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Introduction

When the International Criminal Court (the ICC/the Court) released a warrant for the arrest of Sudanese President Omar al-Bashir in 2009, the response from political world leaders and their advisers was mixed. The responses from States[1] ranged from enthusiastic support for the ICC, and thus acknowledgement of its authority and jurisdiction as a court, to tacit rejections of its independence and its ability to effect justice for the victims of the crimes, to complete disregard for it as an institution. The French and British Foreign Offices welcomed the decision, while the Russian Special Envoy to Sudan and the Senegalese President expressed their displeasure with the Court. al-Bashir's own response was that the ICC could 'eat' the warrant.[2]

The response of al-Bashir is not uncommon from those who are accused of international crimes: the defendants indicted before the tribunals at Nuremberg submitted a motion arguing that their prosecution was against the established principle of no crime without law.[3] The defence counsel on behalf of Tadic's[4] case before the International Criminal Tribunal for the former Yugoslavia (ICTY) submitted a motion questioning the authoritative jurisdiction of the Tribunal.[5] Although both motions were rejected by the respective courts, the intention to query the jurisdiction of such a court indicates that the courts are

[1] 'Sudan: Reaction to Warrant for Bashir's Arrest' *Thomson Reuters*, 4 March 2009, https://reliefweb.int/report/sudan/sudan-reaction-warrant-bashirs-arrest.

[2] 'Sudanese President Tells International Criminal Court to "Eat the Arrest Warrant"' *The Guardian*, 4 March 2009, www.theguardian.com/world/2009/mar/04/sudan-al-bashir-war-crimes.

[3] Nullum crimen, nulla poena sine lege; Motion adopted by Defense Counsel, 19 November 1945, Nuremberg Tribunal 1945, see http://avalon.law.yale.edu/imt/v1–30.asp#1. See Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 EJIL 1085–1102; Stanley Paulson, 'Classical Legal Positivism at Nuremberg' (1975) 4 Phil & PA 132–158.

[4] *Prosecutor v Tadic* IT-91-1.

[5] Decision on the defence motion on jurisdiction 10 August 1995, *Prosecutor v Tadic* IT-91-1.

not accepted by all, particularly those who are defending themselves before them, as authoritative arbiters of international criminal law. This gives rise to an argument regarding the authority and legitimacy of international criminal tribunals. Much has been written about the problems of the legitimacy of such institutions,[6] and the debate regarding the legitimacy of the ICC has been particularly strong in recent years. This has been compounded by the fact that the practice of the Court has lent credence to the arguments of potential bias which might undermine legitimacy: every individual indicted by the ICC has been African, and that no powerful Western leaders have been the subject of the Court's attention. Despite this, the debate tends to centre on the reasons for the lack of legitimacy or attempts to provide solutions for the Court's lack of legitimacy. The underlying problem of what would constitute legitimacy or authority for the Court is rarely explored.[7] This problem is exacerbated by the lack of discussion of the links between authority and legitimacy in international criminal law, and how this may affect the perception of the authority of such institutions. Given the practical impact, which can be seen in the above examples, of the ICC lacking authority and legitimacy, the discussion of such problems is a critical area for research. This work seeks to deal with the issue by exploring the concept of authority and seeking to provide a theory of authority of international criminal law. The overarching intention of the work is to contribute to a more focused debate on the reasons for the Court's perceived and actual lack of legitimacy.

1.1 THE AUTHORITY OF LAW: DOMESTIC SYSTEMS AND CRIMINAL LAW

Before turning to the authority of international criminal law, the discussion of the authority of law more generally should be considered, beginning with the work of Joseph Raz. Raz has contributed extensively to the debate on authority and considers the concept of authority to be one of the most controversial

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

[7] 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 2010).

which exists in legal (and political) philosophy.[8] Its controversy is linked to the fundamental issue of determining what authority is and how it may underpin certain acts and rules. Although it may be considered controversial, an understanding of authority is critical to understand why the law has any power over individuals in society, at both the domestic and international levels. This is particularly important at the international level because of the significant power that some States possess in comparison to others. However, it does not stand alone as a concept: the question of the authority of law is intrinsically linked to that of legitimacy. Legitimacy, in the context of political systems, requires the authority of that system to be recognised by other actors.

The idea of legitimacy tends to be discussed within theories of the right to rule, or justifications for governments. From this debate, there is often reference to authority, although it is discussed in varying degrees of depth by legal and political theorists: Mill wrote that authority and liberty were competing values, that a tension existed between the two, but did not divulge his own conception of authority or breach the discussion further. His writing tends to focus instead on the existence of a government which then has the power to rule, within certain limits, and there is no inkling that the ideas of power and authority should be separated.[9] The command theory, propagated by John Austin, requires a command backed by a sanction without explaining why the State possesses authority in the first instance to command its subjects.[10] Instead, he focuses on the power the State has. Austin shares some similarities to Mill, in that they both refer to the power of the sovereign, its might, rather than any authority it may possess. Interestingly, Austin notes that, were everyone sufficiently 'competent,' all individuals in society could be sovereign.

Weber takes a different view and defines authority in terms of whether a directive will be obeyed.[11] He links, in his discussion, the concepts of power and authority to the legality of a political order, offering a perspective on what may constitute authority. He conceptualises authority as belief, which he regards as pertinent for the legitimacy of the system. This perspective remains political, rather than legal, although it does shed some light on the authority of legal systems. From a legal theory perspective, Raz and Kelsen have posited that the authority of law may emanate from different sources. Kelsen focuses

[8] Joseph Raz, *The Authority of Law* (1st edn, Oxford University Press 1979), 3.
[9] John Stuart Mill, *On Liberty* (first published 1859, Dover Publications 2002).
[10] John Austin, *The Province of Jurisprudence Determined* (first published 1832, General Books 2012).
[11] Max Weber, 'The Three Types of Legitimate Rule' (1958) 4 Berkeley Pub Soc Inst 1.

on his famous 'basic norm'[12] on which law's authority may be founded. Raz, alternatively, makes the argument that authority exists because the law is a legitimate exercise of power.[13] The idea of authority is developed to the greatest extent by Joseph Raz. Although not cited directly, it is a further development of Weber's idea of authority founded on belief in the system as legal and legitimate, and leading on to identify that there is no requirement for individuals to follow the law. Instead, he posits that the law possesses authority to the extent that it supports individual autonomy.[14]

These conceptualisations of authority provide a useful, although not exhaustive, explanation of authority at the domestic level. Inherent in their understanding of authority is the presence of a domestic government. These conceptualisations also explain why individuals in domestic societies should obey the law, and detail why such law ought to be considered to have authority. The domestic criminal system is thus rationalised by such theories: as Weber notes, individual faith in the domestic criminal law is explained through the criminal proscription of activities which most individuals would consider harmful. As Raz notes, domestic criminal law is also justified because of its protective function against general harm for the population as a consequence of its deterrent function.

These theories, however, have not been examined in the context of international law and it remains to be seen as to whether these arguments would stand up to scrutiny in respect of international criminal law. Despite the idea of international criminal law as an extrapolation of domestic criminal law,[15] it lacks a sovereign or central authority which could demand compliance. There is also a lack of connection to the individual, meaning that the argument that it could serve individual autonomy through obedience to rules cannot be considered, as the individual has little engagement with the creation and even the operation of the system. Although the conceptualisation of authority is important at the domestic level, it has much greater complexity and consequence at the international level because the international system lacks a centralised body or institution which governs all States. The capacity of States to create international law and to accept its constraints raises interesting questions, such as from where the authority derives and how it permits States to create international legal rules which can be described as legitimate.

[12] Hans Kelsen, *Pure Theory of Law* (2nd edn, The Lawbook Exchange 2005).
[13] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988).
[14] ibid.
[15] MC Bassiouni, 'The Permanent International Criminal Court' in M Lattimer and P Sands (eds), *Justice for Crimes against Humanity* (Bloomsbury 2003), 181.

1.2 PUBLIC INTERNATIONAL LAW AND ITS AUTHORITY

The question of public international law's authority and legitimacy thus requires some consideration before examining the authority of international criminal law, which exists as part of the wider discipline of public international law. Public international law broadly exists as a set of legal rules created by States and, historically, there has been some discussion on the authority of public international law. Grotius, among others, argued that the authority of the State and its right to govern stemmed from the agreement of its polity.[16] This agreement forms the foundation of State authority at the international level, which would then mean that international law may derive its authority from the States which create the rules, although Grotius did not discuss the idea any further. In contrast, Vitoria focused on individual reason as the basis for authority: his concept was that the natural law and natural order must be respected by others where an organising system such as States or groups existed.[17] His central contribution was to undermine the universality of papal authority, meaning that the idea of authority was more closely drawn to natural law and reason than to the divine order. However, he did not offer any conclusions as to why international law ought to have authority: the discussion of reason and its impact on authority at the international level would have to have been discussed in greater detail.

Other authors have also given the idea their attention more recently. Kelsen's legal theories have been applied to public international law by von Bernstorff.[18] Çali[19] also discusses the use of consent as the source of the authority of international law, arguing that authority in international law is intrinsically linked with the authority of domestic law. Other authors have also regarded the importance of the State, such as Criddle and Fox-Decent.[20] They jointly argue for the recognition of States as the organisations which safeguard rights, as the way in which the international system can function legitimately. Teitel[21] also argues for the existence of an order beyond statehood which restricts the ability of States to act and protects rights in international law.

[16] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Oxford University Press 1950).
[17] Francisco de Vitoria (ed AR Pagden and Jeremy Lawrance), *Vitoria: Political Writings* (Cambridge University Press 1991).
[18] Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010).
[19] Başak Çali, *The Authority of International Law: Obedience, Respect and Rebuttal* (Oxford University Press 2015).
[20] Evan J Criddle and Ewan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press 2016).
[21] Ruti Teitel, *Humanity's Law* (Oxford University Press 2011).

Autonomy is key in the eyes of Besson as the source of international law's authority,[22] while Franck's work on legitimacy[23] supports the idea that the law is obeyed by States when legitimate, and, accordingly, the law has greater authority when legitimate.

These authors set out interesting arguments regarding both authority and legitimacy in the context of international law. A central limitation remains in that it is difficult to apply any of these ideas to international criminal law. Despite the links between public international law more broadly and international criminal law, including similarities in terms of principles, sources and in other ways, there is a key difference: international criminal law is a direct constraint on both individual and State autonomy without necessarily requiring the consent of either the State who may have jurisdiction over the crime or the individual who has been indicted. The central function of criminal law, in restraining behaviour, makes international criminal law significantly different from other branches of public international law. In the same vein, the Rome Statute permits a referral of a non-State party to be made by the UN Security Council (UNSC). This, in and of itself, has the power to undercut the requirement of State consent, through an investigation of the behaviour, or acts within the jurisdiction of, non-State parties.[24] Accordingly, a different approach to analysing its authority must be undertaken.

1.3 AUTHORITY AND LEGITIMACY IN INTERNATIONAL CRIMINAL LAW

The authority of international criminal law raises different questions from that of general international law, and yet the issue has not been dealt with in much detail. Considerations of authority tend to abate in favour of discussions on whether international criminal law in general imposes victors' justice, or whether there exists bias, primarily that which is postcolonial in nature. The scholarship which examines the law of the ICC tends to focus on analysing the law itself[25] and there is little discussion on the purpose of the Court

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

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

[24] Luigi Condorelli and Annalisa Ciampi, 'Comments on the UNSC Referral of the Situation in Darfur to the ICC' (2005) 3 JICJ 590 and Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al-Bashir's Immunities' (2009) 7 JICJ 333.

[25] Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck Hart Nomos 2008); Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999); Ilias Bantekas, *International Criminal Law* (Hart 2010); and William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010).

generally, as it tends to be presumed. There is very little on the authority of international criminal law beyond the Court once questions of victors' justice were presumed to be resolved or of little further interest. Questions regarding the legitimacy of international criminal law are not new,[26] but there has been a greater concentration on questions of the Court's authority and legitimacy over the past few years.[27] As there is no overarching theory of authority posited for this area of the law, questions regarding authority and the legitimacy of the ICC will continue to be raised, which may have a damaging impact on the future of the Court. There are two specific areas which affect the authority of international criminal law, and the Court as the central vehicle for its enforcement. These are complementarity and UN Security Council referrals to the ICC.

Unlike other international criminal tribunals, the ICC has neither primary nor exclusive jurisdiction. Instead, its jurisdiction is complementary to that of national courts. In the context of the ICC, it may prosecute where the State is 'unwilling or unable genuinely'[28] to undertake prosecution. The doctrine of complementarity allows the principal obligation to prosecute to rest with the State, meaning that the authority remains with the State until such time as they cannot or will not exercise their right to do so. Any investigation by the ICC would be predicated on evidence, to an extent, that the 'unwilling or genuinely unable' test was satisfied, typically due to an extensive delay in prosecuting individuals[29] or a clear attempt to protect individuals from prosecution.[30] This creates a further step in the Court's admissibility threshold;[31] it may only proceed if there is no reasonable possibility of prosecuting at the domestic level.[32] Complementarity acts as a bulwark against the exercise of universal jurisdiction[33] by the Court, differentiating the ICC system to an extent from broader international criminal law. Domestic authorities must be

[26] William Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 JMLR 535.
[27] See, among others, Alter et al. (n 6); Hayashi and Baillet (n 6); Gegout (n 6) 800–818; and Niang (n 6) 615–624.
[28] Article 17(1)(a), Rome Statute. *See* Carsten Stahn, 'A Tale of Two Notions of Complementarity' (2008) 19 CLF 87.
[29] Article 17(2)(b), Rome Statute.
[30] Article 17(2)(a), Rome Statute.
[31] Article 1, Rome Statute. *See also* William Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 CLF 5.
[32] *See Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-OI/II-OI/IIOA6, 24 July 2014.
[33] Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56 ICLQ 49.

given the opportunity to prosecute, and, in the absence of compelling reasons, the Court may not attempt to exercise universal jurisdiction over all States.

In international criminal law more generally, States are permitted to prosecute individuals under universal jurisdiction on the proviso that there exists domestic or international law criminalising the conduct. The ultimate power to prosecute rests with the State and the purpose of universal jurisdiction remains in line with that of the ICC: to ensure that there is no impunity for international crimes by providing a forum for prosecution. However, the authority to do so is difficult to parse: some States make ample use of universal jurisdiction,[34] while others have instigated very few prosecutions, such as the United Kingdom. The authority to do so appears to be derived from the State power to prosecute domestically and to honour international obligations. Consequently, its authority for such acts connects directly to the constitutional settlement of the State, as opposed to anything beyond the State.

The second way in which complementarity, and the question of authority, is complicated, is via the provision of a referral mechanism which can be used to self-refer, refer other States to the ICC[35] or for the UN Security Council to make a referral.[36] This can be used as an alternative to both universal jurisdiction and domestic prosecution for nationals of the State itself.[37] Under article 13(b) of the Rome Statute, the UN Security Council is empowered to refer a situation to the ICC, justified by its Chapter VII mandate to maintain peace and security, while article 14 permits the State to refer a situation to the ICC, including one within its own borders.[38] Although a deeper exploration of this and the reasons therefore are beyond the scope of this particular work, it has complicated matters where the Court's commitment to complementarity has been questioned.[39]

[34] Maximo Langer and Eason Mackenzie, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30(3) EJ IL 779.

[35] 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' (2008) 21 LJIL 457.

[36] Condorelli and Ciampi (n 24) 590 and Akande (n 24) 333.

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

[38] Ahmed Samir Hassanein, 'Self-referral of Situations to the International Criminal Court: Complementarity in Practice – Complementarity in Crisis' (2017) 17(1) ICLR 107–134.

[39] 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 2014).

Thus, the connection between the State and the ICC goes beyond questions of jurisdiction: it derives its authority, its legitimate power to act, from the authority that States possess to create treaties, such as the Rome Statute. The creation of treaties by consent demonstrates one of the main sources of authority in international law: the consent of States. The treaty, and the rules thereunder, 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,[40] meaning that national prosecution must be given the opportunity to prosecute first. This places the primary responsibility for prosecution on the State.[41] However, this mechanism complicates the question of authority, because of the potential accusations of abuse of power or politically motivated referrals.[42] Such power complicates the question of the Court's authority: without a 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:[43] with the ICC, international criminal law may also be vulnerable to abuse by those with neo-colonial intentions. From where authority is derived requires further exploration to evaluate the basis for such claims.

1.4 THE PATH THIS TEXT WILL TAKE

Authority has been explored as a concept which is controversial in nature[44] because of the way in which it justifies the exercise of constraints on actions and limitations on behaviour. In a legal sense, this would usually connect to the idea of jurisdiction, particularly in relation to criminal law, because of the way in which it requires individuals to conform to or abstain from certain conduct. Authority has been explored to an extent by certain theorists, who note the struggle between freedom, autonomy, and authority, and who have sought to analyse the concept in a way which makes sense, to understand the

[40] Article 17(1)(a), Rome Statute of the International Criminal Court 1998 (hereafter: Rome Statute).
[41] Article 1, Rome Statute.
[42] Robinson (n 35) 323, 327.
[43] See Philippe Sands, *Lawless Word: Making and Breaking Global Rules* (Penguin 2006).
[44] Raz, *The Authority of Law* (n 8) 3.

existence of freedom in tandem with the existence of rules. To that end, authority relates to both political and legal spheres; the work of Joseph Raz can be used as a useful bridge between the two areas.

The key arguments in this book are set out in six substantive chapters which explore each of these facets in turn. The first substantive chapter addresses this tension by discussing what is meant by authority and focuses on the work of both legal and political theorists to support an understanding of the concept. The relevance of autonomy is considered, and the links between authority and power are also discussed, before turning to an appreciation of the idea of legitimacy. The distinctions between the two ideas, as well as their connections are detailed before the discussion concludes with an analysis of authority and legitimacy in the context of criminal law. This is used to determine whether the restraints placed on autonomy in this context can ever be considered legitimate, and thus whether there is an issue with the authority of domestic criminal law.

Chapter 3 then examines the role of authority in public international law, based on the preceding discussion of authority and legitimacy in the context of exercises of power. Although there is a source of power, if not authority, at the domestic level in the form of government, this does not automatically transfer to the international level. This is primarily because the international system exists without a central authority. The question automatically arises of who ought to be able to make such rules, and whether the requirement for the exercise of autonomy is still as critical as it would be at the domestic level. The discussion is based on an analysis of foundational texts, exploring the ideas of authority at the international level expounded by Grotius and Vitoria, before moving to work by more recent authors. The importance of humanity and the guiding principle of protecting individuals as authority are explored, to identify potential issues for authority in the context of international criminal law created by such approaches. The issue of State consent looms large; for public international lawyers, the focus on voluntary consent is critical, but it is considered as to whether this may undermine the authority of international criminal law where State power may not be exercised legitimately.

The fourth chapter then proceeds to the idea of authority in international criminal law. Although there are links between international criminal law and public international law, rooted in the treaty agreements which created the former, the partly compulsory nature of international criminal law sets it apart from other forms of public international law. The drafting of the Rome Statute has had a specific impact on the nature of international criminal law because there is now a permanent international court which may try serious violations of international criminal law. It has also codified crimes and defences, and sets