Introduction

The International Criminal Court (ICC) soars with the loftiest of ideals as it grapples with the basest of human acts. This first and only permanent international criminal court intends to counter impunity by prosecuting perpetrators of genocide, crimes against humanity, and war crimes. It seeks to deter depredations against citizens in violent conflicts and to contribute to justice, peace, political transition, and reconstruction.

Ideally, domestic societies use legitimate political processes to devise and promulgate their laws. Then the laws are fairly implemented by legal systems that remove the politics from justice. This ideal is often compromised by extralegal influences, by biased legal structures, and by maladministration; nonetheless, the ideal is a widely accepted model of an objective, dispassionate, truth-based mechanism for upholding society's rules.

If this model represents a goal toward which societies strive with only partial success, international law is even more tenuous. International law is based on an ephemeral society that lacks a legislative structure, and it seeks to constrain sovereign states that recognize no consolidated authority for enforcement. International organizations operate at the sufferance of states, subject to their desires, dependent upon their generosity, and victims of their ploys. Moreover, international organizations are subject to the same weaknesses as domestic ones – outside influences, bias, and maladministration. Nonetheless, since the beginnings of the modern state system, advocates of law have tried to extend to the international level the logic and structures familiar in the domestic context. International law has proliferated. This quest for the "legalization" of international politics has added arbitration and judicial decision making

to diplomacy and the naked exercise of power as means of settling conflict between sovereign states.[1] Legalization has arrived as well at the doorstep of individual responsibility.

Since all human action is in the end individual, crimes committed on behalf of states have perpetrators just as do domestic crimes. For approximately 150 years, from at least the origins of the International Red Cross movement in the mid-nineteenth century, international lawyers, diplomats, and advocates contemplated the creation of an international criminal court to hold individuals responsible for criminal acts carried out in the name of the state. Finally, in Rome in July 1998, the Statute for the International Criminal Court opened for signature and ratification. The Court emerged on July 1, 2002, much sooner than most observers had believed possible.

The Court began with a five-member transition team in 2002, and mushroomed past 700 employees in 2007. It is built upon a range of national legal systems and incorporates structural elements common to other international organizations. Its structure, rules, and operations reflect experiences of the ad hoc international criminal tribunals for Yugoslavia and Rwanda but differ significantly from them. The ICC's objectives include the prosecution of transgressors and rehabilitation of victims, its mechanisms combine traditions of civil law with common-law precepts, and it seeks to incorporate lessons from the tribunals in order to improve the effectiveness and efficiency of international criminal trials.

The Court's most profound effects may be invisible and tangential to the cases it pursues directly. If it deters criminality or leads states to tighten their domestic laws and enforce international humanitarian norms, it could be considered successful. On the other hand, it may be deemed irrelevant if potential perpetrators don't recognize it as a threat, if its efforts are thwarted by noncooperation or lack of resources, or if victims regard it as useless in their search for justice. The Court could become an unprecedented, sterling achievement, or it may be a great idea whose time has not arrived. This book is intended to explain where the Court comes from and what it's for, what its challenges are, and how it is managing them in its first years of operation.

[1] Goldstein et al., "Introduction: Legalization and World Politics" (2000), evaluate the degree of legalization implemented in interstate arrangements along three dimensions: the nature of the *obligation* that states accept, from nonlegal at one end of a spectrum to binding rules of behavior at the other; the *precision* of the rules under adjudication, from vague principles to highly elaborated rules; and the degree of *delegation* of decision-making authority to the forum, from an arena of discussion or diplomacy to a definitive judicial process and/or incorporation into domestic law.

THE COURT

The Court consists of three "organs" – the Presidency and Chambers (the judges),[2] the Office of the Prosecutor, and the Registry. The Rome Statute details the legal framework for Court operations, empowering the Court to investigate cases, issue warrants, take custody of arrested suspects, and carry out trials, and enjoins it to protect witnesses and victims involved with its proceedings and to aid the victims of the crimes under its jurisdiction.

The Statute establishes the Assembly of States Parties (ASP) to the Treaty as the legislative organ responsible to elect (and remove) ICC judges and chief and deputy prosecutors, approve and allocate the organization's budget, approve official cooperative arrangements with other organizations (such as the United Nations), and adopt the Court's Rules of Procedure and Evidence, its Elements of Crimes, and the rules of the separate organs. The ASP can also create subsidiary bodies and establish their rules for implementing the Statute (for instance, the Trust Fund for Victims), and it can amend the Statute.

The ICC and especially its founding document, the Rome Statute, are the subjects of an enormous literature. A relentlessly expanding list of books and a torrent of legal journal articles examine the sources, structure, intricacies, ambiguities, and implications of the Statute. The Court itself has so far been rather less analyzed because it has only recently begun operating, but there are useful introductions to its structure and law, and some books illuminate particular aspects of its founding, implications, early operation and possible effects.

The Court is a work-in-progress, an amalgam of normative commitments,[3] legal understandings, political interests, diplomatic bargains, and organization dynamics. It embodies idealistic, largely legalistic conceptions of international norms that were pursued doggedly by international legal experts from the end of World War II onward, shaped by diplomatic bargains and pushed by nongovernmental organizations. Embarked on a course fraught with contradictions stemming from its broad set of objectives, the

[2] Sometimes the Presidency and the Chambers are cited in Court documents as separate "organs," so that the ICC is said to be composed of four organs; sometimes it is described as tripartite. The President and Vice Presidents are elected from among the judges, which appears to make the combination of Presidency and Chambers a reasonable classification. However, the Presidency has administrative duties disconnected from its members' roles as judges, so in that sense they are two separate organs that share some personnel.

[3] By "normative commitment," I mean dedication to behavior bounded by a conception of appropriate behavior based on some nonmaterial value, such as the value of human dignity or fairness.

Court faces the requirements of all organizations – leadership, internal coordination, resource acquisition and deployment, efficiency, seeking to demonstrate success and relevance to major interlocutors. The decisions it makes in its early years about its role, focus, and operations will be crucial to how it survives, thrives, or withers.

THEORETICAL PERSPECTIVE

My choice of topics and the language I use come from the study of international organizations, international relations, and theories about both. This is not primarily a theoretical book; however, international relations and international organization theories help elucidate my topic and so I think it is useful here to present the general theoretical context in which I am working.

Especially since the end of the Cold War, international relations texts and journals have been contrasting the analytical perspectives of realists, neoliberal institutionalists, and constructivists. Rather than apply these as fully deployed theories or complete rivals, I use them to explain different aspects of an extremely complicated world.[4] Their alternative emphases sometimes place them and their enthusiasts at odds with one another, but I am by nature a synthesizer, so I prefer to use them together, the best to explain what I seek to understand. I introduce the three kinds of theory here in the order that they developed in post–World War II American political science.[5]

Realist Theorists

Realist theorists assume that humans are self-seeking, rational beings. Sovereign states are the international system's primary actors. Because there is no global government, realists assert that *anarchy* is the condition (or structure) of the existing international system.[6] Real sovereignty – the state's

[4] For an explanation of the virtues of analytical eclecticism, see Sil, "Problems Chasing Methods or Methods Chasing Problems? Research Communities, Constrained Pluralism, and the Role of Eclecticism" (2004), and Sil, "Analytic Eclecticism and Research Traditions in International Relations" (2007).

[5] There are many and interesting variations of the three general theoretical approaches amongst which vigorous debates continue. I present and apply here the general thrust of the three viewpoints without delving into these variations.

[6] I use the idea of *system* simply as a mechanistic or organic metaphor to denote the collectivity of states as they interact with each other. Kenneth Waltz, in *Theory of International Politics* (1979), is the foremost expositor of (mechanistic) realist system theory. For Waltz, states act according to rules prescribed by the condition of anarchy. Hedley Bull, in *The Anarchical Society*, 3rd ed. (2003), distinguishes between the idea of a mechanistic international system and a value-imbued *society* of states (both under anarchy), and I use his distinction further in Chapter 1.

capacity to maintain domestic order and to protect itself from other states – resides in its military and economic capabilities. Formal sovereignty – the state's right to a monopoly on the domestic use of force to maintain order and its freedom to use force externally to protect itself – is an institution[7] of the (post-1648, European) international system. States affect each other by using, or threatening to use, coercive power defined in material (military and economic) terms. The *relative* power of any state as against others is the key measure of its capacities for action, and thus independence. Balances of power emerge from confrontations among states, and realist theorists generally regard the balance of power as the primary ordering institution of the anarchic system.

For realists, two kinds of change are possible. Change *in* the international system means that the relative power of particular states, or the power hierarchy, varies due to war, differential economic growth, technological innovation, and so on; however, anarchy persists, and the institutions of sovereignty and balance survive. Change *of* the system, on the other hand, would mean transforming the conditions under which international politics takes place. If some international authority were to arise and terminate international anarchy, if new actors of a different sort appeared that could powerfully constrain states, or if states were to base their actions on some principle other than self-help, then the system would be transformed and the balance of power would give way to other institutions.

For realists, international organizations fit into the system as tools of states in their competition with each other, but they are not instruments of an escape from anarchy. It would make little sense for states to sacrifice sovereignty to enforce international laws against genocide, crimes against humanity, and war crimes, unless to do so would confer some relative advantage or to oppose it would entail some relative costs. Realists might

[7] *Institutions:* The term "institution" appears in the international relations literature in at least four different ways. For some, an institution is an *organization*. For others, it is a *routinized pattern of behavior* (such as free trade, democracy, or domestic legal processes) that can be characterized by principles (antiprotectionism, majoritarianism, rule of law) and decision-making routines (global negotiations, voting, trials) that may or may not necessitate organizations. The term is also used to denote *an important general characteristic*; for example, sovereignty is considered by many to be an institution of the post–Westphalian international system and states within it. Lastly, an institution can be *a common, expected dynamic* within the system, such as war or the balance of power. When referring to a concrete organization – with a headquarters, officials, mandate, functions, and the like – I use the word "organization." When referring to the broader idea of an accepted pattern of behavior, accepted characteristic (such as sovereignty), or common dynamic, I use "institution."

thus explain why states would seek to limit the Court's powers (to retain their own freedoms) or go along with it once it was created by others, but they have no explanation for its creation in the first place. This is where additional theoretical perspectives can help.

Neoliberal Institutionalist Theorists

The theories of the neoliberal institutionalists overlap with the realists' vision of international relations but differ in important ways. Liberals too believe in rationality. Classical liberals believed as well in the idea of progress, human goodwill, and the (rational) perfectibility of mankind through collective institutions.[8] Neoliberal institutionalists combine liberalism with realism. They grant the realist premise that states are the primary international actors but argue that states can experience incentives to cooperate for improvements in their own welfare, seeking *absolute* gain, rather than exclusively *relative* gain.[9] When states seeking absolute gains cooperate to reduce international transaction costs, to create new collective goods, and to prevent collective bads, they may establish organizations to implement these objectives.[10] To the extent that these organizations' mere existence and/or requirements of membership entail changes in domestic legislation and international behavior, organization participation may alter and constrain states' behavior. A pervasive enough web of interdependence could create areas of international interaction in which behavior is limited by law or other orderly institutions, and in such areas anarchy could recede. The international system could thus incrementally change as states become increasingly enmeshed in a web of institutionalized interdependencies.[11] Liberal institutionalists also accept that actors other than states – such as international organizations, nongovernmental (or civil society) organizations, transnational movements, and multinational corporations – can affect

[8] Mingst, *Essentials of International Relations*, 3rd ed. (2004), 63–4, explains that liberalism assumes that human nature is basically good, societal progress is possible, and behavior is malleable and perfectible through institutions, based on the Greek idea that individuals can understand universal laws of nature and society through rationality. Immanuel Kant is an example of a classical liberal. Liberals believe in cooperation driven by rational individualism.

[9] Mingst, ibid., describes neoliberal institutionalists, such as Robert Axelrod and Robert Keohane, as reviving liberalism (and rescuing it from utopianism) by finding in iterative international interactions principles of cooperation, even in an anarchic environment, that can lead to the creation of international institutions.

[10] Abbott and Snidal, "Why States Act through Formal Organizations" (1998), 3–32.

[11] Jacobson, *Networks of Interdependence: International Organizations and the Global Political System* (1979).

states, and that states' objectives are defined, at least in part, by internal political dynamics such as interest groups and political parties, and not just deduced by realist calculations flowing from a structurally determined national interest.

Seeking to explain how organizations can affect states, and vice versa, neoliberal institutionalists argue that states will support cooperation if it produces absolute or relative gains. If they see cooperation damaging their interests, they will oppose, constrain, or defect from it. Thus, if the ICC assists in implementing states' normative objective of countering impunity, it should receive continued or increasing support.

For liberal institutionalists, the more the Court can serve states' interests, the greater its autonomy and legitimacy. Its ability to convince states that it is operating to enhance their objectives depends largely on what it does, compared to what it was designed to do, and how efficient it is in achieving these ends. Neoliberal institutionalism thus helps explain aspects of the organization's form, operations, survival, momentum, and growth, but it doesn't explain why the antiimpunity norm and international criminal law grew in the first place. For that purpose, a constructivist perspective is very useful.

Social Constructivists

Social constructivists observe that all visions of how the world works are based on ideas that people develop within a social, historical context. For constructivists, both realism and institutionalism assume that human motivation is primarily materialist, and that states' actions are primarily dictated by anarchy.[12] Constructivists argue, however, that not all motives are materialist and the vision of a world based in anarchy is a particular mental construction. Other motives and visions are possible. Non-materialist motives can include normative objectives.

Because the assumption of anarchy leads to certain conclusions (the importance of relative power, for instance), a different set of assumptions

[12] As Ruggie, "Introduction," *Constructing the World Polity: Essays on International Institutionalization* (1998), 3, put it, realism and institutionalism "share a view of the world of international relations in utilitarian terms: an atomistic universe of self-regarding units whose identity is assumed given and fixed, and who are responsive largely if not solely to material interests that are stipulated by assumption. The two bodies of theory do differ on the extent to which they believe institutions (and by extension institutionalization) play a significant role in international relations. . . . But they are alike in depicting institutions in strictly instrumental terms, useful (or not) in the pursuit of individual and typically material interests." For a much more detailed discussion of social constructivism and international relations theory, refer to Wendt, *Social Theory of International Politics* (1999).

could lead to different conclusions. For example, under anarchy, relative material advantage is vital for self-preservation. Were people to conceptualize the world not as an anarchic, state-centric environment but as an ecologically and ethically shaped, human-centered environment, perhaps relative material advantage (power and money) would be less compelling to foreign policy decision makers than environmental preservation or uplifting human dignity. Constructivism expands the realm of apparent free will, as against realism's determinism and neoliberal institutionalism's tepid optimism. However, constructivism's vulnerability lies in the difficulty of changing people's conceptions of themselves (identities) on a scale massive enough to move away from the standard framework and the lack of any logic that would indicate what (if any) evolution in consciousness is most likely. Identity shifts can, after all, move in humane or inhumane directions.

Constructivists argue that international institutions embody normative commitments that denote personal, national, and global identities.[13] Identities are malleable; thus, changing identities could be a source of system change (that is, *of* the system as well as *within* the system). In one historical example, people in many countries decided that basing a government on formal racial discrimination was inhumane and uncivilized. Their leaders found it either politically advantageous or morally compelling (or both) to adopt this stand domestically and in their foreign policies (although there was no apparent material advantage in doing so). The resulting global anti-apartheid movement ultimately helped force the minority South African government to negotiate transition to majority rule.[14]

Similarly, as government leaders became convinced in the late 1980s and during the 1990s that passivity in the face of genocide, crimes against humanity, and war crimes was incompatible with their identities (perhaps as compelled by civil society groups, international lawyers, and public pressures arising from ongoing conflicts), they sought action (or at least the appearance of action) against those crimes. The United Nations Security Council established the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY, ICTR), and a few years later negotiators considering a Statute for the ICC agreed on an organizational form for the institutionalized criminalization of these core international crimes. For constructivists, creation of the ICC could demonstrate a change *of* the

[13] Identity includes the conception of what it is to be human or to be civilized. Ruggie, op cit., 4, says constructivism "attributes to ideational factors, including culture, norms, and ideas, social efficacy over and above any functional utility they may have, including a role in shaping the way in which actors define their identity and interests in the first place."

[14] Klotz, *Norms in International Relations: The Struggle against Apartheid* (1995).

system in the sense that collectively, without clear relative advantage and for apparently nonmaterial reasons, states committed themselves to cooperate within an international organization established to prosecute collectively proscribed acts whose prosecution had previously been considered (if at all) on an ad hoc, war-by-war basis. Although historically realism came first, then neoliberal institutionalism, and last, constructivism, they are useful in explaining the ICC in a different order. The constructivists explain development of the consensus on which the Court is based; the realists explain states' compulsions to protect sovereignty and to seek relative advantage; the liberal institutionalists explore how the ICC embodies states' cooperative efforts to improve absolute welfare. In the balance of the book, the theories will appear in this logical, rather than historical, order.

CONUNDRUMS

The ICC faces a set of challenges that flow from its nature as an international treaty-based judicial organization with a broad membership and wide mandate. These challenges were built into it in the process of negotiating its creation; they create dilemmas that its officials must manage.

Judicial–Political Dilemma

The ICC was created as a judicial institution to prosecute individuals accused of heinous international crimes. But these are crimes that occur in contexts of violent international and internal conflicts in which the political stakes drive people to extreme behavior. Thus, the ICC is a judicial organization operating in the most political of environments. Court officials insist that, as a judicial institution, the Court cannot gear its actions according to what will win it political favor (although they are happy for nongovernmental organizations to advocate it as a cause or for members of the ASP to encourage other countries to join), and they must make decisions on purely judicial grounds. The Court's actions, however, have political ramifications for states and for actors within states, and will inevitably be interpreted politically,[15] and the distinction between judicial and political grounds is not always clear. The Court seeks to build legitimacy, hence support, by acting transparently and on purely judicial grounds. However,

[15] I use "political" here to refer to choices that are made according to calculations of advantage in the allocation of power or resources by self-seeking actors, as opposed to strictly "judicial-legal" choices made according to principles of law. It can be argued that legal decisions too are political in nature – having power effects and being based on principles capable of being interpreted according to decision makers' subjective preferences.

much of its activity is necessarily confidential, and as in any organization, some amount of its decision making will be the product of negotiation and bureaucratic conflict. Given the charged environment in which the ICC operates, the limits of openness, the vague boundary between political and legal judgment, and the compulsions of organization behavior, it cannot be purely judicial, and it will be interpreted politically even as it strives so to appear.

Structural–Administrative Dilemma

The ICC's organizational structure seeks to replicate in one organization the independent responsibilities and powers usually allocated to separate legislatures, ministries, and courts in domestic systems. An architecture designed to create judicial neutrality and prosecutorial independence, however, is not an optimal design for administrative efficiency and coordination. The Court's objectives of administrative efficiency cut against its objectives of judicial insularity and prosectorial independence.

The Broad Mandate Dilemma: Retributive and Restorative Justice

The Statute creates mechanisms of traditional (retributive) and newer (restorative) justice,[16] but the emphasis between the two remains in flux, and the mechanisms for the second are particularly sketchy. There is strong pressure on the Court to embrace the broadest range of both retributive and restorative justice activities, but the more broadly the mandate is pursued, the more difficult it will be to fulfill. The very innovative qualities that made the Statute achievable and attractive also constitute threats to the organization's welfare.

Civil- and Common-Law Heritage

The Statute and rules combine common-law and civil-law traditions.[17] The Court's Prosecutor is patterned on a common-law model, following from

[16] "Retributive justice" refers to arrest, trial, and sentencing of suspects; "restorative justice" refers to bringing victims back into society as full members and reconciling parties in conflict. This is explained further in Chapter 1.

[17] *Common law, civil law:* Two major patterns of judicial structure have developed in the Western legal tradition. In *common-law* systems, identified with Anglo-American procedure, prosecutors assemble cases against defendants and present evidence in court before a jury of nonexperts. The defendant is usually represented by a defense counsel who responds to the prosecutor's case in court with cross-examination of prosecution witnesses, presentation of defense witnesses, and challenges to evidence and procedure. The judge serves as an impartial referee between the prosecution and defense, instructing the jury on