The Problem of the Authority of the International Criminal Court

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Abstract

This research examines the problem of the authority of the International Criminal Court (ICC), focusing on its claim to jurisdiction as its primary exercise of authority. The research questions the basis of the Court's authority, beginning with an analysis of current theories of authority and exploring their relevance to the Court. It then explores the 'permission' that it has to act, based on the consent of States and the UN Security Council mandate, and questions whether the Court has the authority to act, based on current legal theories. The problems associated with using current theory and methods of thinking about authority to explain the authority that the ICC are then explored.

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Introduction[1]

At a press conference in April 2018, President Rodrigo Duterte of The Philippines, rejected the right of the International Criminal Court to investigate the alleged crimes against humanity that his government has committed in pursuit of its 'war on drugs'. "What is your authority now?'. He asked. 'You cannot exercise any proceedings here without basis. That is illegal and I will arrest you."[2] Although not renowned for his clarity of thought, Duterte makes an interesting connecting between the International Criminal Court's actions and its authority. In the literature relating to international criminal law, the question of the Court's authority has not been considered in great depth. This could be, in part, because of the presumption that it has sufficient authority to act. The link between the State Party and the Court is presumed to give it the authority that it requires to launch investigations without any further negotiation. This is reinforced by the idea that, as an international court, it does not have exclusive jurisdiction and instead its jurisdiction is complementary to that of national courts. This makes it, in some ways, an extension of national criminal law.[3] In a similar way to domestic courts, the International Criminal Court's power is derived from domestic governments, which have created it through ratifying the Rome Statute. The creation of treaties by consent demonstrates one of the central arguments for the authority of international law: the consent of States.[4] The treaty, and the rules thereunder, are presumed to have authority because the States possess the authority to create the treaty in the first place. It would then appear reasonably straightforward: The States Parties have given their agreement to the laws under the Statute and so the Rome Statute has the power to act within the jurisdiction of these States in a manner complementary to the domestic system. As part of this complementarity, States Parties must also be 'unwilling or unable genuinely' to prosecute,[5] meaning that national executive must be given the opportunity to prosecute first. This places the primary responsibility for prosecution on the State.[6]

However, this is not the only means by which the Court may possess the authority to acquire jurisdiction; its jurisdiction may also be 'triggered' in certain circumstances. These 'triggering mechanisms' mean that an investigation can begin in one of three ways: a referral from a State Party, a *propio motu* investigation by the Prosecutor, or a referral from the United Nations Security Council.[7] The latter mechanism considerably extends the authority of the Court and raises issues of consent where the situation concerns failed States or those which do not have democratically elected representation to speak on their behalf.[8] This mechanism complicates the question of authority, because of the potential accusations of abuse of power or politically motivated referrals.[9] Such power complicates the question of the Court's authority: without a

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[2] President Duterte, speaking about the Filipino Government's decision to withdraw from the Rome Statute, quoted in 'Duterte threatens to arrest International Criminal Court prosecutor', *The Guardian*, 13 April 2018, available at https://www.theguardian.com/world/2018/apr/13/philippines-duterte-threatens-to-arrest-international-criminal-court-prosecutor, accessed 4 July 2018.

[3] M.Cherif Bassiouni, 'The Permanent International Criminal Court', in Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes against Humanity* (Hart Publishing, Oxford, 2003), at 181.

[4] Daniel Bodansky and J. Shand Watson, 'State Consent and the Sources of International Obligation', 86 *AJIL* (1992) 108-113.

[5] Article 17(1)(a), Rome Statute of the International Criminal Court 1998 (hereafter, 'Rome Statute).

[6] Article 1, Rome Statute.

[7] Article 13(b), Rome Statute.

[8] Marko Milanovic, 'Is the Rome Statute binding on individuals?' (2011) 9(1) *JICJ* 25-52.

[9] Darryl Robinson 'Inescapable Dyads: Why the International Criminal Court Cannot Win', 28(2) *LJIL* (2015) 323-

clear conception of authority in international criminal law, the Court may be viewed *in aeternum* as a vehicle for the values of the powerful, rather than universal values. International law in general is vulnerable to the influence of economically and politically emboldened States:[10] with the International Criminal Court, international criminal law may also be vulnerable to abuse by those with neo-colonial intentions.

This brief outline of the jurisdictional provisions of the Court demonstrates that the problem of its authority is not resolved by the text of the Rome Statute alone. Moreover, the discussion regarding whether the International Criminal Court should or may act focuses on its legitimacy: many authors query the legitimacy of its actions and its ability to exercise jurisdiction.[11] However, the question of authority is not often investigated in great detail.[12] As legitimacy can be described as the authoritative exercise of power,[13] it is proposed here to investigate the problem of the Court's authority, and to provide an explanation as to why it lacks authority, as we currently understand it.

This research examines the problem of the authority of the International Criminal Court, focusing on its claim to jurisdiction as its primary exercise of authority. The research questions the basis of the Court's authority, beginning with an analysis of current theories of authority and exploring their relevance to the International Criminal Court. It then explores the 'permission' that it has to act, based on the consent of States and the UN Security Council mandate, and questions whether the Court has the authority to act, based on current legal theories. The problems associated with using current theory and methods of thinking about authority to explain the authority that the International Criminal Court are then discussed, concluding that the current theories of authority do not really explain what sort of authority the Court has and explaining the problems this creates.

The Authority of Law

The concept of authority has been, in the words of Joseph Raz, one of the most controversial concepts in legal (and political) philosophy'.[14] Its controversy attaches to the problem of determining what authority is and how it may attach to certain acts and rules: why do we obey or follow rules, and do we need to do so for them to be authoritative? Should rule-makers be able to tell others what to do? Controversial though it may be, understanding authority is a necessary part of understanding why the law has any power over individuals in society, both domestic and international. This is particularly important at the international level because of the significant power that some States possess in comparison to others. The discussion of the idea of authority is discussed in various degrees of depth by legal and political theorists: Mill speaks

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347, at 327.

[10] *See* Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Penguin, London, 2006).

[11] See, among others, Karen Alter, Lawrence Helfer and Mikael Madsen, *International Court Authority* (Oxford University Press, Oxford, 2018) Nobuo Hayashi and Cecilia Baillet, *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, Cambridge, 2017); Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' 34(5) *TWQ* (2013) 800-818; and Mandiaye Niang, 'Africa and the Legitimacy of The ICC in Question,' 17(4) *ICLR* (2017) 615-624.

[12] Allen Buchanan, 'The Legitimacy of International Law', and David Luban, 'Fairness to rights: Jurisdiction, Legality and The Legitimacy of International Criminal Law', both in John Tasioulas and Samantha Besson (eds.), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010).

[13] Joseph Raz, *The Morality of Freedom* (Oxford University Press, Oxford, 1988).

[14] Joseph Raz, *The Authority of Law* (1st edn, Oxford University Press, Oxford, 1979) at 3.

of the tension between authority and liberty but does not outline what he considers authority to be. His writing tends to focus instead on the existence of a government which then has the power to rule, within certain limits, without separating out the ideas of power and authority.[15] John Austin speaks of the command theory of law but does not explain why the State has the authority to command its subjects,[16] focusing instead on the power that the State has to coerce its subjects to obey. In a manner similar to Mill, he speaks of the sovereign's might, rather than its authority to act, and hints at the idea that everyone was sufficiently 'competent,' all individuals in society may be sovereign.

A more realistic view of authority, albeit political, is offered by Weber, who defines authority as the likelihood that a directive will be obeyed.[17] His discussion links the ideas of power and authority to the legality of a particular order and sheds some light on what authority may be. However, Weber focuses on the belief in the system, meaning that the orders are imposed on the population and that they must obey, which reflects their belief in the system. No mention is made of individual autonomy. From a pure legal theory perspective, Kelsen focuses on the existence of a 'basic norm'[18] which gives law its authority by sitting outside the legal order and entitling the law-makers to create rules. Raz's initial offering on the topic states that authority is the legitimate exercise of power,[19] but this is given further development in his other works, which will be discussed later on. Raz undoubtedly develops his ideas of authority to the greatest extent, leading on from Weber's idea of authority as based on a belief in the law as legal and developing it to note that individuals do not need to obey the law. Instead, from Raz's perspective, the extent to which the law has authority corresponds to whether it serves the individual's autonomy.[20]

The work of Raz is a useful bridge between political and legal authority, as he notes the significance of the existing political system to our ideas of authority, freedom and legitimacy.[21] He has made a meaningful and enduring contribution to our understanding of authority, which is worth examining in greater depth. His conception of authority is the 'ability to perform certain kinds of actions,'[22] and centrally, to change the reasons for which individuals act. The legitimate aspects to this authority relate to it being both 'justified' and 'effective',[23] which create the right to exercise the authority. Thus, legal authority should be justified in its exercise in order to be legitimate, and justification may often be found in the necessity for action.[24] The issue of legitimacy as a principle is beyond the scope of this work and the focus instead is simply on an account of the authority of the ICC to act, making the issue more one of effective authority. Following Raz's idea, this would simply be the ability to act and to effect change in individual's reasons for behaviour. In doing so, Raz makes no initial distinction between power and authority, and notes later that de facto power is a requirement of authority.[25] Indeed, the

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[15] John Stuart Mill, *On Liberty* (first published 1859, Dover Publications, New York, 2002).
[16] John Austin, *The Province of Jurisprudence Determined* (first published 1832, General Books, Memphis, 2012).
[17] Max Weber, 'The Three Types of Legitimate Rule' 4(1) *Berkeley Pub Soc and Inst* (1958) 1-11.
[18] Hans Kelsen, *Pure Theory of Law*, (2nd edn, The Lawbook Exchange, London, 2005).
[19] Raz, *The Morality of Freedom, supra* note 12.
[20] *Ibid.*
[21] *Ibid.*, at 1.
[22] *Ibid.,* at 7.
[23] *Ibid.*, at 8.
[24] Samantha Besson, 'State Consent and Disagreement in International Law-Making. Dissolving the Paradox' 29(2) *LJIL* (2016) 289-316, at 302.
[25] Joseph Raz (ed.), *Authority* (Basil Blackwell, Oxford, 1990), at 3.

only reference to power as a separate idea is when the idea of power over individuals and authority over individuals arises.[26] He also notes that the right to give an order, and to expect that order to be followed is thus authority.[27] In this way, there are two key elements to Raz's concept of authority: the ability to act and the reasonable expectation that any directives given should be followed. Thus, the distinction between power and authority becomes clearer: it is not only the ability to act, but also the expectation that one is able to issue directives that shall be respected by others. This is outlined well by Wheatley, who notes that Raz's thesis describes those who have authority[28] as those who are accepted as having that authority with a grouping of individuals who recognise and follow that the directives given. Viewed this way, it is almost a perfectly utopian, and one could say, Western, description of international criminal law: Groupings of recognised States participate on behalf of populations of individuals and confirm the authority they have over their populations, creating and imposing rules at both the international and domestic level. However, it does not describe or explain the system we currently have, nor address the position of States such as The Philippines that began this discussion.
As such, these considerations of what authority is serve the domestic system well: they presuppose the existence of domestic government and answer questions about why an individual in a domestic society, over which a government rules and prescribes law, should obey the law and why the law has authority. This allows the domestic criminal system to be justified in reference to such theories: individual belief in the criminal law, per Weber, could be justified on the grounds that criminal law proscribes activities which the majority would consider harmful. Per Raz, domestic criminal law also finds its justification through the way in which it serves and protects individuals from general harm by deterring those who may cause it through the threat of criminal sanction. However, these theories have not really been tested at the international level. It is not clear that such arguments would work in respect of international criminal law. Although international criminal law is, in some ways, an extension of national criminal law,[29] it does not benefit from the existence of a sovereign to command compliance or from a sufficient connection to the individual to argue that one's autonomy is served by obeying the rules. In situations of genocide, State failure, and crimes against humanity, obeying the rules or fully exercising one's autonomy may be a path fraught with danger. While the discussion of a concept of authority at the domestic level is important, its significance increases at the international level because of the lack of a central authority figure or institution in international law. The question of the authority of the ICC requires the application and critique of such theories to the position of the ICC, and an exploration of the attempts to explain authority at the international level.

The Authority of International Law, Specifically the Rome Statute

As a branch of public international law, international criminal law shares many of the sources of public international law, and arguably could possess authority in the same way. There has been some discussion, historically, on the source of international law's authority, distinct from that of domestic legal theory. Grotius noted that the State's authority and right to govern was based on the collective agreement of the citizenry[30] which, when applied to public international law, would mean that international law derives its authority from a collectivity of States. How-

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[26] Joseph Raz *The authority of law: Essays on Law and Morality* (Oxford University Press, Oxford, 2009), at 19.
[27] Raz, *The Authority of Law,* supra note 25, at 22-4.
[28] Steven Wheatley, 'A Democratic Rule of International Law' 22(2) *EJIL* (2011) 525-548, at 532-3.
[29] Bassiouni, 'The Permanent International Criminal Court', supra note 2, at 181.
[30] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Oxford University Press, Oxford, 1950).

ever, Grotius did not expand upon this point. Vitoria instead focuses on the idea that all individuals have reason and that this natural law, natural order, must be respected by others, particularly where the 'State' or grouping of individuals is organised under a system.[31] Vitoria's main contribution was to undermine the universality of papal authority, revising the idea of authority in line with natural law, but his work did not fully conclude as to why public international law ought to have authority: the account of why reason would give States authority at the international level would need to have been discussed in greater detail.

More recent legal theory works have focused on the problem: Kelsen's theories were applied to public international law by von Bernstorff[32] and Cali[33] equally discusses the idea of consent as the source of the authority of international law, dealing with the idea that the authority of international law has a direct relationship with the authority of domestic law. There have been other texts written on the idea of the importance of the State: Criddle and Fox-Decent[34] argue for a system which relies on States as the guardians of rights, while Teitel focuses on an order outwith statehood that restrains State action and protects rights in international law. Besson similarly, focuses on the autonomy of the individual as the source of international law's authority.[35] Franck's seminal text on the legitimacy[36] supports the idea that States obey the law when it is legitimate, and therefore that the law possesses greater authority when legitimate, leading to a circular proof which does not offer much in the way of an answer to the questions posed here. The recent text by Alter, Helfer and Madsen focuses on a context-dependent theory of authority:[37] the authority of the ICC depends on to whom it is directed, and that it is likely to have a 'narrow' form of authority because of the reluctance of those to whom it is directed to take it seriously.

These authors make interesting arguments about the issues of authority, and how international law may have it, but a central limitation of each of the above works is the difficulty of applying these ideas to the ICC on the following basis. Although the law of the ICC shares many of the same sources and some similar principles to public international law, it has one main difference: it directly constrains individual and State autonomy without the consent of populations each time.[38] Every State is not a State Party to the ICC, and some of the worse violations occur within the territories of non-State Parties. The above constitutional arguments are thus undermined by the fact that behaviour is, and must be, restrained by the criminal law, making it a markedly different form of law from other branches of public international law. Similarly, referrals by the UN Security Council may undermine the requirement of State consent, through investigating the behaviour of non-States Parties.[39]

[31] Francisco de Vitoria (ed AR Pagden and Jeremy Lawrance), *Vitoria: Political Writings* (Cambridge University Press, Cambridge, 1991).

[32] Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010).

[33] Basak Cali, *The Authority of International Law: Obedience, Respect and Rebuttal* (Oxford University Press, Oxford, 2015).

[34] Evan J. Criddle and Ewan Fox-Decent, *Fiduciaries of Humanity: How International Law constitutes Authority* (Oxford University Press, Oxford, 2016).

[35] Samantha Besson, 'The Authority of International Law – Lifting the State Veil' 31 *Sydney LR* (2009) 343-380.

[36] Thomas Franck, *The Power of Legitimacy among Nations* (Oxford University Press, Oxford, 1990).

[37] Mikael Madsen, Karen Alter and Lawrence Helfer, *International Court Authority* (Oxford University Press, Oxford, 2018).

[38] This will be discussed in greater detail later on.

[39] Luigi Condorelli and Annalisa Ciampi, 'Comments on the UN Security Council Referral of the Situation in Darfur to the ICC' 3(1) *JICJ* (2005) 590-599 and Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities' 7(2) *JICJ* (2009) 333-352.

Vinjamuri critiques the idea of narrow authority raised by Alter, Helfer and Madsen[40] and notes that the proximity of the ICC to the UNSC makes it appear powerful, while undermining its authority with many States in less powerful positions. However, this does not address the issue of consent. Indeed, few of the above theories address the consent of all States and the idea that individuals would wish to be bound by the law of the ICC – a key difficulty in applying current legal theory to the position of the ICC. Raz's theory presents a notable example: his idea of authority as the 'ability to perform certain kinds of actions,'[41] and the exercise of legitimate authority as 'justified' and 'effective',[42] would be satisfied by the ICC if it were justified in its necessity for action.[43] This necessity again would be presumed where there was a lack of State consent, or perhaps a case of State failure. He develops this by noting that the right to give an order, and to expect that order to be followed is thus authority.[44] In this way, there are two key elements relevant here to Raz's concept of authority: the ability to act and the reasonable expectation that any directives given should be followed.

This analysis would appear to confirm the permission basis of the law of the ICC: States must possess authority and must have agreed to the jurisdiction of the ICC. They ought to have the power or ability to act, and have the reasonable expectation, as States, that their directives or norms shall be followed. The difficulty arises where a situation is referred under the other forms of jurisdiction, particularly referrals from the UNSC. There is an argument, put forward, by Cali, that State consent is not necessary for international to have authority all of the time, and that it is only required at certain points.[45] Consent was required in order to establish the United Nations, and the Charter under which it operates, and Member States of the United Nations have previously agreed to honour and follow the decisions of the UNSC.[46] Using Raz's work, one could take view of this consent would indicate that the UNSC has authority in the way that Member States have authority: it passes decisions and has a reasonable expectation under the Charter that those decisions will be respected, as States have promised to do so. However, this demonstrates an inherent tension: if the States have already given permission for the UNSC to act, but retain the authority to make decisions and for those decisions to be respected, which form of authority ought to predominate? This question represents a difficulty where the State in question has not ratified the Rome Statute, but where the situation may have created a serious threat to international peace and security. The clear issue here is that there is competition of authority among those at the international level, with international law occupying a spectrum of strength in imposing duties on States.[47] Roughan describes this as a series of plural orders, and notes that this is where Raz's theory becomes "unstable".[48] Even at this stage, it is clear that the ICC has either a limited amount of authority, based on current understandings of authority, or none at all. As this is a deeply unsatisfactory answer, further discussion is required.

Cali also notes that international law imposes duties on State officials and others with variable strength, and that there is a competition for authority created by the power vacuum that exists

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[40] Leslie Vinjamuri, 'The International Criminal Court and the Paradox of Authority' 79(1) *Law and Contemp. Prob.* (2016) 275-287.

[41] Raz, *The Morality of Freedom, supra* note 12, at 7.

[42] Raz, *The Morality of Freedom, supra* note 12, at 8.

[43] Samantha Besson, 'State Consent and Disagreement in International Law-Making. Dissolving the paradox' 29 *LJIL* (2016) 289-316, at 302.

[44] Raz, *The Authority of Law,* supra note 25, at 22-4.

[45] Cali, *Authority of International Law* supra note 32, 62-3.

[46] Article 25, United Nations Charter 1945.

[47] Cali, *Authority of International Law* supra note 32, at 69-73.

[48] Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theories*, Oxford University Press, Oxford, (2013), at 8.

at the international level. This is a direct consequence of there being no central authority. This spectrum ranges from the weaker forms of relying on States to consent and agree to norms, as well as to uphold them, to the stronger forms such as international criminal law where the norms can be imposed on States without their direct consent at every turn. The power and ability to act in this sense is clear: The Court may launch an investigation under the auspices of the UNSC, which retains previous authority from the initial consent of States. Prior to considering how the UNSC may become involved, the jurisdictional provisions of the Rome Statute shall be examined to determine whether these theories explain the authority that the Court may have.

The Jurisdiction of the Court

The Court's jurisdiction can be triggered, as noted above, in three main ways. The authority for two of these mechanisms is rooted in State authority, while the third, referrals by the UNSC, is not. After jurisdiction has been triggered, there are then preconditions for the exercise of jurisdiction, before a consideration of whether the situation is within the jurisdiction of the Court. A brief discussion of the limitations of the Court's jurisdiction and its authority, through the tests laid down by the Statute[49] as well as the principle of complementarity, will be undertaken below.

The 'triggering mechanisms'[50] permit the exercise of the Court's jurisdiction.[51]There are three ways in which the Court's jurisdiction can be triggered: referral by a State Party,[52] referral by the UNSC[53] or the initiation of an investigation by the Prosecutor.[54] Referral by a State Party would indicate that the authority from which the right to exercise jurisdiction derives emanates from the State itself and its consent, unless the referral related to a situation outwith its borders. The Prosecutor may only investigate situations relevant to the territories laid down in the preconditions for jurisdiction and may not investigate crimes which were committed before the entry into force of the Statute.[55] The most interesting trigger mechanism is that of a referral from the UNSC,[56] should the need arise.[57]

This provision significantly extends the scope of the treaty, in a way that potentially allows it to exercise universal jurisdiction, as Bekou and Cryer have highlighted.[58] However, as the authors indicate, it would have been unwise to give the Court universal jurisdiction explicitly[59] despite criticisms that it left the Court in a weaker position.[60] The power of the UNSC to refer

[49] Article 17(1), Rome Statute.

[50] Dominic McGoldrick, 'The International Criminal Court: An End to Impunity?' 8 CLR (1999) 627-655, at 640; *see also* Kerstin Blome and Nora Makard, 'Contested Collisions": Conditions for a Successful Collision Management - The Example of Article 16 of The Rome Statute' 29 (2) *LJIL* (2016) 551-575 and Robinson 'Inescapable dyads' supra note 8, at 327.

[51] Article 13, Rome Statute.

[52] Article 13(a), Rome Statute.

[53] Article 13(a), Rome Statute.

[54] Article 13(a), Rome Statute.

[55] Article 10(1), Rome Statute.

[56] Hereafter, 'UNSC'.

[57] Article 13(b), Rome Statute; *see* Akande, 'The Legal Nature of Security Council Referrals' supra note 38.

[58] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' 56(1) *ICLQ* (2007) 49-68.

[59] Ibid., at 68.

[60] Ibid., at 52.

demonstrates middle ground between universal jurisdiction and complete consent: States should usually give the Court permission, but the UNSC may intervene if the situation is perceived as being one which threatens international peace and security, or which involves acts which constitutes aggression.[61] Thus the State may not legally reject the authority of the Court if the UNSC has made the referral. This is not to say that a rejection of the authority of the Court could not be made in other ways, such as a (far more effective) practical rejection through, at minimum, a failure to cooperate. Particularly where the situation is so serious that it threatens the peace, the prospect of an unsupportive State is not one which would set the tone for a thorough and fruitful investigation. However, such a referral should be rare: To date, only two referrals have been made by the UNSC.[62] Both referrals urge and instruct the States in question to cooperate 'fully' with the Court.[63] Thus the UNSC recognises the difficulties it may have in imposing the authority of the Court, without the support and cooperation of the State concerned, regardless of how chaotic affairs in that State may be. Clearly, the Court is intrinsically affected by power politics, and relies on the cooperation of States to function. However, it is not reliant on the State in the same way as previous tribunals – it can walk and talk and carry out investigations without State action, making it quite different from Cassese's description of the International Tribunal for the former Yugoslavia as a 'limbless giant'.[64] States which do not have a great deal of control over their territories will represent neither a support nor a hindrance to the ICC's investigations. However, as noted above, the difficulty will arise where a State is hostile to the work of the Court, hostile to the idea of permitting prosecution of any kind, and unable or unwilling[65] to raise a domestic prosecution. This may be particularly true where it does not wish to permit the actions of the Court, and where its wishes have been overruled by the UNSC.

When the jurisdiction of the ICC has been triggered, the preconditions for jurisdiction, under Article 12, must then be met. For the Court to proceed with an investigation, first, the territory would need to be of a permitting State, through ratification or consent, as outlined above, and would extend to vessels, aircraft, or land where the crime was committed.[66] Second, the Court may begin an investigation on the grounds of nationality, where the individuals accused of committing the crime were nationals of a State party to the Rome Statute.[67] Where one or both preconditions were satisfied, the Court would then have jurisdiction where the referral concerned the crimes within the remit of the Court: genocide, war crimes, crimes against humanity, or aggression.[68] It should also be noted that only crimes which were committed after the entry into force of the Statute[69] may be prosecuted by the Court. These various limitations, of State consent either through ratifying the ICC Statute or providing consent prior to an investigation, of limiting its jurisdiction to those territories covered by that consent, and of only the most

[61] Chapter VII, United Nations Charter 1945; *see* Daniel Nsereko, 'The ICC and Complementarity in Principle' 26(2) *LJIL* 427-447, at 430.

[62] The situation in Darfur, UNSC Resolution S/RES/1593 of 31 March 2005, at 1 and the situation in Libya, UNSC Resolution S/RES/1970 of 26 February 2011.

[63] The situation in Darfur, UNSC Resolution S/RES/1593 of 31 March 2005, at 1 and the situation in Libya, UNSC Resolution S/RES/1970 of 26 February 2011, at 2.

[64] Address of Antonio Cassese, President of the ICTY, to the United Nations General Assembly, 7 November 1995. *See* James Sloan, 'Breaching International Law to Ensure its Enforcement: The reliance by the ICTY on illegal capture' 6 YIHL (2003) 319-344, at 320.

[65] Article 17(1)(a), Rome Statute.

[66] Article 12(2)(a), Rome Statute.

[67] Article 12(2)(b), Rome Statute.

[68] Article 5, Rome Statute.

[69] Article 11(1), Rome Statute.

serious crimes, makes the Court's scope highly specific.
The ICC's power derives primarily from the Rome Statute, to which the Contracting Parties have 'consent to be bound'[70] by the Rome Statute. Ratification provides further evidence of their acceptance[71] of the Court's jurisdiction. Alternatively, it may give permission for the Prosecutor to open an investigation.[72] This allows the Court to exercise jurisdiction in States which are not party to the Rome Statute. However, the same principle is at play: whether by ratification or through permission given before the Court proceeds to an investigation, the State must consent to the Court's jurisdiction. The Court's authority, in both contexts, emanates from the permission of the State. The States agree to the Court's authority in a contractual sense[73] and are thus willingly bound.

Although the issue of restricting the Court's subject matter jurisdiction to specifically grave crimes, with the attendant thresholds,[74] is less problematic[75] than its territorial jurisdiction, the limitation on jurisdiction only to those States which agree could give rise to the criticism that the Court has a limited amount of authority over the areas in which it operates. It is clearly curtailed by those who have not acceded to the treaty. This represents a particular limitation at present, as some of the most troubled regions in the world have not acceded to the Rome Statute.[76] Similarly, complementarity means that developing and less stable States are more likely to attract the Court's attention than settled democracies.
This leads neatly onto the next criterion, the question of whether the State is 'unwilling or unable genuinely'[77] to prosecute the individuals accused of criminal conduct. The complementarity provisions require that the State remains the primary prosecutor of any criminal offences, which returns authority to the State as the central legal power in the system. Consequently, a situation would only be investigated by the Court if the State was proved to be 'unwilling or unable genuinely. Reflecting on the examples of both UNSC referrals above, in Darfur and Libya, jurisdiction was triggered through a referral by the UNSC. The question of admissibility in the cases could then be confirmed through reference to Article 17's admissibility provisions. These state that the Court may proceed if there are, among other issues, an unjustified delay in investigating or prosecuting at the domestic level,[78] or an attempt to protect the individual indicted from prosecution before domestic courts.[79]

The 'complementary'[80] nature of the ICC's jurisdiction creates an admissibility threshold which must be reached before the investigation can continue. There must be a reasonable likelihood

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[70] Article 1(1)(b), Vienna Convention on the Law of Treaties 1969.
[71] Article 12(1), Rome Statute
[72] Article 12(3), Rome Statute.
[73] Besson, 'The authority of international law – lifting the State veil,' supra note 34.
[74] Article 17(1)(d), Rome Statute; *see* M El-Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' (2008) 19 CLF 35, at 36, on the importance of not slowing down the Court with an 'excessive and disproportionate workload'.
[75] *See* McGoldrick, 'The International Criminal Court' supra note 49, at 628.
[76] Neither Iraq nor Syria have ratified the Rome Statute, and are currently worst affected by the criminal acts of Daesh, which has caused an enormous humanitarian disaster; *see* UNSC Resolution S/RES/2258 of 22 December 2015 which speaks of the 'devastating humanitarian situation' in Syria.
[77] Article 17(1)(a), Rome Statute. *See* C. Stahn, 'A Tale of Two Notions' (2008) 19 CLF 87.
[78] Article 17(2)(b), Rome Statute.
[79] Article 17(2)(a), Rome Statute.
[80] Article 1, Rome Statute. *See also* William Schabas, 'Complementarity in practice: Some uncomplimentary thoughts' 19 *CLF* (2008) 5-33.

of prosecution at the domestic level and, if there is not, then the Court may advance its investigation.[81] The fundamental principle underlying complementarity, which is supported by the jurisdictional provisions of the Statute, is that the individual State should be given the opportunity to prosecute and that, without a genuinely compelling reason, there is no justification for the Court exercising universal jurisdiction over any and all countries in the world. However, this has been undermined in recent years by the self-referral mechanism[82] where a number of parties sought to utilise the Court as an alternative to domestic prosecution.[83] The reasons for doing so are various and outwith the scope of this particular work. However, this has been further complicated by the fact that the Court's commitment to complementarity has been called into question. Gondi highlighted the Court's failure to remit situations regarding election violence to the national courts in Kenya as an example of its refusal to release certain issues[84] from its grip, despite the Court's involvement to encourage the development of domestic mechanisms. Although the concept of complementarity is silent on the notion of whether the Court should release situations if the State becomes willing or able, it would seem at odds with the spirit of the principle to maintain jurisdiction over a situation when the domestic authorities regain control and are able to prosecute where they once could not. In practice, the principle of complementarity is not always honoured as it might be.

The issue of the authority of the ICC is thus rather complex. The International Criminal Court, *prima facie*, possesses the authority to act because of the power devolved from the State signatories who have agreed to the Rome Statute. This form of authority exists, at a very basic level, as permission: The Court's jurisdiction is triggered where the State has previously given agreement. States Parties, and other States, may also refer themselves to the Court, again giving permission for the Court to act. This basic principle, of triggering jurisdiction through permission, is reflected in the idea that non-States Parties should consent to any investigation on their territories. Authority to act, at this point, is permissive. However, there is a key exception to this rule, where jurisdiction of the Court is triggered because of a referral by the UNSC.[85] Thus, the root of the authority of the Court is not only the permission of States, but may also be linked to the priorities of the UNSC. This may include its perception of the effect a situation may have on international peace and security.[86] The ICC has the power to act for reasons beyond the State's permission, but the next question is how to understand its authority. Although this question may appear self-evident, the reduction of the authority of the ICC to the power of States or the authorisation of the UNSC could lead to serious implications for the legitimacy of the ICC. Authority pre-empts legitimacy and determining the kind of authority that the ICC has allows for a clear examination of why and when it may act. The work of Joseph Raz is of great value here, as he developed a theory of authority which is particularly

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[81] *See Prosecutor* v *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-OI/II-OI/IIOA6: 24 July 2014.

[82] Article 14, Rome Statute; *see also* Darryl Robinson 'Inescapable dyads: Why the International Criminal Court Cannot Win' (2015) 28 *LJIL* 323; Steven Roper and Lillian Barria, 'State cooperation and International Criminal Court bargaining influence in the arrest and surrender of suspects' 21 *LJIL* (2008) 457-476.

[83] Each of the situations in Mali, the Central Africa Republic and Uganda were referred by the individual governments.

[84] James Gondi, 'Debunking the Conspiracy Theory: Analysing the Failure to Achieve Complementarity and the Responsibility to Protect in Kenya and Other Jurisdictions' in Steve Ndirangu, Edigah. Kavulavu and Terry Jeff Odhiambo (eds.) *International criminal justice: The ICC and Complementarity* (ICJ Kenya, Nairobi, 2014).

[85] Article 13(b), Rome Statute. *See also* S. Papillon, 'Has the United Nations Security Council implicitly removed Al Bashir's immunity?' (2010) 10 ICLR 275.

[86] The involvement of the 'international community' as a defining element of an international criminal court is discussed in Astrid Kjeldgaard-Pedersen, 'What defines an international criminal court? A critical assessment of "the involvement of the international community' 28(1) *LJIL* (2015) 113-131.

useful for international law, given its lack of central government, or governing body. The next part to this paper demonstrates the limits of current theory as an explanation for the authority of the ICC, and how this may be addressed.

The Limits of Current Theoretical Frameworks

The preceding discussion demonstrates that the most useful theory to explain the authority of law is Joseph Raz's theory of authority. However, that does not mean that it can be applied directly to the issue of the Court's authority. The ICC has authority to act in two separate ways: where the States have given permission for the Court to begin investigations, to lend their support to the Court and to maintain their side of the complementarity bargain as parties to the Rome Statute. The Court begins investigations after its jurisdiction has been triggered, and its presumes that its directives will be followed. Furthermore, the Rome Statute lays down the law in an authoritative manner: there is an inherent presumption that its principles will be followed.[87]

The issue is complicated slightly when jurisdiction is triggered under the auspices of the UNSC, following a referral. Such referrals would appear to have Razian authority but struggle with the second criterion of his test: The UNSC tacitly acknowledges the barrier of State sovereignty which its instructions must surmount[88] and, in doing so, conveys the its own understanding of the reality that it does not possess the requisite authority to begin to issue such an instruction.[89] It has the power to act, through issuing an instruction, but it does not believe that the instruction shall be followed. Instructions which would possess Razian authority would only ever do so after the fact, when the State complied with the instruction or directive. Thus, the UNSC does not have the authority to refer situations as it may wish, under the Rome Statute, unless the State subsequently complies with the instruction. Yet this is written into the Court's Statute,[90] the most significant international criminal law document of this century and the last. There is a clear push towards endowing the UNSC with the ability to act, without properly appreciating whether it may even consider itself to have the authority to do so. The UNSC clearly rests its authority on State permission, requiring the barrier of State consent to be surmounted before the authority of the referral to the Court is placed on firm ground. Indeed, the potential consequences of such a view supposes that international law, and specifically international criminal law with its unique forms of responsibility, has greater authority to act beyond the scope of permission required by other forms of international law. Thus, although the UNSC may not believe in its own authority, or at least recognises the limitations of its authority, submission to such resolutions by the armed groups indicates that the authority does, in fact, exist.

The failure of this theory to explain why the UNSC has authority demonstrates a key problem with our current explanations of the authority of the ICC. It does not reflect individual autonomy, nor give individuals good reason to follow its directives. Despite the reasoning of authors such as Teitel, it is not clear that there is an external order offering a reference point for the ICC's authority. The idea that the State gains its power from its citizens and is in, therefore, a position of trust, per Fox-Decent and Criddle, is violated immediately by the necessity of a referral from the UNSC. Much of this also presupposes the ability of the State to give consent

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[87] *See* Ken Anderson, 'The rise of international criminal law: intended and unintended consequences' 20(2) *EJIL* (2009) 331-358.

[88] UNSC Resolution S/RES/1970 of 26 February 2011, para 5.

[89] Akande, 'The legal nature of Security Council Referrals' supra note 38.

[90] Article 13(b), Rome Statute.

in the first instance. In Libya, at least, there was no functioning State to speak of and power has only recently been unified by a United Nations-backed government, instigated by the UNSC.[91] It would seem ridiculous to suggest that the UNSC does not have the authority to make a referral to the Court, while it clearly has the authority to set up an interim government in a country.[92] Although the UNSC even doubts its own authority, in a Razian sense, to refer situations to the ICC, there is the question of whether it may have further authority to do so if the situation is such that the domestic authorities are unable to give consent. To frame it another way, the question arises of whether such UNSC acts may have authority to act and refer situations where the State does not function as it should.

It has been shown that the Court lacks authority as we currently understand, primarily because the theories of authority discussed above focus too greatly on the individual's reasons for acting, the continuation of which would be predicated on consent. Consent may only be given by functioning States, giving an automatic preference to stable, Western democracies.
At this point, the central problem rooted in the question of authority emerges. The agreed norms, those which are the 'outcome of political contestations,'[93] can then be imposed on States which have variously failed or are deemed to be without effective government by the United Nations. This is one step further than a system of agreement, where the agreed norms by one group of States are then imposed on all via the creation of an international court. The expanding of the scope of action, beyond that of permission, would confirm the clear existence of an international rule of law[94] but would also remove the requirement of consent as a fundamental principle of international law. This form of authority, although applied by States, is beyond their control and applied by only one group.[95]

Conclusion

The points made above provide an answer to the question posed at the beginning: the ICC only has authority as long as it has the consent of the nations involved, and its authority cannot be stretched by the UNSC to permit the referral of situations to the Prosecutor. However, this is based on our current understanding of what authority is. If authority is the power one exercises legitimately, for the right reasons, and in keeping with the individual's idea of following directives because it is the best thing for oneself, the international order makes no sense. The engagement with power politics, with international diplomacy, with war and with crimes against humanity by governments renders our understanding of what authority is untenable. It becomes more than Roughan's description of unstable, but rather inexplicable. Nor, following the political arguments, does it exist simply because there is a legal order. Instead, there is a presumption, based on the permission given to both the UN and the Rome Statute, that the Statute has the requisite authority. This presumption that the Court has authority because of its connection to the authority of the UN is problematic, because it disregards what ought to be a central part of international criminal law. The ICC is not just there to protect individuals from mass atrocities; it is also supposed to reflect common values. The failure of current theory to explain the authority it has, and also why it does not possess that authority universally, is problematic. If it is truly based on a presumption, the area of international criminal law requires

[91] UNSC Resolution S/RES/2144 of 14 March 2011.

[92] On the question of the ability to do so, *see* Ahmed Ali Khayre, 'Self-defence, intervention by invitation or proxy war? The legality of the 2006 Ethiopian invasion of Somalia' 22 *AJCL* (2014) 208-233.

[93] Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' 16(5) *EJIL* (2006) 979-1000, at 989.

[94] *See* Robert McCorquodale, 'Defining the International Rule of Law: Defying gravity?' 65(2) *ICLQ.* (2016) 277-304.

[95] A discussion of the self-aggrandisement exhibited by the Rome Statute is discussed in detail in Michael A. Newton, 'How the International Criminal Court Threatens Treaty Norms' 49(2) *Vand. J. Transnatl. L.* (2016) 49 VJTL 371-431.

significant revision and more detailed thought. If the issue runs deeper, as it is likely to, the discussion of authority must link directly to power and to explain how the ICC is considered to have authority. This area requires a great deal of further detailed research to understand the authority that the Court has, and, perhaps, the authority that it ought to have to justify its actions.