, I then develop a simple hierarchy of anti-treaty discourse, and apply this typological framework to current debates concerning the ICC. This analysis reveals a diverse array of concerns expressed by non-parties to the Rome Statute. Moreover, while some disputes appear to rest on narrow technical grounds, a closer reading frequently reveals underlying normative assumptions that deepen the critique. Yet, as I also seek to demonstrate, these same principled challenges may over time provide opportunities for greater engagement and accommodation with the Court on the part of currently ambivalent states.

Discourse, Contestation, and the Social Legitimacy of International Legal Institutions

From where does international law derive its authority, and how might this influence implicate states that officially reject a given legal process? Thomas Franck has famously argued that the legitimacy of a decentralized legal order is necessarily rooted in a perception that it is broadly fair. Only fair institutions will be capable of generating fidelity among members and asserting influence more widely in the international system.[8] The question of legitimacy has been a central concern in the study of the Court's early operations. Many scholars in this field have adopted the eminently sensible framework proposed by Franck. Thus for Struett, the measure of the ICC's legitimacy is "the extent to which people in the world perceive it as legal and are prepared to accept its commands as binding…. Rules have legitimacy when diverse members of a society can agree in the abstract that such rules are fair to all concerned, before particular interests come into play."[9] This conception is a useful starting point, but a general notion of legitimacy-as-obligating does not, in and of itself, tell us much about the sources of legal authority nor where to look for its expressions.

I wish to suggest that the social structure of international law, combined with its distinctive legalistic mode of justification and reasoning, is central to its ability to garner obligation from its subject actors. Scholars like John Ruggie and Christian Reus-Smit, among others, have argued that international law is understood as a legitimate enterprise because it is situated within a social system that both defines the identities and interests of constituent actors, and is modified on the basis of actor demands.[10] Research in the field of International Relations has demonstrated that norms[11] may exert an important influence in the international system by

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[8] Thomas M. Franck (1990) *Power of Legitimacy Among Nations*. New York: Oxford University Press.
[9] Struett 2008, 153 and 157.
[10] John G. Ruggie (1993) "Multilateralism: The Anatomy of an Institution." In *Multilateralism Matters: The Theory and Praxis of an Institutional Form*. Edited by John Ruggie. New York: Columbia University Press, 1-47; Christian Reus-Smit (1997) "Constitutional Structure of International Society and the Nature of Fundamental Institutions." *International Organization* 51: 555-589.
[11] Following the conventional definition, I conceive of norms as "collective expectations about proper behavior for a given identity." Ronald L. Jepperson, Alexander Wendt, and Peter J. Katzenstein (1996) "Norms, Identity and

constituting actors—providing content in the definition of actor roles—and regulating their subsequent behaviour. Legal institutions are formalized expressions of normative reasoning, as treaties typically emerge from incipient social norms, and convert these aspirational standards into a (more or less) precise legal context.[12] Yet legal institutions are also situated within a hierarchical system of prior or superseding values, principles, and norms, and a horizontal arrangement of legal regimes in other issues areas. It is this interdependence that gives international treaties their persistence, since individual institutions are not isolated phenomena, but are rather embedded within webs of recurring practice and meaning. "It is thus the correspondence between individual norms and rules and the underlying normative structure of the international society which determines the tendency of governments to observe specific injunctions."[13] This in turn has profound implications for the design of particular institutions, as legal rules are created in the shadow of the constitutive norms of the international system.[14]

Transitioning to a legal realm implies new modes of reasoning and action which by implication are more legitimate since they are nominally removed from the political sphere in which material power is expected to dominate. Legal discourse is thus distinct in its employment: "actors enter the realm of international law when they feel impelled not only to place reasoned argument ahead of coercion but also to engage in a distinctive type of argument in which principles and actions must be justified in terms of established, socially sanctioned, normative precepts."[15] Jutta Brunnee and Stephen Toope have extended these insights to more clearly identify the particular features that give law its obligatory status. In their view, "[w]hat distinguishes law from other types of social ordering is not form, but adherence to specific criteria of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action."[16] Applying these criteria permits more general social norms to adopt a specifically legal quality, and thus marks a transition in the ontological status of the norm. The key point here is to note that international law's influence derives not solely from its social situation but also from the particular criteria and procedures by which it is enacted, assessed, and modified.

Non-parties constitute a particularly hard sub-set of cases for evaluating the authoritative potential of a legal institution. This is because a strictly voluntaristic account of international law would suggest that "non-hegemonic" treaties[17] like the ICC will be largely irrelevant for actors beyond their formal ambit. Most international legal scholarship has assumed that formal consent—typically via ratification of treaties and other legal

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Culture in National Security." In *The Culture of National Security*. Edited by Peter J. Katzenstein. New York: Columbia University Press, 33-78, at 54.

[12] Andreas Hasenclever, Peter Mayer and Volker Rittberger (1997) *Theories of International Regimes*. Cambridge: Cambridge University Press, 9-10; Jutta Brunnee and Stephen J. Toope (2010) *Legitimacy and Legality in International Law*. Cambridge: Cambridge University Press, 48-50.

[13] Hasenclever, Mayer, and Rittberger 1997, 172.

[14] Alexander Wendt (2001) "Driving With the Rearview Mirror: On the Rational Science of Institutional Design." *International Organization* 55(4), 1019–49.

[15] Christian Reus-Smit (2004) "The Politics of International Law." In *The Politics of International Law*. Edited by Christian Reus-Smit. Cambridge: Cambridge University Press, 14-44, at 40-41.

[16] Brunnee and Toope 2010, 6-7.

[17] *Cooperating Without America: Theories and Case Studies of Non-Hegemonic Regimes*. Edited by Stefan Brem and Kendal Stiles. New York: Routledge, 2009.

instruments—is the mode through which state actors accrue legal obligations.[18] This leaves us with a smaller community of consenting states which—to the extent that it excludes materially powerful actors—is commonly assumed to lack any claim to universality. Yet as already suggested, legal institutions serve as focal points in establishing standards of appropriate behaviour at the international level and contributing to the construction of actor identities and interests. In so doing, individual treaties become implicated in the broader social processes which define the contours of acceptable practice. This networked quality of treaties holds important implications for states that remain outside of a legal regime, as they typically cannot escape the broader legal milieu in which a particular treaty is located. While states like the United States or China might reject the particular institutional configuration represented in the Rome Statute, they also claim to support the broader norms upon which the ICC is purportedly based. This suggests that while non-parties may resist new developments in international law, they also cannot entirely ignore these processes.[19]

Yet while legal institutions consolidate legal norms at a moment in time, they themselves become the sites of future contestation as existing standards are progressively elaborated, challenged, or replaced.[20] The development of international law is thus a highly contingent exercise, and the meanings attributed to particular obligations "while stable over long periods of time and within particular contexts… are always in principle contested."[21] Understood in this fashion, state practice and discourse may be constructive or destructive to the goals of a treaty. Since the specific norms and rules of treaties are embedded within implicit and explicit principled hierarchies, their legitimacy is defined in relation to these normative orders and may be endorsed or contested on these various grounds. As such, the discursive framing of state actors —whether they accept, reject, or are ambivalent towards particular legal features—will provide important evidence concerning the extent to which a given treaty has become enmeshed in the broader international system. The continued replication of pro-norm discourse (endorsement) reinforces the legal institution even if such acts are deemed unremarkable and receive little attention. However, instances where actors question the legitimate authority of the legal institution or dispute its application to a given situation are in many respects the more illuminating phenomenon, as claims against a given treaty are typically more overt and explicit

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[18] Jack L. Goldsmith and Eric A. Posner (2005) *The Limits of International Law*. Oxford: Oxford University Press. This view is most famously reflected in the ruling of the Permanent Court of International Justice, which in the *Lotus Case* found *inter alia* that "[t]he rules of law binding upon States therefore *emanate from their own free will* as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these *co-existing independent communities* or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." Permanent Court of International Justice, *The Case of the S.S. Lotus*. France v. Turkey. Judgment No. 9 (7 September 1927). Available online at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm. My emphasis. On this view, see also P.E. Corbett, "The Consent of States and the Sources of the Law of Nations" (1925) 6 *British Yearbook of International Law*. 20; Byers 1999: 8 and 17.

[19] Gennady M. Danilenko (2002) "ICC Statute and Third States." In *The Rome Statute of the International Criminal Court: A Commentary*. Volume II. Edited by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones. Oxford: Oxford University Press, 1871-1897, at 1871-1872.

[20] Michael Byers (1999) *Custom, Power, and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press, 3. The International Court of Justice has recognized the evolutionary quality of international law. See for example the *Barcelona Traction Case (Second Phase)* (February 5, 1970), *Joint Declaration by Judge Petren and Judge Onyeama ICJ Reports* 3, 33.

[21] Wiener 2004: 200.

than those in support. In both circumstances, attention to the content of official rhetoric can tell us much about the nature of treaty contestation, and what it means of the health of the legal regime.

Theorizing a Hierarchy of Anti-Treaty Discourse

Scholarly research has previously explored the important role which discourse plays in shaping the contours of international politics and the development of conventional and customary international law.[22] These insights have also been applied to the drafting of the Rome Statute[23] but have received less attention in the context of the ICC's subsequent implementation.[24] Close attention to discursive patterns is an especially valuable way of assessing the impact of legal processes on non-parties where behavioural indicators like ratification will be of little utility. In this study I focus on official statements by non-parties, supplemented by civil society and academic assessments where necessary.

As discussed in the previous section, treaties are composed of a bundled set of principles and rules that reflect both a discrete normative content and the institutional apparatus to implement it, and are themselves nested within a broader international normative universe. As such, legal institutions contain multiple sources of authority, and may be challenged on either principled or procedural grounds. In hierarchical terms, this structure proceeds from global constitutive norms, to particular treaty norms, to more specific rule-based procedural structures (Figure 1). In practical terms, the purpose of the Court is "to try persons alleged to be responsible for the most serious crimes affecting the entire community as well as the peace, security, and well-being of the world."[25] Yet this general mandate can be understood to imply very different configurations of particular institutional and normative commitments. Distinguishing between higher-order norms on the one hand, and the particular configuration of norms and rules embodied in the ICC on the other, provides a valuable means of assessing the various logics by which states may accept or contest a treaty's authority.[26] For example, actors may endorse the

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[22] Anthony D'Amato (1971) *The Concept of Custom in International Law*. Ithaca, NY: Cornell University Press; Byers 1999; Jennifer Milliken (1999) "The Study of Discourse in International Relations: A Critique of Research and Methods" *European Journal of International Relations* 5(2), 225-254; Thomas Risse (2000) "'Let's Argue!': Communicative Action in World Politics" *International Organization* 54(1), 1-39; Harald Muller (2004) "Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations" *European Journal of International Relations* 10(3), 395–435; and Diana Panke (2010) "Why discourse matters only sometimes: effective arguing beyond the nation-state" *Review of International Studies* 36, 145-168.

[23] David Whippman (2004) "The International Criminal Court" In *The Politics of International Law*. Edited by Christian Reus-Smit. Cambridge: Cambridge University Press, 151-188; Marlies Glasius (2006) *The International Criminal Court: A Global Civil Society Achievement*. London: Routledge; Struett 2008; and Deitelhoff 2009.

[24] For one exception, see Michael J. Struett (2009) "The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the ICC." In *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*. Edited by Steven Roach. Oxford: Oxford University Press, 107-132.

[25] Stephane Bourgon (2002) "Jurisdiction Ratione Loci." In *The Rome Statute of the International Criminal Court: A Commentary*. Volume I. Edited by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones. Oxford: Oxford University Press, 559-569, at 559.

[26] Maintaining a strict conceptual separation may be difficult in practice, as the above constitute ideal types whose boundaries may be obscured or indeed overlap. Nonetheless, one can distinguish norms and rules by paying careful attention to the nature of the legal claim – does it refer to a standard of appropriate behaviour or obligation, or rather

principled commitments of a treaty at one level, while at the same time disputing its interpretation or application; on the other hand, states may accept the legal structure of the Court but subsequently come to challenge the normative basis upon which the institution is predicated. Hence a central concern is whether "challenges or rejections of the norm [are] directed at the central validity claim of the norm per se, or are they directed at the definitional margins?"[27]

Figure 1 – Norm Hierarchy and the ICC

Type	**Function**	**Form**
Global Constitutive Norms	Internationally-recognized modes of acceptable action "Generic" form provides reference points across specific issue areas	Contractual Law Sovereignty Diplomacy Peace Justice
Treaty Norms	Issue-specific standards of appropriate behaviour Animating purpose of treaty	Individual Criminal Responsibility Penal Sanction No Immunity Subject Crimes (Genocide, Crimes Against Humanity, War Crimes, Aggression) Cooperation Complementarity
Treaty Rules	Operationalize normative commitments Convert institutional norms into specific behavioural requirements	Elements of Crimes Fair Trial Standards Modalities for Investigation / Prosecution Jurisdiction Relationship to UNSC

A particular legal institution is anchored by a set of core legal norms that provide the animating purpose of treaty. The Statute entrenches a normative order ("rule of law") predicated on a duty to criminal prosecution and penal sanction for grave crimes[28], in which natural human beings[29] are the subject of criminal responsibility. "The expectation of the Rome Statute is that the normal reaction to international crimes is to be prosecution. This sets a 'strict pattern of behaviour'."[30] One of the significant contributions of the Statute is therefore to identify certain international crimes—genocide, crimes against humanity, war crimes, and aggression—as

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the specific technical or procedural means of achieving that end? I thank Professor Katharina Coleman for suggesting this formulation.

[27] Richard Price (2006) "Detecting Ideas and Their Effects." In *The Oxford Handbook of Contextual Political Analysis*. Edited by Robert E. Goodwin and Charles Tilly. Oxford: Oxford University Press, 252-265, at 262.

[28] Paragraph 4 of the Preamble to the Rome Statute.

[29] Rome Statute, Article 1.

[30] Robert Cryer (2005) *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*. Cambridge: Cambridge University Press, 144.

particularly egregious acts, constituting the most serious forms of violence in the international system. These core crimes are thus to be distinguished from other types of international criminal activity like piracy, drug trafficking, and so on. Moreover, the Statute explicitly excludes diplomatic immunity[31] for Heads of State and other senior political figures, thereby reversing the prior diplomatic norms concerning the special legal status of certain high officials. Yet the Court will only possess a limited independent capacity to investigate and prosecute cases, and so depends on the active assistance of states to realize justice. To that end, the Rome Statute embeds two operational norms—what Amnesty International terms the "fundamental implementing obligations"[32]—of complementarity and cooperation; each of these are composed of, and supported by, a host of specific rules. The latter is the more straightforward of the two, as States Parties to the Rome Statute possess a legal obligation to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[33] This involves a host of specific tasks including on matters of arresting and surrendering suspects, providing evidence and documentation, enforcing sentences, and other means of support.[34] As per the conceptual framework advanced above, these constitute the rules that give effect to the norm of cooperation.

Most often however, properly addressing grave acts of criminality will require effective pursuit of justice at the domestic level, and so the broader purpose of the ICC regime is thus to facilitate the application of (international) criminal law in national jurisdictions. In this vein the Rome regime further develops an expectation of that states will develop sufficient domestic legal capacity to try ICC crimes in national jurisdictions, and creates a hierarchical structure of complementarity whereby the Court shall defer to states unless they prove unable or unwilling to genuinely pursue perpetrators.[35] The measure of state willingness and ability to pursue justice will, ultimately, be judged by the Court itself. In this way, complementarity produces a strong incentive towards legal standardization. Mark Drumbl has argued that:

> the more a national legal process approximates that of the ICC… the greater the likelihood that this process will be palatable and pass muster. This, in turn, suggests that… national institutions will model themselves along the lines of the ICC in order to maximize their jurisdiction. Complementarity, therefore, may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out.[36]

The Rome Statute thus creates a new norm of international(ized) prosecution: while national authorities retain the primary responsibility for ending impunity, they must do so via internationally-agreed standards of criminal law and with the oversight of a supra-national legal body.[37] This configuration "represents a sharp contrast to the earlier normative solution" in

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[31] Rome Statute, Article 27.
[32] Amnesty International (2010) *International Criminal Court: Updated Checklist for Effective Implementation*, 5. Available online at http://www.amnesty.org/en/library/info/IOR53/009/2010/en.
[33] Rome Statute, Article 86.
[34] These obligations are detailed in Parts IX and X (Articles 86-102 and 103-111) of the Rome Statute.
[35] Rome Statute, Article 17.
[36] Mark A. Drumbl (2007) *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press, 143.
[37] Wippman 2006, 101-102. This intention is articulated in the Preamble (especially paragraphs 4, 6 and 10) as well as Articles 1 and 17 of the Rome Statute. The assumption underlying this exercise is that justice can be best realized

which the responsibility for enforcing international criminal law rested solely with the domestic legal processes of sovereign states.[38]

In this sense, complementarity occupies an awkward middle ground between norms and rules: it is both a guiding principle and standard of behaviour, and suggests (at least in general terms) a method for determining how to assert jurisdiction over a case.[39] But, while the core norms of international humanitarian law are arguably increasingly "settled," the system of complementarity—and the resulting relationships between international and national institutions—remains contentious. On the one hand, opponents of the Court like the United States have articulated a principled objection to idea that national legal processes may be interrogated by outside actors – a violation, in their view, of the principle of state sovereignty. On the other hand, as a consequence of the structure of complementarity the Court also finds itself in the unique position as both the arbiter of appropriate conduct while at the same time being largely reliant on its member states to implement its mandate. These dual functions point to the difficulty Court officials often have in deciding when and how to comment upon the progress (or lack thereof) of states parties in meeting their commitments.

Ambivalence concerning the normative implications of a treaty does not necessarily imply a wholesale rejection of its legitimacy. Rather, such responses may be indicative of a sincere attempt to wrestle with the implications of legal obligation. Engaging the ICC on its own normative grounds, while providing space for potentially productive debate, also implicitly acknowledges the treaty as a consequential source of legal authority which may not be entirely ignored. To the extent that these critiques remain limited to discrete issues—and do not implicate the normative content of the ICC in its entirety—the treaty may therefore become more acceptable if the state in question modifies its views over time. By the same token, however, it is important to recognize that normative critiques frequently derive from genuinely divergent views concerning appropriate behaviour in a host of issue areas. These concerns may not ultimately be resolved in favour of the treaty, and sceptical states may thus remain outside of the ICC for principled reasons.

In order to operationalize the normative commitments in a legal agreement, treaty rules convert these core institutional principles into "concrete prescriptions or proscriptions" with specific behavioural requirements.[40] To give content to this legal framework, the Rome Statute and the subsequent Elements of Crimes also codifies a host of more particular rules with respect to the definition of core crimes[41], fair trial standards[42], and the specific modalities of criminal investigation and prosecution.[43] In doing so, the Statute largely consolidates disparate strands of existing customary and treaty-based international humanitarian and criminal law. As the above principles were broadly accepted at the Rome Conference as reflecting established international

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by transforming national criminal systems, and not by centralizing legal activity (investigations and prosecutions) in the Court itself.

[38] Deitelhoff 2009, 151.

[39] Article 53(1) and (2) of the Rome Statute offers some guidance for the Prosecutor in making this determination; but note that this is of a general nature, and the various considerations are not ranked or weighted.

[40] Hasenclever et al. 1997: 9-10.

[41] Rome Statute, Articles 6-8.

[42] Rome Statute, Article 67.

[43] Rome Statute, Articles 86-102.

criminal law[44], the revolutionary nature of the ICC is primarily found in its specific institutional arrangement, particularly in respect of how and under what circumstances the Court may assert its jurisdiction ("trigger mechanisms"), and its legal relationship to the United Nations Security Council and non-party states.[45] Procedural challenges do not necessarily undermine the treaty norms themselves, since the resistance is directed towards questions of how the norm should be implemented rather than their inherent legitimacy. This suggests the potential for further accommodation in the future, as procedural forms evolve or sceptical actors become more comfortable with their current configuration. On the other hand, seemingly limited claims can serve as the entry-point into broader ambivalence regarding the aims and intentions of the treaty; this prospect is taken up below.

When taken together, this configuration of actors and responsibilities constitutes a particular institutional solution for addressing the normative goals of the ICC. However, it is also important to point out that the very *existence* of a permanent international court with the ability to exercise legal authority over the nationals of all states (both parties and non-parties to the treaty) is a crucial development. Indeed, as Robert Cryer has pointed-out, the Court has both juridicial and diplomatic functions – it is simultaneously engaged in determining and applying the law, and promoting State acceptance of and adherence to this legal order.[46] These dual aspects of institutional design highlight the difficulty in strictly separating norms from rules and, as will be shown below, invite challenges to treaty legitimacy on either (or both) grounds.

At the top of this conceptual hierarchy, treaties are connected to a set of constitutional norms—such as sovereignty and diplomacy—underpinning the international system, as well as a collection of globally-recognized principles like "justice," "fairness," and so on.[47] These can be thought of as a chronologically prior, "generic category of social norms that provide 'reasons' which appear persuasive to decision-makers"[48] In some cases, specific treaty norms and rules may be perceived to conflict with these general, systemic norms. This can occur either by reinterpreting the norm—suggesting that the same principle of "justice" implies a *different* institutional solution or policy outcome—or by referencing alternative principles altogether – for example, by asserting that concern for guarding state sovereignty trumps other considerations in judging the legitimacy of a legal process.[49] This form of contestation differs from those discussed above, since the referent norms are not being targeted themselves, but are rather invoked in order to challenge the legitimacy of *other*, treaty-based commitments. Such critiques are especially damaging to the normative status of a legal institution, since specific treaty norms

[44] In some important instances, however—like the inclusion of gender violence as a crime against humanity or a customary rule removing diplomatic immunity for crimes under the Court's purview—the final treaty text did not reflect a consensus view. Glasius 2006.
[45] Rome Statute, especially Articles 13 and 12(b) respectively.
[46] Robert Cryer (2008) "The International Criminal Court and Its Relationship to Third States." In The Emerging Practice of the International Criminal Court. Edited by Göran Sluiter and Carsten Stahn. The Hague: Brill, 115-133, at 120-121.
[47] Reus-Smit 1997; Philip Nel (2002) "Between counter-hegemony and post-hegemony: The Rome Statute and normative innovation in world politics." In *Enhancing Global Governance: Towards a New Diplomacy?* Edited by Andrew F. Cooper, John English, and Ramesh Thakur. New York: United Nations University Press, 152-161.
[48] Weiner 2004, 199.
[49] Andrea Liese (2009) "Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment when Countering Terrorism." *Journal of International Law and International Relations* 5(1), 17-47, at 42 and 49; Wiener 2004, 199.

are explicitly bypassed in favour of higher-order or universalistic claims. The latter are then judged to entail a prior and more authentic source of authority and are thus to be privileged.

The content of state discourse provides a useful means of assessing the extent to which legal norms have impacted upon even those states that formally resist the ICC's authority. Developing an adequate conception of these differing modes of contestation will contribute to a fuller understanding of the legitimacy already enjoyed by the Court, by explicitly considering the discursive agency of non-parties. At the same time, this approach will provide useful evidence concerning whether and in what ways the ICC's authority has begun to influence sceptical states.

The Political Significance of Non-Party Discourse: Endorsement and Contestation and the ICC

Disputes over particular rules—whether due to their lack of clarity, fairness, and so on—are a prominent means by which non-parties have challenged the legitimacy of the ICC. The application of treaty rules is necessary for states to comply with their obligations regarding cooperation and complementarity under the Rome Statute, and is thus of central importance to the functioning of the Court. Yet the institutional solution that defines the ICC regime is neither a singly obvious nor uncontroversial outcome. Indeed, as Struett points out, "[d]uring the negotiations [of the Rome Statute], a much wider range of approaches to constructing a permanent ICC was considered, with vastly different approaches to the powers, jurisdiction, and role of the new court."[50]

To begin, states as diverse as Armenia, Azerbaijan, Guatemala, Iran, Russia, Pakistan, Sudan, Ukraine, Uzebekistan, and the United States have objected to ICC rules—including a ban on the death penalty[51] and the absence of trial by jury—on the grounds that these conflict with their own established legal traditions.[52] Similarly, a number of states with large Muslim and Catholic populations have challenged the inclusion of various forms of sexual violence as crimes against humanity and war crimes, and particularly sought to reframe the criminal definition of "forced pregnancy" under the Statute.[53] In another interesting example, the Israeli government has claimed that its sole point of opposition to the ICC rests on the inclusion of the transfer of civilian populations in occupied territories as a war crime, which, in its view, is not an established rule of international law.[54] Finally, some non-parties have expressed concern over

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[50] Struett 2008, 24-25.

[51] Rome Statute, Article 77.1(a) and (b).

[52] See for example, Hirad Abtahi (2005) "The Islamic Republic of Iran and the ICC" *Journal of International Criminal Justice* 3, 635-648, at 644; Bakhtiyar Tuzmukhamedov (2005) The ICC and Russian Constitutional Problems" *Journal of International Criminal Justice* 3, 621-626; and Ruth Wedgwood (2000) "The Constitution and the ICC" in *The United States and the International Criminal Court*. Edited by Sarah B. Sewall and Carl Kaysen. New York: Rowman & Littlefield Publishers, Inc., 121. For the above countries, please also see the specific Country Profiles on the Coalition for the International Criminal Court website: www.coalitionfortheicc.org.

[53] Rome Statute Articles 7.1(g) and 8.2(b)(xxii). "The main aim of the proposal was to replace the crime of forced pregnancy with 'forcible impregnation.' Despite the similarities between these terms, the two crimes contained different elements or rules defining the parameters and penalties for the crime. For instance, whereas forcible impregnation referred to the single act forcing women into pregnancy, forced pregnancy was a 'broader concept involving keeping women pregnant,' even in the case of rape or incest." Roach 2006, 144.

[54] Article 8.2(b)(viii). During the 9th Preparatory Committee meeting (July 17 1998), the Israeli delegate stated that "had [this paragraph] not been included, my Delegation would have been able proudly to vote in favour of adopting

how the crime of aggression would be incorporated into the Court's jurisdiction, and have linked any final decision on accession to the technical merits of this modality.[55]

While undoubtedly reflecting important points of contention, such disagreements often focus narrowly on the precise content of law. Procedural disputes do not necessarily undermine the progressive extension of treaty norms, since the resistance hinges on questions of interpretation and implementation—how the norm is to be realized—rather than disputes concerning the norms themselves. The United States, for example, has asserted that its "concerns about the ICC are concerns about means, not about ends."[56] Treaty opponents may therefore root their objections in particular rules while still claiming to support the broader principles at stake. In isolation, therefore, narrow rule-based critiques may be overcome or outweighed by favourable views concerning other aspects of the Statute.

On the other hand, seemingly limited claims can serve as the entry-point into a broader critique concerning the aims and intentions of the treaty. More trenchant procedural critiques have centred on the jurisdictional scope and relative independence of the ICC, and by extension, its relationship to the broader international system. A number of prominent states including China, Egypt, India, Pakistan, Russia, and the United States have thus rejected the Court's claim to authority over the nationals of non-party states via the territoriality provision[57] and the inclusion of the Prosecutor's ability to launch an investigation *proprio motu* – that is, without prior agreement of the state(s) whose nationals are implicated.[58] In the view of these states, the structure of the Rome Statute violates a fundamental tenet of international law that states cannot be bound by rules to which they do not consent.[59] At the same time, many of these same states

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the Statute." Document on file with the author. There are some grounds to doubt this claim, however, as the Coalition for the International Criminal Court has since noted that this matter "was largely resolved through the negotiations on the Elements of Crimes at the UN Preparatory Committee." CICC Country Profile, Israel: http://www.coalitionfortheicc.org/?mod=newsdetail&news=155.

[55] India, Iran, Kuwait, Laos, Lebanon, Russia, Syria, Turkey, Ukraine, the United States, and Vietnam, among others, have previously indicated concern for how aggression would be incorporated into the jurisdiction of the Court. Thus far, none appear to have made a formal policy announcement since the decision on aggression in Kampala in June 2010. For example, see Abtahi 2005, 636-647; Statement by Djamchid Momtaz, Legal Advisor of the Ministry of Foreign Affairs of the Islamic Republic of Iran, International Criminal Court Review Conference, Kampala, 1 June 2010; Statement by H.E. Kirill G. Gevorgyan, Director of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation, Head of the Delegation of the Russian Federation to the Review Conference of the Rome Statute of the ICC, Kampala, 1 June 2010; Statement by Mr. Ismail Aramaz, Head of the Turkish Delegation, ICC Review Conference, Kampala, 1 June 2010; and Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes, Review Conference of the International Criminal Court, Kampala, 1 June 2010. Official Statements available online at http://www.icc-cpi.int/Menus/ASP/ReviewConference/GENERAL+DEBATE+_+Review+Conference.htm.

[56] Statement by the Representative of the United States of America to the General Assembly of the United Nations, on the Report of the International Criminal Court. (Draft resolution (A/63/L.19)). 45th Plenary Meeting of the 63rd Session of the General Assembly. November 11, 2008.

[57] As per Article 12.1(a), individuals are subject to ICC jurisdiction if the crime was committed on the territory of a State Party irrespective of the status of the individual's home government.

[58] Article 15.1. Regarding the controversy during negotiations, see Glasius 2006, 47-60.

[59] Vienna Convention on the Law of Treaties, Article 34. Ralph 2007, 131; Lu Jianping and Wang Zhixiang (2005) "China's Attitude Towards the ICC" *Journal of International Criminal Justice* 3, 608-620, at 611; Usha Ramanathan (2005) "India and the ICC" *Journal of International Criminal Justice* 3, 627-634; and Bing Bing Jia (2006) "China and the International Criminal Court: Current Situation" *Singapore Year Book of International Law* 10, 1-11. For a representative statement from the U.S. position, see David J. Scheffer, Ambassador-at-Large for War

have argued that the legal structure enshrined in the Rome Statute—by positing an independent role of the ICC Prosecutor beyond the authority of the United Nations Security Council—does not respect the UNSC's pre-eminent responsibility for maintaining international peace and security.[60] This strand of critique also features in many of the concerns voiced regarding the operationalization of the crime of aggression. To this end, at least three alternative arrangements, ranging from domestic trials (with no international oversight), ad hoc tribunals, and UNSC control of a permanent court, have been previously advocated by non-parties as solutions to perceived structural flaws in the Rome Statute. These types of technical critiques are potentially more damaging than narrow legalistic challenges since they call into question the proper nature of the ICC's relationship to established international law.

While rooted in legalistic argument, therefore, jurisdictional disputes also frequently engage with particular normative commitments codified in the legal text, and it is this feature that is responsible for much of the enduring ambivalence toward the institution. For example, Muslim states like Iran and Malaysia have charged that the Rome Statute does not adequately incorporate traditions derived from Shari'ah law, and therefore contains a bias against these domestic legal systems.[61] This critique has played out in a variety of issue areas, perhaps most notably in regard to the definition of "forced pregnancy" and associated sexual crimes. States that reject the inclusion of these (predominantly gender-based) crimes are by extension worried that the ICC will be used to force changes to their own cultural and legal traditions concerning abortion, homosexuality, and women's rights.[62] While this could be read as a rule-based dispute in the mode discussed above, these critiques are ultimately more concerned with fundamental expectations regarding the scope of "grave" crimes—what counts as normatively (in)appropriate behaviour—and the related question of whether international standards should ever supersede domestic legal systems.[63]

This latter concern is reflected more broadly in the scepticism that many non-parties have shown for the complementarity framework enshrined in the Rome Statute. In the view of these states, the structure of Article 17 "gives the ICC the power to judge whether a state is able or willing to conduct proper trials of its own nationals"[64] and thus exert final judgement over

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Crimes Issues, U.S. Department of State. "Deterrence of War Crimes in the 21st Century" Twelfth Annual U.S. Pacific Command International Military Operations and Law Conference. Honolulu, Hawaii, February 23, 1999.

[60] For more on this, please see the discussion below.

[61] Abtahi 2005, 644-646; Roach 2006. However, Nassar argues that Shari'ah law is not necessarily incompatible with international law, and may in fact provide useful grounds for promoting compliance by Muslim countries. Ahmad E. Nassar (2003) "The International Criminal Court and the Applicability of International Jurisdiction Under Islamic Law" *Chicago Journal of International Law* 4(2): 587-596, at 591. See also Farhad Malekian (2009) "The Homogeneity of International Criminal Court with Islamic Jurisprudence" *International Criminal Law Review* 9: 595–621.

[62] As Glasius (2006, 32) reports of the negotiations for the Statute, "the feminist majority of women's groups in New York and Rome, focused on women's rights, met a vocal minority of anti-abortion groups, supported by the Vatican and Arab states, whose preoccupation was to prevent any language that might be interpreted as facilitating abortion from entering the Statute…. While abortion was their primary concern, their agenda was wider, including concerns about 'forced social change by feminist, homosexual and other radical groups'." Interestingly, Article 7.2(f) explicitly states that "This definition shall not in any way be interpreted as affecting national laws relating to pregnancy." For more on this compromise solution, see Glasius 2006, 77-93 and Roach 2006, 144-146.

[63] Roach 2006, 137-138.

[64] Jianping and Zhiziang 2005, 613.

domestic legal processes. Algeria, China, Egypt, India, Indonesia, Sri Lanka, Ukraine, and the United States have all raised concerns that complementarity as presently constructed may lead to an expansive claim to jurisdiction and raise the spectre of politically-motivated prosecutions. Critics have similarly resisted the implications of Article 21.1 eliminating all forms of immunity from prosecution, and have based this objection on a view that diplomatic and especially Head of State immunity qualifies as an established norm of international diplomacy that may not be obviated unilaterally.[65] These challenges are thus underpinned by a more general concern for the appropriate balance of national and supra-national authority. Too much oversight from an international body in this view results in a diminishment of national sovereignty; this effect is particularly pronounced here since the states in question have elected not to join the relevant legal instrument. It is in this context of concern about the scope of ICC authority over national policy that China, India, and Pakistan have challenged the legitimate jurisdiction of the Court over crimes against humanity and war crimes committed exclusively within a nation's borders and (in the case of the former) outside the context of an "armed conflict".[66]

Hence, while state actors may challenge specific treaty norms or rules without necessarily rejecting higher-order principles, non-parties have alternatively invoked constitutive global values to challenge the legitimate status of the ICC. Objections may then speak to wider debates concerning the nature of "appropriate behaviour" for actors in a complex international system. A couple of prominent examples bear this pattern out. First, disagreements concerning the proper content and application of the twin values of "justice" and "peace" have emerged as a central point of contention in assessing the legitimacy of the International Criminal Court. On the one hand, various scholars, diplomats, and civil society representatives have questioned whether the (Western) preference for penal sanctions is *always* the most appropriate mechanism for dealing with acts of mass atrocity.[67] This debate has played out in the context of the complementarity regime established by the Rome Statute, and has been particularly relevant to the ongoing situation in Northern Uganda where government and local civil society actors have suggested that indictees from the Lord's Resistance Army might be offered "alternative justice" through a national peace process.[68] Questioning the *ends* of a legal process in this way engages core normative assumptions embedded in the Rome Statute—especially the expectation that States Parties will adopt the legal modalities for the definition and punishment of "grave crimes" enshrined in the ICC—and does so from the perspective of a purportedly higher-order standard.

At the same time, much of the Court's early case selection and jurisprudence has drawn the institution into profound debates concerning its role in promoting the peaceful resolution of conflicts, and the equally fraught question of what constitutive values should be privileged. This is especially apparent in the debates surrounding UN Security Council Resolution 1422 and its renewal, and the referral (and subsequent indictment) of Sudanese President Omar al-Bashir for

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[65] For example: "we believe the Court could exercise a more balanced approach to the matters concerning the correlation between its jurisdiction and such an important institute of international law as immunities of high ranking state officials." Statement by Gevorgyan (Russian Federation), 1 June 2010.
[66] Jianping and Zhiziang 2005, 614-617; Ramanathan 2005; Jia 2006, 89.
[67] Drumbl 2007.
[68] For example, see Tim Allen (2006) *Trial Justice. The International Criminal Court and the Lord's Resistance Army*. New York: Zed Books; Marieke Wierda and Michael Otim (2008) "Justice at Juba: International Obligations and Local Demands in Northern Uganda." In *Courting Conflict? Justice, Peace and the ICC in Africa*. Edited by Nicholas Waddell and Phil Clark. London: Royal African Society, 21-28.

genocide, crimes against humanity, and war crimes. With respect to the latter, a number of African states—some already members of the Court—have argued that the ICC indictment has made the resolution of the conflict in Darfur more difficult, and in so doing has unnecessarily imperilled more innocent lives. This same logic can be found in much of the discourse concerning how various legal or political processes may impact efforts to negotiate an end to the conflict in Northern Uganda.[69] Debates concerning the primacy of security were also at the centre of U.S. efforts to secure an exemption from ICC jurisdiction for its military personnel serving in UN peacekeeping operations. As the then U.S. Ambassador to the UN explained during debate on the renewal of the UN mandate in Bosnia,

> While we fully expect our peacekeepers to act in accordance with established mandates and in a lawful manner, peacekeepers can and do find themselves in difficult, ambiguous situations. Peacekeepers from States that are not parties to the Rome Statute should not face, in addition to the dangers and hardship of deployment, additional, unnecessary legal jeopardy. If we want troop contributors to offer qualified military units to peacekeeping operations, it is in the interest of all United Nations Member States to ensure that they are not exposed to unnecessary additional risks.[70]

In effect, the United States has argued that concerns for justice *as defined by the ICC* should be subordinated to the goal of ensuring peace in the Balkans. Importantly, the U.S. position came down to a claim that the latter goal largely depended on its own participation, and so should take precedence over a particular formulation of "justice" that it found unacceptable.[71] This normative calculus was by no means accepted by all states, as evidenced by heated debates in the Security Council chamber, and the inability of the U.S. delegation to secure a further extension of the resolution in 2004.

The discourse surrounding UNSC Resolution 1422 (and its renewal) makes clear that the dispute was not just about peacekeeping operations in Bosnia, or legal exposure on similar missions elsewhere. At the heart of this debate were fundamentally divergent views concerning the role of the ICC as the pre-eminent global criminal justice institution and how this new legal entity would sit in relation to existing international principles and structures. Notions of sovereignty and consent as the basis of the international legal order have been highlighted elsewhere, though it is useful to note once again how centrally prominent critics of the Court have viewed these issues in assessing the legitimacy of the ICC.[72] Yet an even more problematic frame has emerged whereby prominent non-parties like China, Russia, and the United States demand that the Court respect the current composition of the international

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[69] For a review of these debates, see for example Sara Darehshori and Elizabeth Evenson "Peace, Justice, and the International Criminal Court" Oxford Transitional Justice Research - Research Article 1 19 March 2010. Available online at http://www.csls.ox.ac.uk/otjr.php?show=workingpapers.

[70] Statement by John Negroponte, United States Permanent Ambassador to the United Nations. United Nations Security Council session on the situation in Bosnia and Herzegovina. New York, 10 July 2002.

[71] Statement by Ambassador John D. Negroponte, United States Permanent Representative to the United Nations. Explanation of Vote on Renewal of the Mandate for the UN Mission in Bosnia and Herzegovina. 30 June 2002. USUN PRESS RELEASE # 87 (02).

[72] See, for example, the Statement of Chinese Delegation at the General Debate of the Review Conference of Rome Statue. Kampala, Uganda, 1 June 2010. Available online at http://www.icc-cpi.int/Menus/ASP/ReviewConference/GENERAL+DEBATE+_+Review+Conference.htm.

system and the special responsibilities bestowed upon materially powerful states by virtue of their structural position.[73] China has thus argued that

> as a member of world peace and security system, the Court cannot operate without support of countries and relevant international organizations, and the Court's activities must be taken within the current international law framework with UN Charter as its foundation. We hope, the Court could fully recognize this, handle its relationship with the outside world in a cooperative and balanced attitude, and make contributions to constructing a harmonious world.[74]

The Court's relationship to the UN—and particularly the Security Council—can be understood as both a practical and normative issue in that it implicates the proper distribution of rights and duties in the international system. As the United States delegation made clear soon after the creation of the Court,

> the United States has had an abiding interest in what kind of court the ICC would be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international peace and security. Our refusal to support the final draft of the treaty in Rome last summer was grounded in law and in the reality of our international system.[75]

This privileging of great power politics seeks to subordinate the ICC to other international structures and is thus a fundamental challenge to its independent position in the international system. Hence the challenge to the Court rests not strictly on technical claims, but ultimately on broader principled disputes that imply that the ICC already operates beyond the scope of its legitimate mandate. This formulation, naturally, differs fundamentally from that of Court supporters.

At the broadest level, these debates engage questions of inherent institutional fairness. The lines of critique noted above converge, for the U.S. at least, in an overall complaint that the Court is unrepresentative and thus conflicts with a foundational norm of procedural fairness in international law. In a very different fashion, a number of less powerful states—including Libya and Iran—have expressed concerns over the prospect of biased or selective prosecutions targeted against the nationals of weaker states.[76] The African Union has repeatedly invoked concerns for equality in charging that the ICC unfairly targets African leaders, and to that end, has ended official support for the Court and demanded that the indictment against President Bashir be

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[73] Hence, "The United States has contributed – and will continue to contribute – to maintaining peace and security in the Balkans and around the globe…. With our global responsibilities, we are and will remain a special target and cannot have our decisions second-guessed by a court whose jurisdiction we do not recognize." Statement by Negroponte (United States), 30 June 2002.

[74] Statement by the Chinese Delegation, 1 June 2010.

[75] Statement by Scheffer (United States), 23 February 1999.

[76] See, for example, Statement by Mr. Fattah Ahmadi, Director, Treaties and Public International Law Department Ministry of Foreign Affairs at the International Criminal Court Assembly of States Parties. Seventh Session. The Hague, Netherlands, 15 November 2008. Available online at http://www.icc-cpi.int/Menus/ASP/Sessions/General+Debate/GENERAL+DEBATE+_+Seventh+Session+of+the+Assembly+of+States+Parties.htm.

withdrawn in favour of an "African" court to try responsible parties.[77] Again, such critiques are especially damaging to the extent that they emanate from actors within the ICC's formal legal community, as is the case with many AU member states.

What are we to make of these various modes of contestation? The preceding discussion has demonstrated that principled and institutional forms of resistance will frequently interact. Challenges to the ICC often appear to turn on questions of appropriate institutional form. Serious discussion of the content of the treaty does not necessarily imply a wholesale rejection of the legitimacy of the institution, since these debates hinge on the technical merits of the particular rules, rather than the broader question of the legitimacy of trying individuals for violations of international humanitarian law. Indeed, there is significant evidence to suggest that many (if not most) non-parties already endorse many of the foundational norms embedded in the Rome Statute. No state argues that genocide, crimes against humanity, and war crimes are permissible or that they should not be punished; instead, opponents often question whether the existing treaty mechanisms are the correct means of addressing these issues. At the time of the ICC's creation, the U.S. delegation noted that

> The Clinton Administration believes that a core purpose of an international criminal court must be to advance a simple norm: countries should bring to justice those who commit genocide, widespread or systematic crimes against humanity, and large-scale commission of war crimes, or turn suspects over to someone who will, such as an impartial and effective international court.[78]

Procedural challenges, especially when isolated from broader normative critiques, pose a more limited threat to the legitimacy of the Court since they have the potential to be resolved as points of law. Non-parties may either accept the ICC legal regime as it currently exists (and thus move towards greater accommodation and potential accession), seek to informally influence the interpretation of treaty rules, or continue their ambivalent stance.

Most prominent non-parties have not succeeded in entirely ignoring the ICC, but have instead chosen to attend treaty meetings and participate in discussions of the Court's future operation. Far from expressing uniform hostility, therefore, such responses may be indicative of a sincere grappling with the implications of legal obligation. Engaging the respective treaties on their own grounds, while providing space for debate, also implicitly acknowledges their status as consequential sources of authority.[79] This has been reflected in statements from various non-parties:

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[77] Assembly of the African Union, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* Thirteenth Ordinary Session July 1-3, 2009, Sitre, Libya; and African Union, *Communique on the 3 February 2010 Judgement of the International Criminal Court Appeals Chamber on Darfur* February 4, 2010. For an excellent collection of short papers concerning the interplay of peace and justice in Africa, please see Oxford Transitional Justice Research (2010), *Debating International Justice in Africa: OTJR Collected Essays, 2008–2010*. Available online at http://www.csls.ox.ac.uk/otjr.php.

[78] Statement by David Scheffer, Ambassador at Large for War Crimes Issues, U.S. Department of State. "Responding to Genocide and Crimes Against Humanity" Address Before the Committee of Conscience, Holocaust Museum, Washington, DC, 22 April 1998.

[79] For example, Nassar (2003: 594) notes that a number of Muslim states signed the Rome Statute during the final few days in order to "allow the respective governments to have an influence on the development of the ICC."

> The strength of the Court consists not only in its ability to punish but also in the fact that its only existence can influence drastically both the world political climate and national legislation of States. It is a kind of a sword of Damocles for those who admit a possibility of achieving political goals by committing mass murders, extermination and violating international law. Therefore, already today at the initial stage of the ICC existence we can affirm that the Court has fulfilled itself and found its own place in the world.[80]

These conditions would seem to open productive avenues for further expanding the formal scope of the ICC over time.

Yet debates over the scope of appropriate behaviour in dealing with the "most serious crimes of concern to the international community"[81] are not easily resolved. Objections to the ICC are so politically salient because they are rooted not merely in narrow technical debates, but frequently invoke broader normative claims involving alternative conceptions of legitimate action and/or fundamental principles of international order. Hence procedural critiques focused on the institutional form of the ICC are deceptive as they often mask deeper, principled logics of resistance. Ralph has suggested that in this way, the ICC is vulnerable to a fundamental competition between a cosmopolitan view of expanding international obligations, and a conservative communitarian adherence to established principles of state sovereignty and consent.[82] This would constitute a more damaging form of contestation, since it would call into question the very principles employed to justify the institution. When faced with a perceived incongruence between treaty norms and general norms of the international system, opponents of a given treaty typically suggest that the more particular instrument should give way. The Bashir case is emblematic of a frequent invocation of "national sovereignty" as a bulwark against a fully independent Court, and the reification of domestic jurisdictions as the privileged and appropriate forum for adjudicating grievous international crimes.

Yet this process can cut both ways. Since endorsement and contestation can converge and diverge at different levels, the same state may find aspects within the legal institution that it supports and rejects. As already noted, a host of current non-parties—including China, Egypt, Iran, Laos, Malaysia, Pakistan, Russia, Turkey, Ukraine, the United States, and Vietnam—have expressed a general acceptance of some constituent ICC norms, even while challenging other aspects. Critiques of the Court are frequently framed in the context of alternative visions of responsibilities and rights—that is, of the proper content of international society[83]—that necessarily come into contact with the Rome Statute's normative model. Differing principled standards may directly conflict, and the process of accepting some norms while resisting others generates paradoxes and inconsistencies that can be productive exploited by treaty proponents. It was therefore highly significant that the United States did not oppose the UN Security Council

[80] Statement by Gevorgyan (Russian Federation), 1 June 2010. Similarly, "We believe that the principles and values laid down in the Statute will enable the Court to become an effective organ for the international community to combat the most serious crimes and render justice to victims of war crimes." Statement by Mr. Fadaifard, Islamic Republic of Iran, United Nations Security Council session on the situation in Bosnia and Herzegovina. New York, 10 July 2002.
[81] Rome Statute, preamble, paragraph 4.
[82] Ralph 2007.
[83] Ralph 2007, 120.

referral of the Darfur situation to the ICC. More significant still was the reference to justice as the basis of this decision:

> While the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it is important that the international community speaks with one voice in order to help promote effective accountability…. We decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in Sudan, and because the resolution provides protection from investigation for U.S. nationals and members of the armed forces of non-state parties.[84]

Thus even when opposition is rooted in foundational norms of the international system, the prospect exists that state actors may be convinced to adopt an alternative conception in which the ICC accords with, rather than contradicts, the cherished value. All of this opens the space for a potential dialogue between competing views that may, given the right conditions, resolve in favour of greater support for the ICC.

Conclusion

Conceiving of the International Criminal Court as a bundle of normative expectations and procedural rules goes some way to identifying and explaining the complex matrix of critiques facing the new legal body. An important contribution is thus to demonstrate that the position of non-parties is not uniformly hostile. Many have indeed evidenced considerable acceptance of constitutive norms if not the particular institutional framework, though this support comes in different forms and in varying degrees. There remain, however, crucial disagreements about the proper interpretation and application of international criminal law as it relates to the "grave crimes" regime. These concerns are frequently underpinned by reference to foundational global values, and this fact gives the challenges much of their potency and longevity. Hence, a second purpose has been to sketch-out a rough hierarchy whereby these various critiques can be assessed for their likely impact on the health of the legal institution. Determining the content of such challenges, and what they imply for the health of other, higher- and lower-order norms, thus requires careful attention to the context of the claims being made.

While the focus here has been on the source of non-party challenges, contestation also implicates the agency of other actors—both state and non-state—in the process of supporting or challenging legal norms. In the wake of disputes over treaty authority, the response from other actors is vital to the reinforcement of norms and rules. States and civil society representatives have a range of options in how they interpret and engage instance of contestation. Actors may highlight transgressions and engage in public condemnation, and seek various means of coercive or non-coercive influence; alternatively, parties may choose to downplay the violations or disputes and pursue non-confrontational, cooperative solutions. This raises the important question of what strategies—publicizing violations vs. looking the other way, punishment vs.

[84] Statement by Mrs. Patterson, Representative of the United States of America at the United Nations Security Council Meeting concerning Reports of the Secretary-General on the Sudan (Passage of UNSC Resolution 1593). New York, 31 March 2005. S/PV.5158. The U.S. has reiterated this position on numerous occasions. See for example Remarks by Ambassador Rosemary A. DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, on Sudan and the ICC, in the Security Council Chamber. New York, 4 December 2009. Available online at http://www.amicc.org/usinfo/administration_policy_SC.html#referral.

cooperative engagement—are best able to promote robust norms. This latter subject cannot be addressed adequately here, except to note that the future development of non-party relations with the Court—whether leading to greater accommodation or further retrenchment—will be influenced in no small measure by the actions of ICC proponents.