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Inherent Imperialism: Understanding the legal roots of anti-imperialist criticism of the International Criminal Court

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ABSTRACT

Since 2008 the International Criminal Court has been subject to criticism for being somehow imperialist and some criticism of the Court has pursued a distinctly anti-imperialist narrative. Whilst such criticism is often motivated by political considerations, this article examines whether such narrative can be to a certain extent due to some provisions of the Rome Statute itself, rather than the contingent choices made by Court organs. This involves analysing the law itself for traces of what this article terms 'inherent imperialism'. This is where the text of an instrument implicitly envisages an unequal or hierarchical legal structure. If some of the Rome Statute's features can be considered inherently imperialist, this could provide a partial justification for some of the political attacks on the Court's choices. This article, by providing a theoretical framework, which interprets claims that the law is imperialist, aims to put the anti-imperialist attacks on the Court in perspective.

1. Introduction

When the International Criminal Court (ICC) was created in 1998, one of its aims was to end the culture of impunity that political leaders enjoyed in relation to international crimes. Some scholars at the time argued that the creation of a permanent judicial body would enable prosecutions of those with the greatest responsibility for crimes against humanity and genocide. Moreover, the establishment of tribunals, such as the International Criminal Tribunal for Rwanda, seemed to indicate a broader acceptance of international organisations and tribunals.¹ The preamble to the 1998 Rome Statute stated that the ICC was to “put an end to impunity” for the perpetrators of international crimes and that the law would “apply equally to all persons without any distinction based on official capacity.”² Yet when, in 2008, the ICC first issued an indictment against a sitting head of state – Sudanese President Omar Al-Bashir – this was the

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¹ P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', 95 *The American Journal of International Law (AJIL)* (2001) 7 -31. R. Glossop, 'Creating and International Criminal Court: Giant Step Forward for World Law 31 *Peace Research* (1999) 1 -10.

² Preamble and Article 27 of the ICC Statute 1998.

beginning of narrative about the Court that it was an imperialist organisation. Some of this was motivated by concerns about the operation of the court and the politics surrounding its operation.³ On other occasions anti-imperialist criticism has been more self-interested. Abdul Tejan-Cole, the former Special Prosecutor at the Special Court for Sierra Leone illustrates this by reference to a simple example; when the former President of the Ivory Coast Laurent Gbagbo signed up to the Rome Statute in 2003 he broadly supported its operation. When in 2011 he was indicted by the ICC he and his supporters criticised it as a "White man's Court" and complained about its "neo-colonialist" and "imperialist" prosecutions.⁴ In 2016 three states issued notices saying they were intending to withdraw from the ICC and other states are actively considering withdrawing. The Gambia used explicitly anti-colonial terms when announcing its withdrawal criticising the ICC for failing to tackle "heinous war crimes" from western states and describing it as bringing "persecution and humiliation of people of colour, especially Africans".⁵ The Kenyan parliament has previously voted on withdrawal from the ICC and has proposed that other states in the African Union should also leave the Court due to it unfairly targeting African states.⁶

This article argues that, whilst many of those who label the ICC as 'imperialist' sometimes have cynical political motives, it might be possible that the ICC's legal structure is actually itself imperialist.⁷ In this regard, this article uses the expression 'imperialism' in a non-materialistic sense. Critiques of international law focusing on the role of economic accumulation or in the perpetuation of material conditions favouring the construction of an economic order sustaining inequalities are important, but do not assist with an analysis of the ICC whose principal function is to adjudicate on individual criminal responsibility.⁸ Rather, as the second section of this article argues, international instruments can possess structural features which are *inherently imperialist* in that they are predicated on the domination of weaker states and the diminution of their sovereign decision making capacities. Certain provisions within the Rome Statute can be read as inherently imperialist in that they envisage a legal relationship with states predicated on an on-going sovereign dominance of the organisation over the state. Inherent imperialism compliments existing theoretical explanations of anti-imperialist hostility to the ICC. One of the most common readings of the ICC legal framework is that it is a liberal or cosmopolitan institution since the Court assists in the pursuit of justice and promotes universalist aims, such as ending impunity for those responsible for

³ For example of criticism engaging with structural inequalities and anti-imperialism - see for example T. Reinold, 'Constitutionalization? Whose Constitutionalization? Africa's ambivalent engagement with the International Criminal Court' 10 *International Journal Of Constitutional Law (I-Con)* (2012) 1076-1105. Also see an explanation of anti-imperialist criticism of the ICC in dialogic terms D. Robinson, 'Inescapable dyads: why the International Criminal Court cannot win', 23 *Leiden Journal of International Law* (2015) 323-347.

⁴ A. Tejan-Cole, 'Is Africa on trial?' BBC News 27 March 2012 available at <http://www.bbc.co.uk/news/world-africa-17513065> (accessed 11 January 2016).

⁵ Reuters 'Gambia announces withdrawal from International Criminal Court' World News Reuters 26 October 2016 available at <http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0> (accessed 21 November 2016).

⁶ Agence France-Presse 'African Union members back Kenyan plan to leave ICC' The Guardian 1 February 2016 available at <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court> (accessed 21 November 2016).

⁷ For an example of a critique see R. Cole, 'Africa's Relationship with the International Criminal Court with the International Criminal Court: More Political than Legal', 14 *Melbourne Journal of International Law* (2013) 670 -698.

⁸ M. Neocleous, 'International law as primitive accumulation; or, the secret of systematic Colonization', 23 *European Journal of International Law (EJIL)* (2012) 941-962.

serious international crimes.⁹ This provides a partial explanation as to why its operation might be interpreted as imperialist but in practice the court is relatively powerless and struggles to enforce its decisions. Critical theorists of international law have focused on the ICC's origins noting that states from the Global South were marginalised in its construction in a manner that is symptomatic of the marginalisation of postcolonial states more generally in international law.¹⁰ Again this offers a partial explanation of anti-imperialism; many states from the Global South experienced juridical inequalities but do not engage in anti-imperialist attacks on the ICC and actively support its operation.¹¹ By focusing on what the law intends inherent imperialism can provide a reading of certain provisions of the Rome Statute that explains why in practice the law contributes to anti-imperialist attacks on the ICC.

True, the ICC has been resource starved and suffered from lack of cooperation from some state parties. However, inherent imperialism is a means of analysing what a legal instrument envisions the world to be, not what the way it actually shapes the world. Those who hold that the anti-imperialist criticism of the ICC is largely political focus too much on the contingent application and operation of the law, forgetting critically interrogate the world imagined by that law.¹² This article tries to assess whether certain provisions of the Rome Statute are inherently imperialist. It assesses in particular the doctrine of complementarity under Article 17, the role of the Security Council under Article 13 and the prosecutorial powers under Article 15. This reading of the Rome Statute explains how juridical structures generate anti-imperialist political arguments. To what extent these arguments matter is, as the conclusion notes, contingent upon individual political perspectives. Yet, criticism of the ICC in increasingly incendiary anti-imperialist terms is a feature of the world in which the ICC operates. This article tries to identify the legal causes of this criticism and concludes by sketching out how certain features of the Rome Statute could be designed differently to minimise inherent imperialism.

2. What is inherent imperialism?

To understand the anti-imperialist critique it is firstly necessary to briefly define what is meant by 'imperialism'. Whilst 'imperialism' is often associated with colonialism, in particular Western European colonialism, it is important to separate the two as the practice of imperialism continued after decolonisation. Whilst 'colonisation' – Michael Doyle argues – refers to the practice of “settling territories”, 'imperialism' describes instead the process of “maintaining an empire.”¹³ Other attempts to define 'imperialism' have also differentiated physical empires from the extraterritorial control, in a material or legal sense, of weaker states in the international system.¹⁴ Most notably Michael Hardt and Antonio Negri's definition of 'Empire'

⁹ A. Fichtelberg 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence' 4 *Journal of international Criminal Justice* (2006) 765-785.

¹⁰ See C. Schwöbel 'The Comfort of International Criminal Law' 24 *Law and Critique* (2013) 169-191, at 181-82. I. Tallgren, 'Who are 'We' in International Criminal Law? On Critics and Membership' in C. Schwöbel (ed.) *Critical Approaches to International Criminal Law: An Introduction* (London: Routledge 2013) 71-95.

¹¹ For a good overview see E. Keppler, 'Managing setbacks for the International Criminal Court in Africa', 56 *Journal of African Law* (2012) 1-14.

¹² See for example K. Ambos 'Expanding the Focus of the 'African Criminal Court'' in W Schabas, Y. McDermott and N. Hayes *The Ashgate Research Companion to International Criminal Law* (Surry: Ashgate, 2013) 499-529.

¹³ M. Doyle *Empires* (Ithaca: Cornell University Press, 1986) 30- 37.

¹⁴ H. Magdoff *Imperialism: from the Colonial Age to the Present* (New York: Monthly Press, 1978).

as a “decentred and deterritorializing apparatus of rule” captures how imperialism can be understood as a form of external dominance, but not necessarily territorial control, of a state that is characterised by unequal relations of power.¹⁵

In order to understand whether or not a legal instrument is itself imperialist one should not assess only what that instrument does in practice, but also the sort of world that the text of that instrument imagines. This is the sort of exercise undertaken by Stephen Humphrey’s in the *Theatre of the Rule of Law* where he analyses the nature of the rule of law contained within the legal structures of the World Bank’s Good Governance programmes.¹⁶ This is different from assessing the fact of economic or territorial dominance, as some international relations scholars have done when examining trade barriers and humanitarian intervention as forms of imperialism.¹⁷ What they are analysing here is neo-imperialism, which is a state practice and not necessarily contingent upon the particular form of a legal instrument. For example, the doctrine of self-defence as set out in Article 51 of the UN Charter does not necessarily connote a relationship of dominance of weaker states by stronger states and the ICJ have been critical of attempts to use it for these purposes.¹⁸ However, Article 51 has also been used as the justification for practices such as drone strikes, which are often criticised as being a neo-imperialist practice.¹⁹ Crucially, Article 51 does not envisage a hierarchical form of dominance of one party by another.

International relations scholars examining hierarchy and the role it plays in generating authority have focused both on the role of formal-legal relationships and on the role that informal networks of power and control have over states.²⁰ David Lake defines hierarchy as a collective of individuals “possessing authority” over another collective in a manner that legitimately controls their actions and notes that there is a relationship between this and patterns of informal imperialism.²¹ The important question to ask therefore is whether a legal instrument envisages this form of dominance over a state and the constriction of their sovereign decision-making capacities. There is an important point to be made about the indeterminacy of legal instruments, which critical legal scholars have often sought to highlight in order to challenge the underlying political assumptions behind the law and the way that they underpin

¹⁵ M. Hardt and A. Negri *Empire* (Boston: Harvard University Press 2000) xii-xiii.

¹⁶ S. Humphreys *Theatre of the Rule of Law: Transnational Legal Intervention In Theory And Practice* (Cambridge: CUP 2012)

¹⁷ See respectively W. Bello ‘Humanitarian Intervention: Evolution of a Dangerous Doctrine’ *Focus on the Global South*, 19 January 2006 available online at http://www.tni.org/archives/archives_bello_humanitarian accessed 10 January 2016. M.W. Janis ‘Towards a New International Order by M. Bedjaoui’, 6 *Boston College International & Comparative Law Review* (1983) 355 -360.

¹⁸ See Judgment, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* I.C.J. Reports 2005, p.168.

¹⁹ See W. Banks ‘Regulating Drones: Are Targeted Killings by Drones Outside Traditional Battlefields Legal’ in P. Bergen and D. Rothenberg *Drone Wars: Transforming Conflict, Law and Policy* (Cambridge, CUP 2015) 129-159. On the association with imperialism see Larry Everest ‘The Illegality, Illegitimacy and Immorality of U.S. Drone Strikes’ *Global Research*, November 05, 2013 available at <http://www.globalresearch.ca/the-illegality-illegitimacy-and-immorality-of-u-s-drone-strikes/5356886> (visited 11 January 2016).

²⁰ See J. Hobson ‘The Twin Self-Delusions of IR: Why ‘Hierarchy’ and Not ‘Anarchy’ is the core concept of IR’ 42 *Millennium Journal of International Studies* (2014) 557-575. D. Lake *Hierarchy in International Relations* (Ithaca: Cornell University Press 2009).

²¹ *Ibid* Lake, at 51-52.

existing forms of structural injustice.²² Martti Koskenniemi frames indeterminacy as an analytic tool for identifying “political preference” within the structure of the law but argues that the more relevant debate is how international institutions shape particular vocabularies and sub-disciplines of international law.²³ Inherent imperialism, as an analytic tool, utilises the framework of indeterminacy in its consideration of the underlying assumptions of the international law. However, the question of what an instrument envisages involves looking at the implicit assumptions it makes about the world as well as the origins of an instrument and its framing. There are three specific elements which make an instrument inherently imperialist, which are set out in the remainder of this section. Not all of these elements have to be present in an instrument for it to be considered inherently imperialist and they describe what the text of instrument envisages; they do not necessarily mean that the instrument itself is used for actual imperial dominance.

A. Consequential sovereign inequality

One ought to remember that the nature of sovereignty as a legal concept is unequal. Legal regimes that presuppose the diminution of sovereign powers will invariably operate within the context of unequal sovereignty. Historically international law was responsible for the development of imperialism and the modern concept of sovereignty is in many ways built upon doctrines that emerged during the colonial-imperial era in the eighteenth and nineteenth centuries.²⁴ The legal sovereignty of postcolonial states was shaped by former colonial powers which, as Anthony Anghie argues, generated a distinction between the states that created international law and the states that had been *created by* international law.²⁵ As Krisch notes “sovereignty was accorded only to those [within] the family of nations ... international law was European law” which meant that those whom the law did not apply to were “uncivilized ... and not members of the [European] family.”²⁶ In *Portugal v India* the ICJ acknowledged the existence of different forms of sovereignty in relation to the capacity to form treaties in the colonial era.²⁷ Unequal sovereignty had a distinct effect on both the substance and form of international law, as Pahuja notes in her study on the right to natural resources, the structures of power in international law helped preserve colonial era patterns of ownership.²⁸ This led to state’s that had been under colonial rule lacking effective control over international institutions, in particular the UN and UN institutions, which not only entrenched existing hierarchies (see the discussion below) but also gave a tangible dimension to the juridical inequalities between states. Sovereign inequality is an important because it directly affects the assumptions underpinning legal regimes. For example, the reasoning behind scholarship that argues that reduction in sovereign autonomy by an international regime, such as the WTO, can be

²² Seen N. Purvis ‘Critical Legal Studies in Public International Law’ 32 *Harvard International Law Journal* (1991) 81-127 at 89-90.

²³ M. Koskenniemi ‘The politics of international law–20 years later’ 20 *European Journal of International Law* (2009) 7-19, 13.

²⁴ A. Anghie *Imperialism Sovereignty and the Making of International Law* (Cambridge: CUP, 2004)

²⁵ A. Anghie ‘The Evolution of International law: Colonial and Post-colonial realities’ in R. Falk et. al (eds.) *International Law and the Third World: Reshaping Justice* (London, Routledge, 2008) 35 – 50, at 37.

²⁶ N. Krisch ‘More equal than the rest? Hierarchy, equality and US predominance in international law’ from M Byers and G Nolte (eds) *United States Hegemony and the Foundations of International Law* (Cambridge: CUP, 2008) 135-175.

²⁷ Judgement, *Portugal v India* I.C.J Reports 1960 p.6

²⁸ S. Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: CUP, 2011) 26.

instrumentally justified, due to concomitant gains to that state, often neglects to explore the fact that sovereignty in both its juridical and material forms is not enjoyed equally by all states.²⁹ Therefore a legal regime which envisages reducing the legal autonomy of a state, needs to acknowledge that not all states enjoy equal levels of sovereignty, in order to avoid perpetuating existing juridical inequalities.

B. Implicitly envisaged hierarchies

In the late nineteenth century international law was seen as a virtue of European civilization, which presupposed Western Europe at the centre of a civilizing world order.³⁰ James Tully's examination of imperialism notes that the informal mechanisms of imperialism that characterised colonial-imperialism in the nineteenth century, now characterise the neo-imperialism of western powers that use international law to construct a network of power.³¹ Tully's analysis points towards there being a need for a sovereign-imperial formation at the heart of international law something which Hardt and Negri also identify.³² This is in part because the nature of law itself, Peter Fitzpatrick argues, points towards some form of unifying power behind it, which makes imperialism within international law's operation inevitable.³³ This is not to suggest that there is a definitive imperial formation in operation in the world today however, the centralisation of international legal apparatus and the creation of regimes involving international tribunal's compulsory jurisdiction can make international law assume a hierarchical structure.³⁴ The generation of hierarchy will invariably mean privileging existing systems of power and the construction of what Hobson describes as an "inegalitarian hierarchical discourse" which can then constrict the autonomy of states.³⁵ Therefore any international legal regime creating a hierarchical framework can be considered inherently imperialist, as it envisages the perpetuation of dominance by existing powerful actors under the guise of international law.

C. Unaccountable sovereign constraint

Stephen Krasner notes that the concept of sovereignty has multiple components a state's domestic legal sovereignty – the power to make and unmake their own laws –and international legal sovereignty – their recognition by other states – are two different concepts but both have value to a state.³⁶ Where an organisation lacks material or physical coercive powers over a state but is tasked with enforcing international law within states, it can use powers of indirect coercion or exhortatory power to pressure a state into compliance - in international human rights law this is discussed in the context of 'state shaming' or collateral consequences on a

²⁹ See for example K. Raustiala 'Rethinking the Sovereignty Debate in International Economic Law' 6 *Journal of International Economic Law* (2003) 841-878.

³⁰ M. Koskenniemi 'Nationalism, Universalism, Empire: International Law in 1871 and 1919' *Whose International Community? Universalism and the Legacies of Empire*; Columbia Department of History, April 2005.

³¹ J. Tully *Public Philosophy in a New Key Vol.2* (Cambridge: CUP, 2008) 134-43.

³² Hardt and Negri *Multitude* (London: Penguin, 2005) 205-207.

³³ P. Fitzpatrick *Gods would be needed: American empire and the rule of (international) law* 16 *Leiden Journal of International Law* (2003) 429-466.

³⁴ J. von Bernstorff 'Hans Kelsen on judicial law-making by international courts and tribunals: A theory of global judicial imperialism', 5 *ESIL Conference Paper Series* (2015) 2-10.

³⁵ Hobson *supra* note 20, at 562.

³⁶ S. Krasner *Sovereignty: Organised Hypocrisy* (New Jersey: Princeton University Press 1999) 11-15.

state.³⁷ These actions are designed to have direct practical consequences on states – for example if the ICC issues an arrest warrant for a member of the government of a state, then other states who are party to the ICC are under an obligation to arrest them.³⁸ This means a government containing individuals who have arrest warrants issued for them are now unable to engage in normal diplomatic relations with the 120 other states that are party to the ICC, weakening their international legal sovereignty. Although this doesn't always work in practice – Bashir has notably escaped arrest since an arrest warrant was issued in 2009 – this what Articles 86 and 92 of the Rome Statute envisage happening.

This is a form of leverage to make a state change its internal laws or policies, or act in a particular way. Indirectly this involves weakening what Gerry Simpson describes as a state's existential sovereignty which is “recognition by the international community” that an entity is entitled to sovereignty in “a form of the state's own choosing”.³⁹ In *Nicaragua v US*, for example, the ICJ condemned violations “of the freedom of choice of the political, economic, social and cultural system of states” by coercive measures such as armed intervention or economic coercion.⁴⁰ It is possible to construct a justification of this power, with an appeal to cosmopolitan or teleological reasoning; such as the organisation is acting in the interests of values or in the long-term welfare of the citizens of that state.⁴¹ Yet this power is institutionalised in an international legal framework over which states have relatively little power, situating the organisation in a dominant position over the state. International legal doctrines such as state consent which justify this form of control from a positivist perspective, not only fail to take account of the on-going and evolving nature of organisational power which can evolve beyond the original act of consent, but also treats sovereignty as a fixed and uniform concept.⁴² Again this relates to specific features of the law and its design, rather than its application.

These three elements are markers of why an international instrument can be considered inherently imperialist. The next section of this article will examine three provisions of the Rome Statute and consider why they could be considered inherently imperialist, identifying where appropriate one or more of the elements described in this section and what way (if any) the inherent imperialism of these provisions affects anti-imperialist criticism of the ICC.

³⁷ J. Lebovic and E. Voeten ‘The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR’ 50 *International Studies Quarterly* (2006) 861-888. Douglass Cassel “Does international human rights law make a difference?” 2 *Chicago Journal of International Law* (2001) 121

³⁸ S. Roper and L. Barria. ‘State co-operation and International Criminal Court bargaining influence in the arrest and the surrender of suspects’ 21 *Leiden Journal of International Law* (2008) 457-476. M. Berlin, ‘Why (not) arrest? Third-party state compliance and noncompliance with international criminal tribunals.’ *Journal of Human Rights* (2016) 1-24.

³⁹ G. Simpson *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2nd ed. Cambridge: CUP, 2006) 53-54.

⁴⁰ Judgement on the Merits, *Nicaragua v. United States of America* I.C.J. Reports 1986, p.14 § 263.

⁴¹ Fichtelberg *Supra* note 9.

⁴² This problem is sketched out by O. Hathaway ‘International Delegation and State Sovereignty’ 71 *Law and Contemporary Problems* (2008) 115-149.

3. The inherent imperialism of Article 17: complementarity as a form of institutionalised sovereign inequality

The principle of complementarity requires that where possible states should ensure that international law is enforced within their jurisdiction. Kamari Maxine-Clarke describes complementarity as representing “a nod to the primacy of the nation state” whilst ensuring “standards of international adjudication are used as the ultimate measure of justice.”⁴³ Under Article 17 of the Rome Statute where states are “unwilling or unable genuinely” to carry out an investigation or prosecution the ICC may assert its jurisdiction.⁴⁴ The Prosecutor’s job under Article 17, Rahmet Mohamed argues, is not to “compete” with states over who has jurisdiction but to ensure that crimes “do not go unpunished and thereby put an end to impunity.”⁴⁵ The general sentiment at the drafting conference of the Rome Statute was that the ICC’s jurisdiction needed to be of an exemplary nature as otherwise it would be unable to prosecute the crimes that it was created to deal with.⁴⁶

A. Article 17’s Inherent Imperialism: Complementarity as Colonial Victimhood

There are two ways of reading Article 17 as inherently imperialist. Firstly complementarity is premised on the existence and perpetuation of state failure and weakness. As Louise Arbour noted at the time of the Rome Statute’s drafting, Article 17 effectively required the Prosecutor to put a state on trial for its perceived failure to prosecute an international crime.⁴⁷ Kevin Jon Heller disputes this interpretation, noting that in the Travaux Préparatoires of the Rome Statute there was no express wish from state parties to carry out the function of national courts.⁴⁸ The process of complementarity however requires a state to acknowledge its own weakness in a specific case and its dependency on international organisations. This is reflected in the structure of Article 17 which, as well as dealing with cases where the state was genuinely unwilling, also covers cases where the state lacks “impartiality”, where there are “unjustified” delays or where there has been a “total or substantial collapse or unavailability” of the national judicial system.⁴⁹ The former Chief Prosecutor Luis Moreno Ocampo remarked in 2003 that a sign of success would be if his office handled relatively few cases and there was an increase in prosecutions by state parties.⁵⁰ The implication of that statement was that complementarity would only apply to truly exceptional states, incapable of mounting prosecutions.

⁴³ K. Maxine-Clark “Global Justice, Local Controversies: The ICC and the Sovereignty of Victims” from M.B. Dembour and T Kelly *Paths to International Justice: Social and Legal Perspectives* (Cambridge: CUP, 2007) 134-160, at 134.

⁴⁴ For a history of this see M El Zeidy *The Principle of Complementarity in International Criminal Law; Origin, Development and Practice* (The Hague: Martinus Nijhoff, 2008) chp. II.

⁴⁵ R. Mohamed ‘The role of the International Criminal Court and the Rome Statute in international criminal justice standard setting: some reflections’ from Rowena Maguire, Bridget Lewis, Charles Sampford (eds) *Shifting Global Powers and International Law: Challenges and Opportunities* (London: Routledge 2013) 100, at 104

⁴⁶ M. Politi ‘Reflections on Complementarity at the Rome Conference’ from Carsten Stahn and Mohamed M El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice Vol.1* (CUP 2011) 144.

⁴⁷ L Arbour ‘The Challenges of Litigation in the 21st Century: From the ad hoc Tribunals to the International Criminal Court’ (1998) ICTY Year Book 445.

⁴⁸ K. Heller ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ *17 Criminal Law Forum* (2006) 255-280.

⁴⁹ Article 17 ICC Statute.

⁵⁰ Statement made by the L Moreno-Ocampo, Chief Prosecutor, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, The Hague 16 June 2003.

Complementarity is in effect saying, as Menno Kamminga argues, that states are too weak to actively assert jurisdiction.⁵¹

The language of state failure in Article 17 feeds into what Charles Call terms, ‘the Failed State fallacy’ which weakens the historic culpability of western powers for the role of state failure, as European and North American states “created the system of nation-states...propping up post-colonial leaders, providing them with arms ...and [maintaining] weak institutions.”⁵² The language of state failure can be seen in an official report from the Office of the Prosecutor in late 2003, which argued that states may well be unable to carry out investigations and prosecutions because they were “conflict torn.”⁵³ At the 2010 Review Conference on the Rome Statute a stocktaking exercise on the operation of the principle of complementarity fell into the trap of endorsing the failed state fallacy. It noted that states that were unable to carry out successful prosecutions at a national level had “domestic institutions operating in the context of a weak economy” and were often affected by the “lack of infrastructure” which caused a “lack of confidence in the judicial structure.”⁵⁴ Whilst this can be read as a move to reduce of sovereign inequality, the reality is that moving the prosecution of an individual to a supranational court diminishes the domestic legal sovereignty of a host state. A mechanism that was genuinely designed to reduce sovereign inequality would push resources downwards to the state itself allowing it to rebuild its justice system. As Article 17 does not do this and instead provides a mechanism for enhancing the relative power of the Court it arguably fulfils the first element of inherent imperialism as it ignores, and arguably reinforces, existing sovereign inequalities.

Secondly, Article 17, by underscoring the weakness of states implicitly situates them as victims. Muaka Mutua noted in a critique of international human rights law, that its “grand narrative” specifically envisaged the notion of “savages” over whom the law needs to be applied.⁵⁵ This is a distinctly colonial-imperialist configuration of universal justice based on the identification of an “other” or “alterity” over whom the law is supposed to save or civilise.⁵⁶ As Maxine-Clarke argues, the doctrine of complementarity does something similar by describing states as lacking control and power and then creates a legal regime vesting power, and by implication sovereignty, within the ICC. This, Maxine-Clarke argues, refuses to treat Africans as “political agents” seeing them “in need of salvation by a benevolent “West””.⁵⁷ This is part of a broader problem, described by Frédéric Mégret, that international criminal law attempts to “imagine an ideal number of recipients”.⁵⁸ This fulfils the third element of inherent

⁵¹ M. Kamminga ‘Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses’ 23 *Human Rights Quarterly* (HRQ), (2001) 940-974, at 950.

⁵² C. Call The Fallacy of the ‘Failed State’ 29 *Third World Quarterly* (2008) 1491- 1507, at 1499-1500.

⁵³ *Informal Expert Paper the Principle of Complementarity in Practice*, ICC-01/04-01/07-1008-AnaA 30 March 2003 § 4.

⁵⁴ M Bergsmo, O Bekou and A Jones, “Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools’ , 2 *Goettingen Journal of International Law* (2010) 791-811, at 801.

⁵⁵ M. Mutua ‘Savages, Victims, and Saviours: The Metaphor of Human Rights’, 42 *Harvard International Law Journal*, (2001) 201-245, at 204.

⁵⁶ *Ibid.*

⁵⁷ Maxine-Clarke *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa: The ICC and the Challenge of Legal Pluralism in Sub-Saharan Africa* (New York: CUP, 2009)120.

⁵⁸ F. Mégret ‘In whose name? The ICC and the search for constituency’ from C. De Vos, S. Kendall, C. Stahn *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: CUP 2015) 23-45, at 26.

imperialism as complementarity effectively institutionalises the capacity of the ICC to put a state's legal system on trial. The capacity for self-referrals under Article 14 of the Rome Statute notionally mitigates this by allowing states to self-refer situations to the ICC. Again however, it is worth reading this power in the context of sovereign inequality; states making such referrals may well be making a constrained choice because their domestic legal system and their state administration more broadly makes this the only realistic option available to them. Globalisation theorists have argued that a notionally voluntary action by a state in relation to aspects of international economic law does not necessarily mean that a state's choices are really free choices.⁵⁹ In an early piece of commentary on Article 14 Claus Kress noted that although Article 14 treated the role of the Prosecutor as passive, in practice they had been actively managing referrals and there was a clear obligation within Article 14 that were a state to be unable to carry out an investigation they were "to surrender to an international criminal jurisdiction."⁶⁰ This indicates that the choice under Article 14 is at best constrained and the freedom of that choice varies according to the relative level of sovereign inequality experienced by a state.

B. The Practical Effects of Article 17's Inherent Imperialism

The way that Article 17 has been interpreted and applied has often highlighted its structural assumptions about the weakness and underdevelopment of states. For example it is unclear that complementarity has had much of an impact in encouraging domestic prosecutions. As William Schabas notes in relation to the Democratic Republic of Congo (DRC) cases there has been hardly "any beneficial effects" in terms of encouraging states to take "responsibility[y] for criminal justice."⁶¹ The Trial Chamber in *Katanga* held that a state's "unwilling[ness]" to bring a prosecution under Article 17 may include situations where a state "chooses not to investigate or prosecute a person before its own courts, but had nevertheless every intention of seeing that justice done."⁶² In 2011 the Office of Public Counsel for Victims argued in *Katanga* that "the Court's approach to the principle of complementarity should be practical and not overly exacting" which as they acknowledged involved equating the inability and unwillingness of states to undertake prosecutions.⁶³ This is a practical manifestation of the inherently imperialist nature of Article 17 described above and this interpretation appears to endorse the notion that complementarity is meant to apply to states that can be categorised as failed or failing, which for historical reasons is a label often associated with postcolonial states.

The connotations of weakness and underdevelopment also help explain the relatively hostile institutional reaction from the AU. Institutionally the AU, and in particular its predecessor the

⁵⁹ For examples see Hardt and Negri *Supra* note 15; P. Trimble 'Globalization, International Institutions and the Erosion of National Sovereignty and Democracy' 95 *Michigan Law Review* (1997). See also in terms of convergence limiting the scope of choices D. Drezner 'Globalization and policy convergence.' 3 *International studies review* (2001) 53-78.

⁶⁰ C. Kress, 'Self-Referrals and Waivers of Complementarity-Some Considerations in Law and Policy' 2 *Journal of International Criminal Justice* (2004) 944-948 at 946.

⁶¹ W. Schabas 'The rise and fall of complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds) at 158.

⁶² Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga Pursuant to Article 19(2)(a) of the Statute, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-949, Trial Chamber II March 2009, Paras 4-6, 9, and 14.

⁶³ Observations by the OPCV on the Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber on the Motion Challenging the Admissibility of the Case, *Prosecutor v Katanga* ICC-01/04-01/07 13 August 2009.

OAU, had a long history of interstate solidarity which was often used to counter historic and contemporary practices of imperialism.⁶⁴ A legal structure such as complementarity was likely to be seen through the prism of imperialism because of the connotations of weakness and sovereign inequality associated with its operation. This was the view articulated by the Rwandan President Paul Kagame, who in a 2008 radio interview drew an explicit link with imperialism stating that the ICC was seeking to “undermine people from poor and African countries, and other powerless countries.”⁶⁵ AU resolutions criticising the ICC have emphasised the near existential nature of the threat that they perceive the ICC poses. At the July 2010 AU summit in Kampala Uganda a resolution was adopted calling for member states to refuse cooperation with the ICC in the matter of Darfur singling out the Prosecutor for “making ... condescending statement[s]”. Malawian President Bingu wa Mutharika, the then President of the AU condemned the ICC for issuing indictments which were “undermining ... African peace and security” and went on to condemn the ICC's interference with “African solidarity and African peace and security that we fought for so many years.”⁶⁶ The broader problem with Article 17 is that it is one of what Carsten Stahn terms the “paternalising and disempowering features” of the Rome Statute which allow the Court to act in ways that appear to marginalise local concerns.⁶⁷

4. Article 13 and the power of the UN Security Council

Under Article 13 (b) of the Rome Statute the UN Security Council retains the power to refer cases to the Prosecutor. During the Rome Statute's drafting there was a disagreement about the role of the Security Council, with states who were permanent members arguing for it to have an expanded role, especially in terms of determining the subject of investigations and prosecutions.⁶⁸ The relationship between the Security Council and the Prosecutor's office was clarified in the 2004 ‘Relationship Agreement’ which stated that the ICC retained the status of a permanent judicial institution with legal personality.⁶⁹ The separation between the two bodies allowed the ICC to preserve its judicial independence. As Amal Alamuddin summarises it the legal position under the Rome Statute is that the Security Council “can expand the Court's jurisdiction but not dictate what it does with it.”⁷⁰

A. The Inherent imperialism of Article 13

⁶⁴ For an overview see I. Shivji, ‘Pan-Africanism or Imperialism? Unity and Struggle towards a New Democratic Africa’, 1 *Law, Social Justice & Global Development* (2008) 3-11 available online at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_2/shivji/shivji.pdf (last viewed 3 February 2016).

⁶⁵ International Criminal Court Cases in Africa: Status and Policy Issues' Congressional research Service 7-5700 22 July 2011

⁶⁶ Aljazeera ‘AU chief slams ICC Bashir warrants’ Aljazeera Africa 25 July 2011 available online at <http://www.aljazeera.com/news/africa/2010/07/201072571956380906.html> (last viewed 3 Feb 2016).

⁶⁷ Stahn ‘Justice civilisatrice? The ICC, post-colonial theory and faces of ‘the local’ in De Vos et al. (eds.) *Supra* note 58 at 83.

⁶⁸ W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012) 202.

⁶⁹ ICC ‘Negotiated Relationship Agreement between the International Criminal Court and the United Nations’ ICC-ASP-3-res 1 available at https://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf (last viewed 5 February 2016).

⁷⁰ A. Alamuddin ‘The Role of the Security Council in Starting and Stopping cases at the International Criminal Court: problems of Principle and Practice’ from Andraž Zidar and Olympia Bekou (eds) *Contemporary Challenges for the International Criminal Court* (BIICL 2014) 128.

There are two ways of reading Article 13 as inherently imperialist. Firstly by institutionalising the power of the Security Council, the Rome Statute perpetuates what Simpson termed its “legalised hegemony”.⁷¹ The core theories interpreting the relationship between the Court and the Council point to this entrenchment of privilege as Deborah Ruiz Verduzco notes, the dominant view favoured by members of the Security Council is that the ICC is an instrument for the preservation of international peace and security with Security Council acting almost as an international executive.⁷² In Hardt and Negri’s view this has made the ICC a mechanism for reproducing and reinterpreting “the political hierarchy of Empire” as it operates in service of the management of wars for imperial powers rather than holding them to account.⁷³ Even if one is prepared to acknowledge that Article 13 attempts to balance competencies within the international legal system the problem Richard Dicker argues, is that by virtue of “their genesis in a political body” the “investigations and prosecutions” resulting from Article 13 referrals are viewed as “tainted.”⁷⁴ Schabas’ follows a related line of argument, noting that the “deference” of the Court towards the Security Council is at the root of the criticism that the ICC is politicised.⁷⁵ The mere fact that the Rome Statute contains a clause empowering the Security Council is in itself inherently imperialist as the Security Council grants direct juridical privileges to a narrow group of states – the permanent members who hold the power of veto – underscoring the inequality between states in line with the first element of inherent imperialism.

Secondly Article 13 gives the Security Council the power to effectively universalise the ICC’s jurisdiction by enabling the Prosecutor initiate investigations in states that are not party to the ICC. In this respect Article 13 represents a broader tension within the ICC as to whether it is an organisation governed by state consent or is a supranational organisation.⁷⁶ On one side of the argument M Cherif Bassiouni argued that the “ICC was never intended to be a supra-national legal institution” and was intended as an institution of “last resort”.⁷⁷ This interpretation sits somewhat uneasily with the Security Council’s power of referrals which Bassiouni describes as a “jurisdictional resort of convenience” seemingly implying a relationship where the Security Council was much more powerful than the ICC.⁷⁸ David Chandler puts the other side of the case, arguing that the ICC was part of a broader liberal trend in the 1990s which saw an “extension of the state form to the international level and with this the constitution of a global community bound by shared norms and laws”.⁷⁹ This cosmopolitan vision is seemingly closer to the power outlined in Article 13 and is representative of what Mireille Delmas-Marty terms the contradiction in the statute, that the ICC appears to evoke a universalism whilst containing

⁷¹ Simpson *supra* note 39, at 7.

⁷² D. Verduzco ‘The relationship between the ICC and the United Nations Security Council’ from Carsten Stahn (eds) *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015) 31-35.

⁷³ Hart and Negri *supra* note 32, at 29.

⁷⁴ R. Dicker ‘The International Criminal Court (ICC) and Double Standards of International Justice’ from Stahn (eds) *supra* note 72, at 3.

⁷⁵ Schabas ‘The Banality of International Justice’, 11 *Journal of International Criminal Justice* (JICJ) 545-551, at 550.

⁷⁶ B. Schiff ‘Universality meets Sovereignty at the International Criminal Court’ from M. Cox and N. Shawki *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Ashgate 2009) 59-80.

⁷⁷ M Cherif Bassiouni ‘The ICC — Quo Vadis?’ 4 *JICJ* (2006) 421-427, at 422.

⁷⁸ *Ibid.*

⁷⁹ D. Chandler ‘Born Posthumously: Rethinking the Shared Characteristics of the ICC and R2P’ (2010) 21 *Finnish Yearbook of International Law* 1-9, at 3.

provisions that politically constrain its operation.⁸⁰ The distinct problem with the cosmopolitan vision of the ICC is that there remain deep asymmetries of power between states which means that any utopian project to dilute sovereignty is invariably going to affect some states more than others. As Jonathan Graubart and Latha Varadarajan argue, in a critique of the International Criminal Tribunal for Yugoslavia's prosecution of Slobodan Milosevic, the utopian project of universal justice cannot dilute the relatively unequal international order in which it operates.⁸¹ This line of argument is similar to the one advanced in relation to Article 17 and the inherent imperialism of Article 13 in this respect is due to universalism being unequal and creating a hierarchy within international law, fulfilling all three elements of inherent imperialism.

B. The Practical Effects of Article 13's Inherent Imperialism

The definitive practical effect of Article 13's inherent imperialism is that it contributes to the 'double standards' attack – the argument that the Court applies one standard to powerful nations and another to less powerful nations. The absence of three of the five veto holding powers on the Security Council from the ICC in essence means that the Security Council retains a significant supervisory control of its prosecutions without ceding any responsibility to Court for their own actions. In 2005 just as the US Congress was putting pressure on countries to guarantee immunity for US citizens that might be charged by the ICC for their actions overseas, the US state department was working with the prosecutor to ensure indictments in Sudan.⁸² In their analysis of the referral of the Darfur situation to the ICC Luigi Condorelli and Annalisa Ciampi noted that the resolution contained numerous inconsistencies designed to retrench the existing position of the US with regard to immunities from prosecution and financial support of the Court, but still allow it to support ICC involvement in this case.⁸³ This was echoed in arguments over the Al-Bashir indictment in the AU. Whilst some states such as Ghana and Tanzania defended the ICC, other states were much more forthright in their attacks on the Court's perceived double standards. Ethiopian Prime Minister Hailemariam Desalegn criticised "the double standard that both the United Nations Security Council and the ICC have displayed".⁸⁴ AU Commissioner Jean Ping commenting on the Gaddafi indictment said the court was "discriminatory" because it was yet another example of the ICC only going after crimes committed in Africa while ignoring crimes by Western powers in Iraq, Afghanistan and Pakistan.⁸⁵

⁸⁰ M Delmas-Marty 'Ambiguities and Lacunae The International Criminal Court Ten Years on' 11 *JICJ* (2013) 553-561, at 554.

⁸¹ J. Graubart and L. Varadarajan, 'Taking Milosevic seriously: Imperialism law and the politics of global justice', 27 *International Relations* (2013) 439-460.

⁸² M Happold, "Darfur, the Security Council and the International Criminal Court", 55 *ICLQ* (2006) 226 -236.

⁸³ L. Condorelli and A. Ciampi 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' 3 *Journal of International Criminal Justice* (2005) 590-599.

⁸⁴ J. Fortin African Union Countries Rally Around Kenyan President, But Won't Withdraw From The ICC' *International Business Times* 12 Oct 2013 available at <http://www.ibtimes.com/african-union-countries-rally-around-kenyan-president-wont-withdraw-icc-1423572> (last viewed 10 Jan 2016).

⁸⁵ S. Stearns 'African Union Says ICC Prosecutions Are Discriminatory' *Voice of America* 4 July 2011 available at <<http://www.voanews.com/content/article--african-union-says-icc-prosecutions-are-discriminatory-125012734/158424.html>> (last Viewed 1 Feb 2016).

Some of these arguments were often advanced in a highly cynical manner and as Udombana noted the AU's defence of sovereignty in the Darfur case was often highly contradictory.⁸⁶ Nevertheless, these arguments can gain a veneer of plausibility as one of the causes of double standards is that Article 13 seemingly enhances existing hierarchies in international law. This is particular apparent when members of the Security Council use their votes on Article 13 references to protect political allies. In 2014 Russia and China vetoed an Article 13 referral in the case of Syria, as its government was a mutual ally of both states.⁸⁷ In 2005 a diplomatic row broke out when the Chinese declined to veto the resolution on referring the case in Sudan to the ICC after China had indicated it would protect Sudan.⁸⁸ This essentially was the dispensing of juridical privilege by veto holding states to client states under their protection and the process of managing client states was identified by David Harvey as a core facet of the development of classical imperialism and neo-imperialism.⁸⁹

5. Article 15 and the Power of Prosecutor

The office of the Prosecutor under Article 15 has a *proprio motu* (i.e. of its own initiative) power to initiate investigations independently, without referral from a state party or from the Security Council. This power was initially opposed by the ILC who in 1994 commented that *proprio motu* powers were not advisable "at the present stage of development of the international legal system."⁹⁰ As Fabricio Guariglia observed, the "imaginary character of the frivolous prosecutor" was a common feature of debates about the Prosecutor's powers, both at the time of the Rome Statute's drafting and later during the debate on the Crime of Aggression.⁹¹ Article 15 requires the prosecutor to analyse the seriousness of the information received and then ask the Pre-Trial Chamber authorization to open an investigation. The latter then decides whether there is a reasonable basis for initiating an investigation. In the *Situation in the Cote' d'Ivoire* the Pre-Trial Chamber confirmed the "continuing crimes" doctrine which allowed the Prosecutor to bring charges in relation to situations that went beyond the facts contained in the original referral.⁹² This gives the Prosecutor considerable power to define the nature of the criminal offences brought before the court and the scope of this power raises the potential for Article 15 to be considered inherently imperialist.

A. The purported inherent imperialism of Article 15

⁸⁶ N. Udombana 'When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan' 4 HRQ 1149-1200.

⁸⁷ UN News 'Russia, China block Security Council referral of Syria to International Criminal Court' UN News Centre (Online) 22 May 2014 <http://www.un.org/apps/news/story.asp?NewsID=47860#.WDrN1fmLSM8> (last accessed 22 November 2016).

⁸⁸ ST 'China defends decision not to veto Darfur ICC referral' Sudan Tribune (Online) 11 November 2009 <http://www.sudantribune.com/spip.php?article33085> (last accessed 22 January 2016).

⁸⁹ D. Harvey *The New Imperialism* (Oxford: OUP 2003) 39-44.

⁹⁰ Opp Cite A. Danner 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *AJIL* 510 at 515.

⁹¹ F. Guariglia 'The Proprio Motu Powers of the Prosecutor to Commence Investigations' Contemporary challenges for the International Criminal Court' from Andraž Zidar and Bekou (eds) *supra* note 70, at 94.

⁹² *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire* ICC-02/11-14, 3 October 2011, §178-179.

The inherent imperialism of Article 15 is not as clear as the arguments relating to Articles 13 and 17. It is important to acknowledge, as Tor Krever notes, that at an international level “politics lies in the motivation behind a particular prosecution” as the choice of whom to prosecute and what to prosecute them for are choices guided by political considerations.⁹³ When the Prosecutor exercises their power under Article 15 about which situations to bring before the Pre-Trial Chamber and how to frame the offences against individuals, they are engaging in a form of political decision-making. This decision making however takes place within a legal structure which is hierarchical, in along the lines described in the third element of inherent imperialism. Margaret deGuzman seeking to contextualise the numerous criticisms that have been levelled at the Prosecutor, noted that whilst the Court had been created “adjudicate “the most serious crimes” it had “a budget that enables only a handful of prosecutions per year”.⁹⁴ Whilst the thrust of deGuzman’s argument is that decisions of the Prosecutor are reflecting pragmatic constraints, pragmatism in this context reflects a world of unequal sovereigns where, as set on above, power imbalances are a legacy of colonial imperialism. Equally if one follows Holly Kendall’s reading of the role of the Prosecutor at the ICC being to provide “symbolic validation ... of the law’s authority by grounding it in the social order”, it is easy to read Article 15 powers as effectively putting a state’s domestic legal system on trial, in the manner of third element of inherent imperialism outlined in section 2.⁹⁵ Yet these prosecutorial choices would have happened under any international regime and whilst it is possible to argue that the ICC is an exceptional position, all international tribunal face problems of selectivity.⁹⁶ What distinguishes the ICC is as is the broader context of its origins and operation; as Nerida Chazal notes the ICC was intended to be an organisation designed to assist global governance.⁹⁷ As Chazal goes onto note the ICC is caught between acknowledging the “unpredictability” of international society and the “desire for control and order” which guides its interpretation of international criminal law.⁹⁸ This means that the powers of the prosecutor under Article 15 are in some way geared towards exercising a form of international control, potentially conforming to the different facets of inherent imperialism described in the first section above.

This critique of the discretionary powers of the Prosecutor is arguably compounded by the relative lack of control that states have over the Prosecutor and over the ICC more generally. As Alison Danner notes, the Office of Prosecutor is caught between the notion of “quasi-judicial independence” and being bound by the real political considerations in the exercise of its power.⁹⁹ Whilst there is notional accountability, in that the Prosecutor is accountable to the Assembly of States Parties, this provides a relatively weak regime of formal accountability. In

⁹³ T. Krever ‘Unveiling (and veiling) politic in international criminal trials’ from Schwöbel (eds) *supra* note 7, at 118.

⁹⁴ M. deGuzman ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ 33 *Michigan Journal of International Law* (2012) 265-320, at 267.

⁹⁵ H Kendall ‘The Right to Access Legal Representation and Admissibility to the International Criminal Court: Walking the Tightrope Between Legitimacy and Effectiveness’ (2015) 4(2) *UCL Journal of Law and Jurisprudence* 299-329, at 302.

⁹⁶ See T. Harrison ‘What Does it Mean for the Prosecutor to be a Political Actor?’ in *Debating International Justice in Africa OTJR Collected Essays, 2008–2010* (Oxford: Centre for Social-Legal Studies, 2010) 55-57.

⁹⁷ See N. Chazal *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity* (London; Routledge 2015) 6-9.

⁹⁸ *Ibid* 54.

⁹⁹ Danner *supra* note 90, at 523-524

the broader context of the ICC as an institution, this can be seen as another example of ICC adopting what Tallgren describes as the exclusive sense of “we” who possess law over “they” whom law needs to be applied.¹⁰⁰ However, prosecutorial independence is an important concept if justice is to be administered fairly and as Joseph Isanga argued the criticism that Prosecutor is unaccountable and is susceptible to politicisation is somewhat “overstated”.¹⁰¹ It is not clear that Article 15 is inherently imperialist as it does not directly envisage a role for the Prosecutor that could be considered to place them in a dominant relationship over a state party and the powers the limited powers they do have in this respect are subject to a high degree of control by the Pre-Trial Chamber. In fact an imperialist interpretation of Article 15 is only possible when reading it in the broader context of the ICC’s operation or in tandem with other provisions.

B. Are there any practical indications of Article 15’s inherent imperialism?

A 2015 empirical study of Prosecutorial discretion at the ICC concluded that given the budget constraints and other political limitations, the Prosecutor had “picked the gravest situations for which it has jurisdiction”.¹⁰² Whilst there is little evidence that either of the two Prosecutors to date have utilised their power in a manner that has been overtly biased or politicised, the failure to exercise discretion in particular cases has compounded the double standards argument. David Bosco notes that shortly before the ICC began undertaking its first investigations in 2004 senior staff were careful to issue informal reassurances that the Court’s focus would be “Congo not Iraq”.¹⁰³ In 2006 the Prosecutor issued a letter confirming that although there was a reasonable basis to believe that British troops had committed war crimes in Iraq the crimes did not meet the sufficient gravity threshold under Article 17 for an investigation to be opened using Article 15.¹⁰⁴ However this related to the nature of the crimes themselves and in 2014 the current Prosecutor Fatou Bensouda, opened a preliminary examination of the situation in Afghanistan indicating a willingness – if warranted by the circumstances – to investigate international crimes linked to Western military interventions.¹⁰⁵

One area where the charge of inherent imperialism could potentially be levied is in relation to the potential partial application of prosecutorial power. For example Ocampo’s ex-gratia statements about individual defendant’s guilt which appeared to be pre-judging cases.¹⁰⁶ The Appeals Chamber heavily criticised Ocampo noting that his “behaviour not only reflects poorly on the Prosecutor but ...may lead observers to question the integrity of the Court as a whole.”¹⁰⁷ Whilst this can be seen as imperialist in that it seems to be a judicial official acting

¹⁰⁰ Tallgren *supra* note 10, at 73-74.

¹⁰¹ J. Isanga ‘The International Criminal Court Ten years Later: Appraisals and Prospects’, 21 *Cardozo Journal of International and Comparative Law* (2013) 235-323, at 265.

¹⁰² A. Smeulers, M Weerdesteijn, and B Hola, "The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP’s Performance" 15 *International Criminal Law Review* (2015) 1-39, at 38.

¹⁰³ D. Bosco *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford; OUP 2014) 88-92.

¹⁰⁴ Office of the Prosecutor *Letter Concerning Communication on the Situation in Iraq*, The Hague, 9 February 2006.

¹⁰⁵ C. Fehl *Growing Up Rough: The Changing Politics of Justice at the ICC* PRIF Report 127 (Frankfurt: Peace Research Institute, 2014) 17.

¹⁰⁶ K. Sheffield ‘Speak Softly and Carry a Sealed Warrant: Building the International Criminal Court’s Legitimacy in the wake of Sudan’, 18 *Appeal* (2013) 163-175.

¹⁰⁷ Decision on the Request for Disqualification of the Prosecutor *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 3, 12 June 2012 §33.

in manner that would infer the existence of a hierarchy in international law, these were the actions of an individual stepping outside the bounds of their authority, not really a sign of the inherent imperialism of the law facilitating their actions. Even if it were possible to read Article 15 as inherently imperialist, it is unclear how Article 15 has had a distinct effect on the anti-imperialist case against the ICC. Whilst there are features of the Rome Statute which Stahn terms “paternalising and disempowering” not all of these features are necessarily inherently imperialist, in that their disempowering features may have more to do with the application of the law than the law itself.¹⁰⁸ As Stahn goes on to note these disempowering features may have the potential to be “handled more constructively” with closer consideration of local factors and solutions.¹⁰⁹ Article 15 appears to fit into this category as it is perfectly possible that by improved and greater oversight of the office holder prosecutorial powers under Article 15 could be applied in a way that minimises sovereign inequalities.

6. Conclusion

It is worth noting once again that some of the attacks on the ICC have been based more on short-term political expediency, than any sustained critique of the ICC and the law it applies. For example, in a 2013 paper to the Brookings Institute John Mukum Mbaku, a fellow of the African Growth Initiative observed that the tension between the ICC and state sovereignty, which was often characterised by anti-imperialist rhetoric, was in the Kenyan case essentially a way of deflecting difficult decisions about improving domestic legal structures.¹¹⁰ Criticising the court in strident anti-imperialist rhetoric was a way of bolstering the Kenyan government’s case against the ICC to both internal and external political audiences. Yet the persistence of this criticism is noteworthy not least because it is a powerful motivating factor for questioning the legitimacy of the Court and was a factor in some of the recent withdrawals, even if as Timothy Longman notes it was being used by states “to appear anti-imperial while protecting their own power and hiding abuse.”¹¹¹ Anti-imperialism remains therefore an important means of undermining the Court’s overall legitimacy and whilst it is to an extent contingent on political relations the above argument shows that there are structural causes behind it linked to the structure of the law.

Understanding inherent imperialism helps interpret the nature of an international instrument and the legal reality it envisages. Where an instrument contains provisions that envisage an organisation whose operation relies upon existing hierarchical structures within international law and powers to weaken a state’s international legal sovereignty, that organisation is in a dominant relationship with state parties. This means that it is possible to legitimately describe the organisation as imperialist as it predicated upon a form of legal relationship with state parties that constrains their sovereignty or exacerbates existing conditions of sovereign

¹⁰⁸ Stahn *supra* note 67.

¹⁰⁹ *Ibid.*

¹¹⁰ J. Mukum Mbaku ‘International Justice: The International Criminal Court and Africa’ The Brookings Institute: African Growth Initiative (2013) 8-12 available online at <http://www.brookings.edu/~media/Research/Files/Reports/2014/foresight%20africa%202014/03%20foresight%20international%20criminal%20court%20africa%20mbaku.pdf> (last accessed 1 Feb 2016).

¹¹¹ M. Durmaz and Z. Armagan ‘Is the International Criminal Court racist?’ TRT World 1 November 2016 available at <http://www.trtworld.com/in-depth/is-the-international-criminal-court-racist-218836> (last accessed 29 November 2016).

inequality. As argued in the final section, in relation to Article 15, inherent imperialism is not about the administration of the law but the text of the law itself.

There are two potential mechanisms for addressing the inherent imperialism described above. Firstly, scholarship on the design of legal regimes noted that their capacity to resolve collective problems relies on how the process or bargaining works when states are treated on an equal footing.¹¹² Recognising sovereign inequality in Article 17 by, for example, clarifying the nature of unwillingness and explicitly delinking it from any form of material constraint, alongside an extensive technical assistance for the domestic legal systems of state's that might be subject to Article 17 – might go some way to addressing the sovereign inequality present in the complementarity doctrine. This would involve, not just requiring various administrative arms of the court to change their practice, but changing the law itself to entrench such policies into law so that they guide the operation of the different Chambers of the ICC. Secondly diluting the power of Security Council referrals under Article 13, by having a checking mechanism in the General Assembly or allowing the General Assembly to initiate referrals, would lessen the potential for permanent members of the Security Council to use this power for their own political ends.¹¹³ The extent to which this possible is part of what Leslie Vinjamuri describes as the Court's authority paradox as it tries to operate under the principle that "justice must be independent from politics" but at the same time is "structurally dependent on states to enforce its mandate."¹¹⁴ In this context some degree of inherent imperialism is inevitable in a supranational legal structure, but that does not mean that practical steps could not be taken to address some of the inherently imperialist features of the Rome Statute that directly cause political problems for the Court described above.

The willingness to engage in any of these measures depends to a large extent on how much the inherent imperialism of Rome Statute matters which largely depends on the political perspective of the appraiser. In one sense it is important, as the ICC was originally a liberal project to universalise notions of justice and create an end to impunity for international crimes.¹¹⁵ This would mean that the inherent imperialism of the Rome Statute potentially poses a serious problem for the ICC's legitimacy. In another sense the inherent imperialism of the ICC is simply a reflection of an unequal and imperfect world where great power politics mean that the Security Council retains a disproportionate power over international law and international criminal law. As Stahn observes, it may be unrealistic to expect that the Rome Statute can eradicate all the problems related to the application of international criminal law.¹¹⁶ Yet in 2016 the escalating rate of withdrawals, seems to suggest that the tactical use of anti-imperialism described above, is likely to obscure any potential attempt to tackle the structural causes of anti-imperialism within the Rome Statute.

¹¹² B. Koremenos *The Continent of International Law: Explaining Agreement Design* (Cambridge; CUP 2016) 30-40.

¹¹³ Maximising Security Council control was a core aim of the US negotiating position in the Rome Statute's drafting see J. Seguin 'Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute' 18 *Boston University International Law Journal* (2000) 85-110, 95.

¹¹⁴ L. Vinjamuri "International Criminal Court and the Paradox of Authority" 79 *Law and Contemporary Problems* (2016) 275 – 287 at 287.

¹¹⁵ For this argument see Fichtelberg *supra* note 9 and Chandler *supra* note 79.

¹¹⁶Stahn *supra* note 67.

