The International Criminal Court and the BRICS States: Solidarist Progress and Pluralist Limits in a Changing International Society

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Submitted in accordance with the requirements for the degree of Doctor of Philosophy

The University of Leeds
School of Politics and International Studies

August 2018

The candidate confirms that the work submitted is his/her/their own and that appropriate credit has been given where reference has been made to the work of others.

ACKNOWLEDGEMENTS

This thesis is the product of just under four years of doctoral research that was undertaken at the Department of Politics and International Studies at the University of Leeds and co-supervised at the Department of Law at the University of Sheffield. The project was undertaken with the benefit of a scholarship provided by the Economic and Social Research Council.

I would like to begin by thanking POLIS for providing a friendly and stimulating environment in which to undertake this research. I would like to give special thanks to my colleagues in POLIS, those at the European Centre for the Responsibility to Protect and beyond who have always been supportive of my research and generous with their time in providing invaluable constructive feedback including: Edward Newman, Adrian Gallagher, Cristina Stefan, Eglantine Staunton, Jess Gifkins, Georgiana Epure, Chloe Gilgan and Sam Jarvis. Particular thanks are however due to Alex Beresford with whom I had the immense pleasure and privilege to co-author a paper, and from whom I learnt a great deal in the process. Thank you for being so generous with your time and knowledge. Thanks are also due to Caroline Wise and Jenny Love for dealing with all my requests and questions over the last four years, as well as to all of the other POLIS staff who have always been immensely helpful.

The greatest thanks are however due to my supervisors, Jason Ralph and Russell Buchan. Thank you for encouraging me, supporting me, guiding me, challenging me to think more deeply and to write more clearly, having confidence in me and, most importantly, for giving me the space that I needed to explore my topic and to pursue my intellectual curiosity. For this and much more I will always be grateful.

My PhD research took me away from Leeds at numerous points and thanks are due to the various individuals and institutions that have helped me to develop my research over the last four years. First, thanks are due to the iCourts and Pluri Courts research centres for hosting me at their jointly convened summer school which was held at the beautiful University of Copenhagen in June 2016. It was an intellectually stimulating experience and a privilege to be able to engage with world leading academics who provided invaluable feedback on my doctoral research. Thanks are also due to the Sir Geoffrey Nice Foundation for hosting me at its annual summer school in Dubrovnik in July 2016. The course encouraged me to critically examine our received knowledge about the benefits of international criminal justice and allowed me to engage with so many inspiring people. Special thanks are due to Sir Geoffrey Nice QC and Nena Tromp for providing this opportunity and for continuing to provide opportunities for me and many others to develop our careers.

In the autumn of 2017, I spent a wonderful three months as a visiting researcher at the Center for International Criminal Justice at the Vrije Universiteit Amsterdam. This gave me the space for much needed reflection on my research and allowed me to push it forward in a quiet but supportive and stimulating academic environment. Special thanks are due to Joris van Wijk for supervising me during that time and for making me feel so welcome at the Centre and in the Netherlands. The Center, and the department of law within which it was based, was full of so many wonderful people who welcomed me and gave me generous feedback on my work: Barbora Hola, Maijolein Cupido (with whom I would later work at the ICC), Elies van Sliedregt, Elinor Fry, Marieke de Hoon, Sergey Vasiliev and Wouter Werner.

During this trip I also spent a substantial amount of time at the Peace Palace library making use of their incredible resources and the quiet but inspiring working environment. It was overlooking the gardens of the Peace Palace that my PhD gradually fell into place and it will therefore always be a special place for me. Thank you to the staff who were generous with their time and for satisfying my relentless book requests and reserving stacks of them for me over numerous days.

After my time as a visiting researcher I had the immense privilege of taking up the position of Visiting Professional at the International Criminal Court working on the defence team of Mr Jean- Pierre Bemba. This gave me the opportunity to reflect upon my research in the most stimulating of environments, the institution that was the subject of my research. I am forever indebted to Melinda Taylor for giving me the incredible opportunity. It was the most formative of experiences and one I shall never forget. Special thanks are also due to Ines Pierre de la Briere for being an excellent colleague and friend, and for making me so welcome in Den Haag, as well as my other colleagues: Marjolein Cupido, Sarah Codde Francois, Stephanie Schilder, and Mylene Dimitri.

I would also like to thank the many other people I met in The Hague who either kindly provided valuable feedback on my research or simply, their friendship. Special thanks are due to Boris de Graff and Gabriel Luzac. I would also like to thank Eric and Irene Luzac for opening their home to me during my time in the Netherlands. You provided me with a home from home which allowed me to focus on my work. I am immensely grateful to you for that.

My friends have played an invaluable part in helping me to get to the end of this project whether through reading and commenting on early drafts, offering advice or simply providing a welcome distraction from work, often in the pub. There are too many to name individually but they will know who they are. Special thanks are however due to Jess, Kyle, and Georgiana as well as to Ruth who, in addition to being a great desk-neighbour over the past year, was kind enough to take on the responsibility of submitting my thesis on my behalf when I was not able to do it in person.

Finally, the support of my family has been immensely important and valuable to me during this period,

as it always has been, and I am forever indebted to them for that. They will no doubt be pleased that at the (relatively) young age of 30 I have finally completed my (formal) education. Special thanks must, however, go to my parents, Janice and Roger. They taught me that I could achieve anything that I wanted with hard work, discipline and perseverance, but also that life should not be taken too seriously and that failure is not the end of the world. Adopting this approach, as I always do, was the reason I got to the end of this project. They are a constant source of inspiration and comfort to me, and are the basis of my academic and professional success, now and in the future. It is for this reason that I proudly dedicate this thesis to them.

ABSTRACT

The focus of this thesis is the relationship between the BRICS states (Brazil, Russia, India, China and South Africa) and the International Criminal Court (ICC). More specifically, it examines the nature of the BRICS states' support for and contestation of the Court, including their views on the Rome Statute legal regime and the Court's practice of international criminal justice, and the impact their actions have on the Court. It does so using an English School theoretical framework. In addition, this focused analysis is used to draw broader conclusions about the contribution of non Western states to global order building and, more particularly, to establish whether the shift in the balance of power from the West to the Global South and East, represented by the evolution of the BRICS as a political group, poses a challenge to the sustainability of liberal international society and its cosmopolitan evolutionary trajectory as represented by the ICC.

It is argued that the BRICS states support the institution of international criminal justice and the ICC but only to the extent that it is operationalised and the Court discharges its mandate consistent with a state-solidarist conception of international society, paying sufficient deference to pluralist primary institutions including a substantially absolutist conception of sovereignty, diplomacy and multilateralism, and a classical interpretation of international law. They also defend the overriding pluralist value of order in international society. This approach manifests in a backlash against the Court' s pursuit of retributive justice which the BRICS states' assert hinders the negotiated settlement of ongoing conflicts and the achievement of peace. On this basis it is further argued the BRICS states do not provide a radical challenge to liberal international society or a threat to its future but they will contest and seek to prevent substantial further cosmopolitan progress.

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INTRODUCTION

The global political order is currently experiencing a period of profound change, characterised by shifting power balances. The power and control once exerted over international society by liberal Western states is gradually diffusing to the Global East and the Global South. This has led to the emergence of rising powers and the evolution of a multipolar world, replacing US hegemony. This can also be referred to as a post-unipolar or a post-Western era.[1] This development poses the important question: what impact will this shift in the location of power have on the sustainability and future evolutionary trajectory of liberal international society, particularly its normative and governance structures, given, as Ikenberry notes, 'liberal international order was designed and built in the West'?[2]

There has already been talk of a 'crisis' for liberal international society. This is the result of, among other things, the failure of states to resolve the bloody conflict in Syria which has been ongoing since 2011,[3] the global refugee crisis, Brexit,[4] and the election of Donald J. Trump to the presidency of the United States, the result of which, Acharya notes, has led to a 'vast pouring of anxiety over the future of the liberal world order.'[5] This state of affairs was summed up by United Nations Secretary General, Antonio Guterres, in his opening address to the UN General Assembly in 2017, when he explained '[w]e are a world in pieces' and 'we also face a crisis of solidarity'.[6] In light of these issues, Dunne and Duncombe surmised '[l]ittle wonder that many scholars claim we are witnessing the end-times of the liberal world order.'[7]

There has been substantial scholarship produced examining how rising powers relate to liberal international society and to its decline. This scholarship is, however, largely confined to assessing the political relations between rising powers and Western states, most often China and the United States, or analysing the views and positions adopted by rising powers at a level of generality, as will be discussed in detail in Chapter One. Whilst this is valuable work and a necessary starting

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[1] E. Newman and B. Zala, 'Rising powers and order contestation: disaggregating the normative from the representational', (2017) 39(5) *Third World Quarterly* 871-888, 873.
[2] G. J. Ikenberry, 'The Future of the Liberal World Order. Internationalism after America', *Foreign Affairs*, May/June 2011, available online at https://www.foreignaffairs.com/articles/2011-05-01/future-liberal-world-order (accessed 20/06/2017).
[3] C. Duncombe and T. Dunne, 'After liberal world order', (2018) 94(1) *International Affairs* 25-42, 37 - Duncombe and Dunne noted that '[s]cholars and practitioners alike point to the failure of the international community to intervene in and assist in ameliorating the complex humanitarian emergency that is unfolding in Syria as a key example of the disintegrating liberal world order'.
[4] G. J. Ikenberry, I. Parmar and D. Stokes, 'Introduction: Ordering the world? Liberal internationalism in theory and practice',(2018) 94(1) *International Affairs* 1-5, 1. *See also,* G. J. Ikenberry, 'The end of liberal international order?', (2015) 94(1) *International Affairs* 7-23, 7.
[5] A. Acharya, 'After Liberal Hegemony: The Advent of a Multiplex World Order', (2017) 31(3) *Ethics and International Affairs* 271-285, 271. *See also,* C. Layne, 'The US-Chinese power shift and the end of Pax Americana', (2018) 94(1) *International Affairs* 89-111, 89; C. Norrlof, 'Hegemony and inequality: Trump and the liberal playbook', (2018) 94(1) *International Affairs* 63-88, 63; O. W^ver, 'A Post-Western Europe: Strange Identities in a Less Liberal World Order', (2018) 32(1) *Ethics and International Affairs* 75-88, 77.
[6] Secretary General's Address to the General Assembly, 19th September 2017, available online at https://www.un.org/sg/en/content/sg/statement/2017-09-19/secretary-generals-address-general-assembly (accessed 14/07/2018).
[7] Duncombe and Dunne, 'After liberal world order', 25. *See also*, E. Newman, 'What prospects for common humanity in a divided world? The scope for RtoP in a transitional international order', (2016) 53(1) *International Politics* 32-48, 36.

point, further research is required to examine the engagement of rising powers with particular aspects of liberal international society in greater depth in order to develop a better understanding of how the shift in the balance of power may impact upon international society. As Duncombe and Dunne have recently articulated:

> there is no shortage of scholars predicting the demise of liberal world order. But what many of these interventions lack is a nuanced account of which aspects of liberal ordering are at risk, how they are being modified, and whether there is capacity in the system to adapt and survive.[8]

This thesis makes an original contribution to this important and evolving research agenda, and attempts to address the deficiencies within the existing literature, by specifically examining the BRICS states' (Brazil, Russia, India, China and South Africa) engagement with international criminal justice, with a particular focus on their relationship with the International Criminal Court (ICC). The principal purpose of the study is to answer the question: what is the relationship between the BRICS states and the ICC? This includes asking the more specific question: how and why do the BRICS states contest and/or support the ICC? This narrow enquiry also contributes knowledge to assist in understanding the wider issue of how the BRICS states view and engage with liberal international society and its cosmopolitan trajectory, and whether its future is threatened by the shift in the balance of power. In doing so, it satisfies Duncombe and Dunne's proposal. It also contributes to the research agenda identified by Acharya which is concerned with understanding the contribution of non-Western states to the construction of the global order.[9]

There are additional contributions which emanate from this research project as a result of its core focus. It makes a contribution to the ICC literature because it is currently lacking accounts of the Court's relationship with states, particularly beyond the Court's relationship with the United States, and specifically with rising powers. In addition, it makes a contribution to the English School literature, the theoretical framework that has been adopted for this thesis. Specifically, it addresses the English School's lack of research on the function of international organisations in international society and, particularly, how organisations contribute to the evolution of international society, including the intervening role that states play in that process. It achieves this by examining how the ICC contributes to the evolution of international society in a cosmopolitan direction, through both the establishment of the Rome Statute, the constituent document of the Court, and its subsequent implementation of its mandate through its practice of international criminal law, and how the BRICS have responded to it.

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[8] Duncombe and Dunne, 'After liberal world order', 31. It should be noted that this article was written after my research project had been conceived in 2014.
[9] A. Acharya, 'Constructing Global Order. Agency and Change in World Politics, (CUP, 2018).

A. The Background to the Research Project and its Importance

The research was prompted by the response of the BRICS states to NATO's intervention in Libya in 2011, taken in furtherance of the Responsibility to Protect, which can only be described as a strident backlash.[10] This sparked an interest in investigating and better understanding the role of these rising powers in international society and, more particularly, how they view and engage with cosmopolitan norms and governance structures, and, more particularly, whether they pose a threat to the sustainability of liberal international society. With substantial research having already been conducted on the BRICS' backlash against the Responsibility to Protect norm and thus there being limited scope to make an original contribution as a result, the focus of the research was placed on the BRICS states' relationships with another example of cosmopolitan progress in international society, international criminal justice and its permanent enforcement mechanism, the ICC.

This research topic is important because the BRICS states share a view of international society and how it should be organised which differs to that held by liberal Western states and is contrary to the cosmopolitan trajectory on which liberal international society has evolved over the past seventy years. More specifically, as will be explained in detail in Chapter Three, the BRICS states generally promote what is called a 'state-solidarist' conception of international society which involves defending the existence and function of 'pluralist values and primary institutions' as the underpinning structures of the global political order. This includes promoting a substantially absolutist conception of sovereignty, the dominance of inter-state diplomacy and multilateralism as the primary means of global governance, and an overriding concern for the maintenance of peace and stability among states, which they see as a responsible approach to the governance of international society.[11] This arguably differs from the conception of international society which exists today and the trajectory on which it continues to develop, which is based upon a more limited and conditional understanding of sovereignty which permits internationally coordinated intervention into the domestic affairs of states in particular circumstances; is governed to a large extent by international law imposed through increasingly powerful supranationalised organisations; and is committed to the protection of individuals or, in other words, to the pursuit of justice, which manifests in the protecting of human rights and the promoting of accountability for human rights violations through international frameworks. This is described a 'cosmopolitan-solidarist' conception of international society.

This clash of visions as to the basis upon which international society should be structured and

[10] J. Ralph and A. Gallagher, 'Legitimacy fautlines in international society: The responsibility to protect and prosecute after Libya', (2014) 41(3) *Review of International Studies* 553-573.
[11] *See,* J. Gaskarth, 'Rising Powers, Responsibility, and International Society', (2017) 31(3) *Ethics and International Affairs* 287-311.

governed underpins concerns about the future of international society in light of the shift in the balance of power. As Newman and Zala explain, '[o]ne of the central themes running through the current literature on rising powers is that new aspirants to great power status pose a challenge to the underlying principles and norms that underpin the existing, Western-led order.'[12] Similarly, Andrew Hurrell argues ' [t]he international system increasingly is characterized by a diffusion of power, to emerging and regional powers' and '[w]ithin this context the inherited institutional structure is coming under severe stress and challenge'[13] with international society being 'pushed back in a Westphalian direction.[14] This led Oliver Stuenkel, a prominent BRICS scholar, to say that this 'creates a necessity to understand emerging powers' view',[15] especially because, as Acharya notes, 'the particular historical circumstances behind the rise of liberal hegemony are gone. The global power shift is for real and here to stay'.[16] Moreover and most importantly, the BRICS states have the means and capacity to effect change within international society.

This thesis aims to advance the existing knowledge of rising power, and particularly BRICS, engagement with liberal international society with a focus on international criminal justice and the ICC. More specifically, the thesis will examine the nature of the support and contestation of international criminal justice and the ICC by the BRICS states, identifying particular objections and criticisms of both norms of international criminal justice and how they are implemented by the ICC. These specific findings will also contribute to our understanding about the extent to which rising powers, and the BRICS more specifically, contest or support cosmopolitan progress in international society. Overall, this research provides the groundwork for further enquiry into whether and, if so how, concerns raised by the BRICS about the implementation of international criminal justice and the operation of the ICC could be addressed in order to protect against further contestation. In doing so, this research aligns itself with evolving scholarship on 'utopian realism'[17] and 'pragmatic constructivism',[18] both of which advocate reflection upon the obstacles to moral progress and the need to reconstitute, or reframe, norms or to amend practices to address those concerns or, put in another way, advocating a new approach to normative progress which 'navigates between the extremes of utopianism and realism in an effort to effect positive change.'[19] Similarly, as Sikkink

[12] Newman and Zala, 'Rising powers and order contestation', 871.
[13] A. Hurrell, 'Brazil: What Kind of Rising State in What Kind of Institutional Order' in A .S. Alexandroff and A. F. Cooper (eds), *Rising States, Rising Institutions: Challenges for Global Governance',* (Brookings Institution Press, 2010), 141.
[14] A. Hurrell, 'Order and Justice' in C. Navari and D. M. Green (eds), *Guide to the English School of International Relations,* (Wiley, 2014), 153. *See also,* T. Dunne, T. Flockhart and M. Koivisto (eds), *Liberal World Orders,* (OUP, 2013), 5 - Ikenberry, Flockhart and Koivisto explain that '[a]s the so called rising powers take up their positions as major players in the international system, alternative conceptions of order and governance will challenge the existing power structures and existing visions of liberal order.'.
[15] O. Stuenkel, *The BRICS and the Future of Global Order,* (Lexington Books, 2015), xii.
[16] Acharya, 'After Liberal Hegemony', 279.
[17] *See,* A. Hehir, ''Utopian in the Right Sense": The Responsibility to Protect and the Logical Necessity of Reform', (2017) 31(3) *Ethics and International Affairs* 335-355.
[18] J. G. Ralph, 'What Should be Done? Pragmatic Constructivist Ethics and the Responsibility to Protect', (2018) 72(1) *International Organization* 173-203 - Ralph argues in relation to the failure of the Responsibility to Protect to provide a solution to the crisis in Syria, that criticism is not levelled at the 'hypothesis' of the norm but rather 'the tenacity of those who insisted and held an unyielding commitment to ends that were, in practice, unrealistic', namely that regime change was required as a part of a transition to peace.
[19] *See,* Hehir, ''Utopian in the Right Sense".

explains, when trying to establish the correct normative response in a given situation, 'we need to ask not just 'what is right?' but also 'what may work?'[20]

This specific focus on the ICC is particularly important at the present time because, much like other aspects of liberal international society, it is under sustained pressure and has been subject to extensive criticism. The ICC has been described as being in 'crisis'[21] and, as Margaret de Guzman has explained, '[t]o some observers ...the institution is a prisoner of politics rather than a legitimate force for global justice. That we are debating whether the I.C.C. should be eliminated shows how strong the illegitimacy charges have become.'[22] Moreover, questions are being raised about the value of the Court given that after over 15 years in existence and well over one billion dollars having been spent, the Court has secured only a handful of convictions.[23] The institution is also particularly vulnerable because it is reliant on state support to function effectively and, moreover, unlike other international organisations, such as the UN or the WTO, its purpose is not to assist states but rather to protect individuals by directly confronting state power and speaking truth to it. It also exercises significant authority *vis-a-vis* states, as will be examined in due course, which places it squarely in the firing line of state contestation.

By identifying and understanding the particular objections and criticisms that have been made of the ICC by the BRICS states, some of its most ardent critics, we can identify the impediments to its effective operationalisation, and the obstacles to the shift in global governance more generally. This is not only valuable in advancing the academic understanding of how society changes, which is an element of this thesis, but could also potentially be utilised by international organisations, including the ICC, to develop strategies to avoid or mitigate contestation, secure more support and promote compliance, and thereby facilitate the continued development and strengthening of global governance. This is particularly important for the ICC given its reliance on state cooperation to function effectively and also given the significant role the ICC plays in delivering justice and protecting human rights, both practically and symbolically. The dire consequences of a paralysed and ineffective Court can be seen in Syria, where the absence of ICC intervention has led to ongoing impunity which has potentially resulted in the prolonging of the civil war and ongoing bloodshed. In the conclusion of the thesis, suggestions are made as to policy approaches that could be

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[20] J. Ralph, 'What Should be Done?' citing K. Sikkink, 'The role of consequences, comparison and counterfactuals in constructivist ethical thought' in R. Price (ed), *Moral Limit and Possibility in World Politics*, (CUP, 2008), 85.
[21] See, for example, M. Kersten, 'Yes, the ICC is in Crisis. It Always Has Been', *Justice in Conflict,* 24 February 2015, available online at https://iusticeinconflict.org/2015/02/24/yes-the-icc-is-in-crisis-it-always-has-been/ (accessed on 01/08/2018).
[22] M. de Guzman, 'The I.C.C Deserves Our Full Support', *New York Times,* 11 December 2014, available online at http://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/the-icc-deserves-our-full-support
(accessed on 01/08/2018).
[23] *See,* for example, C. Schmitt, '13 years, 1 billion dollars, 2 convictions: Is the International Criminal Court worth it?', *Deutsche Welle,* 27 January 2016, available online at https://www.dw.com/en/13-years-1-billion-dollars-2-convictions-is-the-international- criminal-court-worth-it/a-19006069 (accessed on 31/08/2018).

investigated and adopted by the ICC to address concerns that have been raised by the BRICS states. This research project therefore has both theoretical and practical relevance.

B. Research Design

i. The BRICS and the ICC as the Objects of Study

The BRICS states were selected as the object of study because they are the 'embodiment of rising powers'.[24] As Stuenkel notes, the BRICS powerfully symbolised the momentous shift of power that was taking place 'away from the United States and Europe towards emerging powers such as China, India and Brazil' and reflect 'the advent of a "Post-American World"'.[25] More importantly, the BRICS are playing an active role in liberal international society, including 'clamouring for a greater voice and leadership in existing institutions while also creating new global and regional mechanisms',[26] and they heralded 'a challenge to longstanding, predominantly Western understandings of economic and political governance.'[27] Moreover, existing literature, both within the English School tradition and outside, uses the BRICS states in the same way, as the representatives or vanguard of the new global political order. It has been questioned whether the BRICS states and group are still relevant given the slowdown in their economic ascendance and it has been noted their time has passed.[28] Others however, such as Hurrell, argue 'such a conclusion is profoundly mistaken'[29] and I agree. The BRICS remain powerful, continue to engage in attempts to reform international society, and therefore remain worthy of examination.

Whilst the BRICS are a multilateral grouping and are increasingly acting as a bloc to achieve shared objectives, this thesis is primarily focused on understanding the relationship between individual BRICS states and the ICC, as opposed to their relationship with the Court as a group. However, any coordination between the states and any similarities or divergences in their positions in relation to the ICC and relevant norms will be identified as this contributes to providing a richer understanding of how the BRICS states view liberal international society and act towards it. It also aids us in assessing whether and how they may affect the sustainability and evolutionary progress of liberal international society.

The ICC was chosen because it represents cosmopolitan progress and is the pinnacle of the

[24] Newman, 'What prospects for common humanity in a divided world?', 39.
[25] Stuenkel, *The BRICS and the Future of Global Order,* 5.
[26] Acharya, 'After Liberal Hegemony', 279.
[27] M. Bevir and J. Gaskarth, 'Global governance and the BRICs. Ideas, actors, and governance practices' in J. Gaskarth (ed), *Rising Powers, Global Governance and Global Ethics,* (Routledge, 2015), 75.
[28] See, H. V. Pant, 'The BRICS Fallacy', (2013) 36(3) *The Washington Quarterly* 91-105.
[29] A. Hurrell, 'Beyond the BRICS: Power, Pluralism and the Future of Global Order', (2018) 32(1) *Ethics and International Affairs* 89101, 91-92.

cosmopolitan-solidarist international society. This is on the basis that, as will be explored in greater detail in Chapter Two, it contributes to reconstituting sovereignty in a more limited and conditional form, replaces governance through multilateralism with the rule of law, and prioritises the pursuit of justice in the form of criminal accountability for gross human rights violations. Ralph has argued that the ICC 'offers a truly revolutionary vision of world society'[30] and Antonio Cassese similarly suggested that it 'is a revolutionary institution' that 'could mark a real turning point in the world community.'[31] When combined, the ICC and the BRICS provide an excellent means of examining how rising powers relate to and engage with cosmopolitan-solidarist liberal international society and whether they pose a threat to its sustainability and its future trajectory.

ii. Research Questions

The questions this thesis predominantly seeks to answer are as follows:

- How has the ICC contributed to advancing the cosmopolitan evolution of international society and reconstituting its pluralist primary institutions?
- What is the relationship between the ICC and the BRICS states?
- What are the BRICS states' objections to the nature and work of the ICC?

iii. The English School Theoretical Framework

This research was conducted using the English School as a theoretical framework. The English School was chosen after I had considered a number of theoretical approaches and rejected them. The English School was selected because: i) it accorded with my personal views about how international politics and relations should be studied, and about how theory should be used; ii) it was the most suitable theory for the type of research that was to be conducted and the questions that needed to be answered; and iii) there was an established literature within the English School concerning the ICC on which this project could draw and build, combined with the fact there was a distinct absence of concern with the ICC by other theoretical perspectives, and it therefore had a natural home within the international relations literature.

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[30] J. Ralph, *Defending the Society of States. Why American Opposes the International Criminal Court and its Vision of World Society*, (OUP, 2007), 24.
[31] A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *European Journal of International Law* 144-171, 145.

In respect of i), the English School is considered to be a *via media* between polarising positions. It is not a narrow theoretical approach but rather it incorporates many elements of international relations thinking including realism and constructivism. The English School theoretical approach contains realist postulates in that it accepts and considers to be important, the state as an entity, the role of self-interest, and the impact of state power in international relations. At the same time, however, it accepts the role of morals, norms and other actors in international society, drawing on liberal thinking, constructivism and global governance studies, and attempts to understand the complex ways in which they interact. Robert Murray has noted:

> The focus on individuals, norms, values and even discourse have come to provide a forum for liberal and critical projects in IR to use the English School as a method of both explaining and understanding the world from a perspective which does stray from realism but does not reject the primacy or necessity of the state in global affairs.[32]

It recognises, correctly, that state decision-making is complex and informed by both normative and material concerns, it is not solely informed by rational aspirations of power-maximisation which result in inter-state competition (and the state as the primary actor), as in realist thinking, or self-interest (cost-benefit analysis), as in rationalist thinking, but it is imbued with a vision of how the world should be, in its underpinning ideas and values, its rules and its governance structures (a distinction between the logical of consequences and the logic of appropriateness).

The English School can therefore be considered to be more of an analytical framework than a prescriptive theory which seeks to explain how and why things happen. The English School approach is concerned with understanding what has occurred and what is occurring, particularly the question of how international society changes including its normative and governance structures, and it aims to provide a narrative account of that. This is reflected in the English School's triad of international system – international society – world society, and its concepts of pluralism and solidarism, which will be explored in greater depth in Chapter One.

The English School also draws upon other disciplines which also strengthens its analytical ability. First, it is historically focused in that it takes seriously what has occurred in the past and the impact that this has on current events. This is again part of its focus on producing narrative understanding, which is quite unlike theories such as constructivism and realism. Furthermore, the English School takes very seriously the role of international law in international society which is important given

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[32] R. W. Murray, 'An Introduction to the English School of International Relations', *E-International Relations*, 5 January 2016, available online at https://www.e-ir.info/2016/01/05/an-introduction-to-the-english-school-of-international-relations/ (accessed on 19/01/2019).

volume and reach of international law in contemporary society, as will be explored in Chapter Two. The English School's intellectual diversity is a key strength and it is a sensible way in which to approach international politics and to analyse international society given its complexity; as has been argued by Murray, '[a]s a result of such a pluralistic model, the English School can be said to represent a coherent and advantageous method for achieving a broad and complex understanding of modern international political issues.'[33]

This approach is also the most suitable one for the type of research to be conducted in this project and to answer the questions that have been posed, which is why it has been selected over other theoretical perspectives such as realism and constructivism. First, at the most abstract level, the project is seeking to understand how the shift in the balance of power from the Global South and East, as represented by the BRICS states, is impacting upon the evolution of liberal international society, as represented by the ICC. This concern with the interaction between state power and societal construction and evolution, both at normative and governance levels, is a fundamental concern of the English School and it has the necessary analytical tools to assess that, which will be explored in greater depth in Chapter One. Further, the purpose of this research project is to understand what the relationship between the ICC and the BRICS is, and to develop a narrative of it. It is not the purpose to explain how change is occurring or to predict what may happen in the future. This narrative ambition is more consistent with English School thinking than other theoretical approaches. For example, social constructivism is more concerned with explaining how norms evolve at the micro-level and how norms impact upon state behaviour; its focus is on establishing causative links which is not part of this research design. This project is also not focused on norms for the most part but rather on the ICC as an institution of global governance, and the English School is better equipped to engage in that type of analysis than social constructivism given its primary concern for norms. Moreover, the specific focus on the ICC-BRICS relationship is underpinned by a larger concern for understanding how international society is evolving. The English School focuses on that 'bigger picture' and has the conceptual tools to grapple with it whereas social constructivism is concerned with more micro-level analysis and does not seek to understand international society as a whole. However, social constructivism does offer some valuable insights, and so social constructivist literature is relied upon throughout this thesis.

Finally, there is an established literature within the English School concerning the ICC and rising powers. In respect of the ICC specifically, there is very little written about it from an international relations perspective outside of the English School. This was a good indication, therefore, that the English School was a good theory to use for this project. Moreover, the English School literature

[33] Murray, 'An Introduction to the English School of International Relations'.

on these topics provided a good base upon which I could build my research. But, more importantly, there were still gaps and deficiencies in the English School literature which I could fill and therefore make an original contribution to knowledge.

The English School approach is operationalised through a focus on 'institutions', a means of analysis that has recently been revived by Tonny Knudson among others in the English School, although it was initially utilised by Hedley Bull in *The Anarchical Society* and developed more recently by Holsti.[34] Primary institutions are 'patterned *practices,* or practices that are routinized, typical and recurrent' which are based 'on coherent sets of *ideas and/or beliefs* '[35] These institutions, which include but are not limited to, sovereignty, diplomacy, multilateralism and, more recently, human rights and criminal justice, constitute the global political order and regulate the interactions between the various different actors that exist within it. Primary institutions are not static. They evolve, rise and decline over time, in response to support and contestation by states and other actors, including international organisations. Moreover, the combination of primary institutions is determinative of the type of global political order that exists.[36] As such, they can be used as markers of change in society[37] because, as Ralph explains, 'when institutions are no longer fit for the moral purpose of a society or when they no longer reflect its identity, then political pressures to design moral suitable institutions…often become irresistible.'[38] Thus, by examining how states view particular institutions and how those institutions change we can understand their views on global political order and how it evolves. Moreover, as states affect change in institutions, examining their attempts to bring about or resist change tells us about their ambitions to reform or defend a particular form of global political order. We can also examine how international organisations contribute to reform in the same way.

This thesis will examine the BRICS views of particular institutions, namely: war; sovereignty; diplomacy; international law; criminal justice; and multilateralism,[39] in order to understand their views of global order and evaluate whether it conflicts with liberal international society's conception of order and its cosmopolitan trajectory. Moreover, it will examine how the ICC has sought to promote or reform these institutions in a cosmopolitan direction, it being at the forefront

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[34] H. Bull, *The Anarchical Society. A Study of Order in World Politics,* (Columbia University Press, 2002) and K. J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics,* (CUP, 2004). For an overview of the evolution of the institutions approach within the English School *see,* T. B. Knudson, 'Master Institutions of International Society: Theorizing continuity and change', paper prepared for the 8th Pan-European Conference on International Relations 18-21 September 2013, Warsaw and C. F. Parratt, 'On the Evolution of Primary Institutions of International Society Theory Note', (2017) 61(3) *International Studies Quarterly* 623-630.
[35] Holsti, *Taming the Sovereigns,* 20-22
[36] *See,* Knudson, 'Master Institutions of International Society', 15-19.
[37] Holsti, *Taming the Sovereigns,* 17. *See also,* B. Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation,* (CUP, 2004), 172.
[38] J. Ralph 'Anarchy is What Criminal Lawyers Make of It: International Criminal Justice as an Institution of International and World Society' in S. C. Roach, *Governance, Order and the International Criminal Court,* (OUP, 2009), 136.
[39] These have been selected because they are the main primary institutions and are most relevant for this project in that they have been impacted by the evolution of international criminal justice and the creation and practice of the ICC. A detailed explanation of the nature of these particular institutions is provided in the next chapter.

of the cosmopolitan evolution of liberal international society, and how the BRICS states have responded to this. This will assist in understanding whether the BRICS states are willing and able to challenge such progress and, if so, how and why. In other words, the institutions approach is being used as a means to analyse the relationship between the BRICS and the ICC including for the purpose of understanding their position on liberal international society and whether they pose a threat to its sustainability and continued cosmopolitan evolution. In seeking to understand why the BRICS states may have concerns about such progress, the English School's order vs justice debate is also employed as an analytical tool. This debate will be explained in detail in Chapter One.

iv. Research Methodology

This research project has adopted an interpretivist methodology, a common approach in English School and constructivist scholarship.[40] It requires the researcher to take a subjective or 'insider' approach to their research, hence it also being described as taking the 'participant standpoint'.[41] The purpose of this is to understand, through a process of interpretation, the values and interests of states as well as their views in relation to specific issues, and how those views and values inform political behaviour, and thus contribute to change in international society. As Brutsch explains, English School researchers 'adopt a 'participant standpoint' to canvas understandings and traditions of thought and distil the - pluralist or solidarist - purpose of an international order from the 'ordinary conduct' of the agents that can define and sustain it.'[42] It involves paying 'close attention to the language of the actors and the way they explore and justify their actions [which] helps the researcher to enter the normative world of the participant and discern the standards of value that guide their conduct'.[43]

The interpretivist approach is informed by the Weberian social theory of *Verstehen* - the concept of understanding social action for the purpose of explaining it.[44] This differs from the objectivist approach to research which seeks to explain what is happening through observation as opposed to understanding. By adopting an interpretivist approach, a researcher can gain a much deeper understanding of political and social phenomenon, including of why change occurs, than is possible from mere observation. Moreover, this is necessary in light of the anti-foundationalist ontology of the English School. This is the belief international society, including the institutions, norms, rules and organisations that constitute it, are socially constructed. It only exists because it is brought into

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[40] C. Reus-Smit, 'Imagining society: constructivism and the English School', (2002) 4(3) *British Journal of Politics and International Relations* 287-509, 495
[41] M. Neufeld, 'Interpretation and the 'Science' of International Relations', (1993) 19(1) *Review of International Studies* 39-61, 41.
[42] C. Brutsch, 'Technocratic manager, imperial agent or diplomatic champion? The IMF in the anarchical society', (2014) 40 (2) *Review of International Studies* 207-266, 211.
[43] P. Wilson, 'The English School Meets the Chicago School: The Case for a Grounded Theory of International Institutions', (2012) 14(4) *International Studies Review* 567-590, 584.
[44] Wilson, 'The English School Meets the Chicago School'.

being and sustained by states through the collective meaning, value and purpose which they assign to it - also known as *intersubjective meaning* - and the subsequent political actions and decision-making informed by that shared understanding. We can therefore only explain what is happening and anticipate change by studying and understanding the views of the actors involved. John Ruggie describes this approach as 'narrative explanation'.[45] The interpretive methodology associated with English School theorising is also an inherently historical approach. As Dunne has argued 'international society can only be properly described in historical and sociological depth'[46] and Bull said historical study in international relations is essential ' because any international political situation is located in time, and to understand it we must know its place in a temporal sequence of events'.[47] This tracing of social processes in history is absolutely necessary 'as no social realities are natural, they are all the result of political and social processes that are rooted in history'.[48]

v. Research Methods

In light of the anti-positivist nature of my methodology, and the historical and sociological approach which has been adopted, I will be using only qualitative research methods. As Vromen explains, '[t]he focus on qualitative methods in political science is on detailed, text-based answers that are often historical or include person reflection from participants in political institutions, events, issues or processes. This is often characterized as the use of 'thick' description'.[49] The principal qualitative research method that will be used is document analysis. This involves reviewing and analysing a wide range of official documents including national policy statements, speeches by government or international organisation officials, diplomatic communiques, records of United Nations General Assembly and Security Council meetings, records of the Rome Statute and Kampala negotiations, reports of the International Law Commission, United Nations as well as any other official documents related to international criminal justice, international criminal law or the ICC. The benefit of using official documents is that they are authoritative and reliable, and often written or translated in English.

This method will permit a close analysis of the language used by BRICS states in justifying the positions they have adopted in relation to the ICC and relevant norms of international criminal justice. This will allow me to understand the BRICS states' positions and views on the ICC and

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[45] J. G. Ruggie, *Constructing the World Polity. Essays of International Institutionalisation,* (2000, Routledge), 94. *See also,* V. Pouliot, '"Sobjectivism": Toward a Constructivist Methodology', (2007) 51(2) *International Studies Quarterly* 359-384, 365 and Neufeld, "Interpretation and the 'Science', 58.

[46] T. Dunne, 'International Society. Theoretical Promises Fulfilled?', (1995) 30(2) *Cooperation and Conflict* 125-154, 142. *See also,* Pouliot, '"Sobjectivism": Toward a Constructivist Methodology', 364.

[47] A. Linklater (ed), *International Relations. Critical Concepts in Political Science,* (Routledge: 2000), 56.

[48] Pouliot, '"Sobjectivism": Toward a Constructivist Methodology', 367.

[49] *See,* A. Vromen, 'Debating Methods: Rediscovering Qualitative Approaches' in D. Marsh and G. Stoker, *Theory and Methods in Political Science,* (Palgrave Macmillan, 2010).

international criminal justice more generally, including the instances of support and contestation, which is the empirical contribution of this thesis. In determining the views and positions of states in respect of particular issues, assessing the language they use is important. The positions states adopt in policy documents or which are conveyed in speeches by government representatives have meaning, just like when a position is demonstrated through material actions. As Epstein argues, words constitute practice and 'discourses constitute the identities of social actors, by carving out particular *subject-positions*'[50] This approach is based on Wittgenstein's thinking that 'words are deeds'[51] and Austin's argument that 'the issuing of the utterance is the performing of an action - it is not normally thought of as just saying something.'[52] This is why, for example, speech acts of states can constitute state practice for the purposes of the formation of customary law.[53]

This research project will also make use of case studies. The case studies will be the situations of the ICC which involve the BRICS nations, specifically Sudan and Libya. It will also analyse the BRICS' response to the proposed referral of the civil war in Syria to the ICC which failed as a result of Russia and China exercising their vetoes in the Security Council. The purpose of using case studies is to gain an in depth understanding of the BRICS states' views and approaches to the work and activities of the ICC. It will also allow me to assess the effect of BRICS' interventions on the work of the Court. It will also allow me to chart how the relationship has evolved over time and to identify whether the BRICS states have taken different approaches to different situations addressed by the Court as well as to understand the reasons for this. This will allow me to present a comprehensive understanding the BRICS states' relationship with the ICC, which is the principal contribution of this thesis.

vi. Limitations of the Research

There are a number of limitations to this research project which are necessary to identify and explain. First, this project takes official statements as the basis of establishing the BRICS' views on international criminal justice and the ICC. However, there is a limit on our ability to verify the truthfulness of official positions put forward by BRICS states in official statements made by members of their governments or which are included in official documents. As will be examined in greater detail in Chapter 1, states can act in duplicitous ways, justifying a particular action one way

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[50] C. Epstein, *The Power of Words in International Relations. Birth of an Anti-Whaling Discourse',* (Massachusetts Institute of Technology, 2008), 5-6. *See also,* J. Milliken, 'The Study of Discourse in International Relations: A Critique of Research and Methods', (1999) 5(2) *European Journal of International Relations* 225-254.

[51] L. Wittgenstein, *Culture and Value,* trans. Peter Winch, ed. G. H. von Wright, (University of Chicago Press, 1984), 74.

[52] *See,* J. L. Austin, *How To Do Things With Words. The William James Lectures delivered at Harvard University in 1955,* (Clarendon Press, 1962).

[53] *See,* M. H. Mendelson, 'The Formation of Customary International Law', (1999) 272 *Hague Academy of International Law Collected Courses* 155-410, 206 - 'Verbal acts, then, can constitute a form of practice'. *See also,* ILC, 'Report ofthe International Law Commission on the Work of its Sixty-Sixth Session' (5 May - 8 August 2014), UN Doc. A/69/10, para.143 – 'Practice may take a wide range of forms. It includes both physical and verbal actions.'

in public, usually on moral or normative grounds, but in reality acting for ulterior, and perhaps more sinister or self-interested, reasons. Moreover, official positions adopted by states can be informed by a number of different factors, not all of which may be communicated in the statement. For example, while an official position may be presented in normative and moral terms, it may be partly informed by national interest considerations. This makes it difficult to conclusively establish the reason for a state's actions.

Given that as researchers we do not have access to classified information or recent or real-time records of decision-making by state officials (I certainly do not), we are unable to directly assess the reliability of official statements. In a sense, we are placing some level of faith in the truthfulness of the official statements of states and this is a limitation of the research. This limitation is highly unlikely to be cured by elite interviews with government officials because they are only likely to repeat the official public position of the state.

Caution can however be exercised and the veracity of official statements can be assessed by considering an official statement in the context of other statements made by the state, especially in the *longue durée,* on the basis that consistency is an indicator of truth, and by considering whether official statements are consistent with state actions, on the basis that actions are potentially a better indicator of the true views of a state than its words. We can also assess statements in light of the political context in which they are made. In essence, as researchers we need to approach an official statement with some caution, employ a critical eye and consider whether it represents the true view and position of a state.

It is also important, however, to be aware of the risk of our internal biases affecting our judgement on the veracity of official statements. For example, we need to be careful not to cast too greater doubt on the veracity of official statements by the Russian Federation or China because received wisdom tells us that such states are more likely to act in duplicitous ways than liberal democracies. If we allow this to happen we risk not taking seriously the views put forward by such states, writing them off as nothing but self-interested mistruths, and therefore fail to hear and understand genuine concerns that such states may have. This would be of huge detriment to this type of research project which is seeking to identify and understand the views of non-western states which have for a long time been ignored in international relations studies. As will be explained in the conclusion, this thesis shows us that it vitally important that we take seriously the concerns non-liberal states raise in respect of the operation of international criminal justice and the ICC if we are to preserve these institutions for the future due to the ongoing and increasingly strong contestation from such states. We risk not taking such concerns seriously if we become unjustifiably fixated on alternative explanations that belittle legitimate concerns of these states in favour of explanations which portray

the states as 'duplicitous' and untruthful in their criticisms of international criminal justice and the ICC. This is not to suggest, however, that as has been stated previously, state actions are informed by numerous considerations, both normative and material. We have to bear this all in mind when interpreting the statements and the official positions adopted by states, including in relation to the ICC.

Second, in light of time and space constraints it has not been possible to conduct an in depth analysis of each of the BRICS states' cultural, social, economic and political histories. Given how these domestic factors influence a state's foreign policy, a better knowledge of these would improve our understanding of the states' views on international criminal justice and the ICC. Third, given that the research is more broadly concerned with understanding the sustainability of liberal international society in light of the emergence of rising powers, it would have been beneficial to assess the relationship between the ICC and a wider range of rising powers, such as Iran, Indonesia or particular South American nations. The focus on the BRICS countries is therefore a limitation on the research. It was not possible to undertake a wider study including more rising powers, however, due to time and space constraints. This could be the focus on future research, however. The impact of this limitation has been mitigated as much as possible, however, given that the BRICS states are treated, both by states and in the existing literature, as the representatives of the emerging world order.

C. The Argument

The central argument of this thesis is that the BRICS states support the institution of international criminal justice and the ICC but only to the extent international criminal justice is implemented and the ICC operates in accordance with a state-solidarist conception of international society, paying sufficient deference to pluralist values and primary institutions, and does not threaten order within international society. The BRICS states' objections and contestation of the ICC are based on disagreements about *how* international criminal justice is delivered, not about the legitimacy of criminal justice or the ICC as institutions; the concern is a procedural one, rather than substantive one. This reinforces the claim made by Ralph and Gallagher that the backlash against NATO's intervention in Libya in 2011 under the guide of the Responsibility to Protect revolved around 'the procedural question of *who decides how* international society should meet its responsibilities rather than substantive disagreements about *what* those responsibilities (that is, human protection and justice) are'.[54] Similarly, Newman and Zala recently argued rising powers do not 'seek to resist or challenge the underlying principles of international order in all instances, but rather they seek to

[54] Ralph and Gallagher, 'Legitimacy fautlines in international society', 554.

gain greater access to, and representation in, the institutions and processes which define, administer and uphold international rules.'[55] More specifically, the BRICS states contest instances where the ICC challenges, undermines and seeks to reconstitute pluralist primary institutions of international society and advances an increasingly cosmopolitan-solidarist conception of international society. As part of this, the BRICS states contest the narrow approach to justice pursued by the ICC which, in their view, privileges retributive justice at the expense of the peaceful settlement of conflicts through political negotiation or, in other words, the BRICS states advance a more pragmatic approach to transitional justice than that employed by the ICC. In advancing this central argument, the thesis is organised on the basis outlined below.

It should also be noted, however, that while the BRICS states share a broad common position in relation to international criminal justice and the ICC, as outlined above, there are also noticeable divergences in opinion between them in respect of particular issues, which need to be acknowledged. These differences in opinion, which will be expressly identified and addressed throughout the thesis, primarily concern the extent of various international criminal courts', including the ICC's, powers and competences, and the relationship between the courts and the existing global governance architecture. This can also be described as a difference of opinion about the appropriate extent of liberal cosmopolitan progress in the international society. These differences of opinion are the result of the contrasting historical experiences of the BRICS states. For example, as important global powers with permanent membership of the UN Security Council, China and Russia often seek to protect their privileged positions by resisting rules of international criminal justice or actions by the Court which threaten that privilege and what they see as their ability to manage effectively international peace and security. In contrast, South Africa and India resist developments which entrench the power of the Security Council including *vis-à-vis* international courts. This is driven by a rejection of what these states see as an unfair distribution of power within the global political order which is the partly product of their status as former colonial states. Identifying these divergences of opinion is important for the reliability of the analysis and the conclusions drawn therefrom, which will be addressed in detail in the conclusion to this thesis.

D. Chapter Outline

Following an explanation of the theoretical framework employed in this thesis and the literature review, which identifies the deficiencies in the existing scholarship and how this thesis contributes to filling the gaps, the substantive part of the thesis begins at Chapter Two. This chapter provides an examination of the cosmopolitan-solidarist evolution of international society which involves the reconstitution of pluralist primary institutions. This includes an examination of the legalisation and judicialisation of international relations and the shift from inter-state, horizontal governance to

[55] Newman and Zala, 'Rising powers and order contestation', 871.

vertical, global governance administrated through increasingly powerful and supranationalised international organisations, such as the ICC, which marginalises the role of states, politics and diplomacy in favour of the rule of law. The chapter also analyses the development of the status of the individual in international society and how this cosmopolitan progress manifested in the development of international human rights and international criminal law over the past one hundred years. It is pointed out, however, that while international criminal justice has evolved as a primary institution in international society and as the principal response to gross human rights violations, it remains contested and has obscured alternative approaches to transitional justice which may more suitable in particular situations.

Chapter Three examines the rise of the BRICS in international society and the contemporaneous decline of the West. It demonstrates how the BRICS states support and advance a state-solidarist conception of international society in that they defend pluralist primary institutions such as sovereignty, multilateralism, diplomacy, and a classical understanding of international law, but accept cosmopolitan moral progress in the form of human rights and criminal justice. The chapter also shows that the BRICS states are aiming to reform international society, particularly to limit Western influence and control in global governance, but do not demonstrate a desire to overthrow the existing order or shoulder the management responsibilities currently undertaken by the US, UK and other great powers. This chapter provides an analytical and historical background for the examination of the BRICS states' engagement with international criminal justice and the ICC.

Chapter Four provides some further important background to the study of the BRICS' relationship with the ICC by examining their engagement with international criminal justice since 1945. More specifically, the chapter surveys China and USSR's involvement in the post-World War Two military tribunals of Nuremberg and the Far East, the BRICS states' contributions to the development of the Genocide Convention, the states' views and approaches towards the *ad hoc* and hybrid tribunals of the 1990s and early 2000s, particularly the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. It is argued this research demonstrates a clear commitment by the BRICS states to international criminal justice and a willingness to contribute to its development but, at the same time, a belief that it should be developed and implemented without posing a significant challenge to the pluralist primary institutions and values, with a specific emphasis on the need for the pursuit of justice not to undermine the potential for the peaceful resolution of conflicts.

Chapter Five marks the beginning of the thesis' focus on the ICC and provides an analysis of the Rome conference negotiations which led to the establishment of the Rome Statute, the Court's constituent treaty. It is demonstrated how the BRICS states played a substantial and critical role

during the negotiations and assisted in the creation of the ICC. It is, however, also shown how the BRICS states, but particularly China, Russia and India, sought to ensure that the creation of the ICC did not fundamentally challenge pluralist primary institutions and was consistent with a state-solidarist conception of international society, and they achieved some important concessions in this regard. However, this was not enough for India and China to be able to vote in favour of and sign the Rome Statute. It is also shown how South Africa and Brazil had a more cosmopolitan position and supported the creation of a strong and independent court, free from power politics and great power domination. The chapter concludes with an English School analysis of the Rome Statute. It is argued the Court advanced the cosmopolitan development of international society by contributing to the reconstituting of pluralist primary institutions in a cosmopolitan form. However, as will be shown, the Statute represents a compromise between the pluralist and cosmopolitan visions of international society, which is exemplified in the role given to the Security Council vis-a-vis the ICC, the complementarity regime established under Article 17 of the Statute, and the consent-based nature of the Court's jurisdiction. It is therefore argued that the Court should be viewed as an *evolutionary,* as opposed to a *revolutionary,* institution.

Chapter Six goes on to examine a specific and important norm of international criminal law which is now subject to the ICC's jurisdiction, the crime of aggression. The chapter analyses the history of the prohibition of aggressive war and the criminalisation of acts of aggression, and identifies the contributions made by the BRICS states to it. The chapter then traces the criminalisation of aggression within the Rome Statute regime and highlights the views and positions adopted by the BRICS states in respect of this critical development. It is shown that whilst all of the BRICS states were supportive of the ICC having jurisdiction over the crime of aggression, there were divergent views as to how it should operationalised. Both China and Russia advocated for the Security Council to control the Court's ability to prosecute aggression on the basis that this was consistent with the UN Charter. In contrast, South Africa rejected such a powerful role for the Council on the basis that it would lead to the politicisation of the Court's work. During the Kampala Conference, at which the Court's latent jurisdiction over aggression was confirmed, Brazil played a critical role as a bridge builder, facilitating a compromise among divergent positions, which ultimately resulted in the ICC being granted jurisdiction over the crime.

The next section of the thesis goes on to examine the views of the BRICS states on the ICC's practice of international criminal justice and implementation of its mandate, and it does so through three case studies including the ICC's interventions in Sudan and Libya, and the failed referral of the situation in Syria to the Court. The chapters show that the BRICS states were initially supportive of the ICC's interventions as demonstrated by their voting in favour of or abstaining on the Security Council resolutions referring Sudan and Libya to the ICC, thus making them subject to its

jurisdiction, and their positive comments about the Court's work. However, as will be demonstrated, the states become increasingly critical of the Court when they saw it advancing its cosmopolitan agenda in terms of prioritising the pursuit of retributive justice over and at the expense of the ongoing political negotiations that were seeking to bring the conflicts in Sudan and Libya to an end. More particularly, the states were critical of the Court's issuing of arrest warrants for Omar al-Bashir, the incumbent President of Sudan, and Colonel Gaddafi of Libya, on the basis they would hinder the resolution of the conflicts and, in the case of Libya specifically, that the arrest warrants contributed to the objective pursued by NATO of forcible regime change which caused Libya to descend into chaos. The ICC was also criticised particularly in respect of its intervention in Libya, for the one-sided nature of its investigations and prosecutions. It is argued that these concerns, particularly about the ICC making a contribution to regime change and the detrimental impact of its approach to justice on peace, meant that it was marginalised in the Syrian conflict, with Russia and China vetoing the proposed referral. However, as will be shown, despite Russia and China refusing to permit the intervention on the ICC in Syria, they continued to express their commitment to justice and accountability which, it is argued, is demonstrative of the fact that these states have an issue with how criminal justice is implemented by the ICC, not with the institution itself.

The final chapter of this thesis, Chapter Nine, examines one of the most significant events in the Court's relatively short history, the withdrawal of South Africa from the Rome Statute, which occurred in 2016. After providing a background to this event, namely the failure by South Africa to arrest al-Bashir when he travelled to the country in June 2015 and the criticism of it that followed, the Chapter identifies and analyses the reasons South Africa gave for its decision to withdraw. It is demonstrated South Africa withdrew from the Court principally on the basis that the Court's narrow approach to justice was incompatible with the effective facilitation of political settlements of conflicts and prevented South Africa from playing its historic role as a peace-maker on the African continent. South Africa was also critical of the ICC's expansive interpretation of the relevant law and its failure to listen to the concerns that South Africa had raised regarding its inability to arrest al-Bashir. Overall, it is argued that South Africa decision to withdraw reflects a pluralist backlash against the ICC and an attempt to force reform in accordance with a state-solidarist conception of international society.

CHAPTER ONE

THEORETCIAL FRAMEWORK AND LITERATURE REVIEW

1.1 Introduction

This chapter outlines the theoretical framework adopted in this thesis, reviews the existing scholarship and identifies the principal contributions of the research. It begins by providing a detailed explanation of the English School of international relations (the English School). This includes its global political order triad of international system-international society-world society, the concepts of pluralist and solidarist international society, its understanding of societal evolution including the function of power and legitimacy in that process, and finally, it outlines the perennial order and justice debate within the English School which is central to assessing and understanding the relationship between the ICC and BRICS states, as will be discussed.

Building on the explanation of the English School of international relations, the section goes on to examine the existing scholarship relevant to this project and identifies where the thesis sits within it. It first shows how the English School has failed to study international criminal justice in any substantial way, focusing instead on humanitarian intervention and the Responsibility to Protect as contested aspects of cosmopolitan solidarist progress. It also highlights how the School has largely failed to examine the role and function of international organisations in international society and the contribution they make to societal progress. This is a significant deficiency given the number of organisations that exist and the major role they play in global governance alongside states and other actors. This thesis addresses these deficiencies with its focus on international criminal justice and, more particularly, the ICC.

The section then goes on to examine the limited existing English School literature on the ICC specifically, consisting primarily of Ralph's study of the ICC and its relationship with the United States, before going on to examine the relevant literature on the Court in other fields. It is argued that there is very limited existing literature engaging with the ICC in the English School tradition and the limited literature that does exist is substantially out of date. Furthermore, it is demonstrated that the literature on the ICC across the disciplines has generally failed to consider the Court's relationship with states and, particularly, with rising powers. This thesis addresses those gaps with a focus on the relationship between the Court and the BRICS states, which includes an analysis of how the BRICS have engaged with the Court in relation to the implementation of its mandate, including the major events that have taken place up to the present day. Finally, the thesis examines

the English School's engagement with rising powers, and specifically the BRICS, and their relationship with liberal international society. It identifies how this has been a substantially neglected area of research despite interest being identified by a number of prominent scholars and it is explained that this thesis intends to contribute to that aspect of the English School research agenda, as well as to the rising power literature beyond the English School. Finally, a summary of the contributions of this thesis is provided.

1.2 The English School of International Relations: An Overview

The English School has an enduring concern with understanding how the world evolves, and particularly with understanding how moral progress can be achieved in the context of a political society made up of sovereign states, all of which have different identities, values and national interests.[1] As Buzan explains, within the English School 'there is a strong and persistent progressive concern to improve the condition of world politics' and notes that one of the core questions of the English School's research agenda is '[h]ow is progress possible in international society?'[2] More particularly, it is keenly interested in understanding the relationship between power and change in international society. It therefore provides a highly suitable theoretical framework for this research project given that it is broadly concerned with understanding how the shift in the balance of power away from the West and to the Global South and East may impact upon the normative and governance frameworks of liberal international society which have so far been sustained and developed by the dominance of the West in international affairs. As Newman and Zala confirm, '[a] compelling framework that can be explored in connection with the transitional international order is the distinction between the pluralist and liberal [solidarist] worldview', an English School framing which will be explored.[3]

1.2.1. The English School Triad

In attempting to understand societal change, the English School employs a triad of 'international system', 'international society' and 'world society', each of which describes a different type of global political order. Global political order, or 'international order' as Newman labels it, 'is generally related to the distribution and balance of hard and soft power, and the institutions and norms that regulate international politics: the accepted rules of international society, reflected in the

[1] A. Linklater and H. Suganami, *The English School of International Relations. A Contemporary Reassessment,* (CUP, Cambridge, 2006), 114.
[2] B. Buzan, *An Introduction to the English School of International Relations,* (Polity Press, 2014), 19. *See also,* J. Mayall, *World Politics: Progress and its Limits,* (Polity Press, 2007), 152.
[3] E. Newman and B. Zala, 'Rising powers and order contestation: disaggregating the normative from the representational', (2017) 39(5) *Third World Quarterly* 871-888, 881.

behaviour of states and other actors.'[4] The three types of global political order can also be labelled, respectively, as Hobbesian or Machiavellian, Grotian, and Kantian, and they align with Martin Wight's three traditions of international relations theory, namely realism, rationalism and revolutionism.[5]

In summary, international system refers to a form of global political order in which states exist in near absolute anarchy, where their interactions are characterised by competition and conflict, and 'the question of morality in international politics, at least in the sense of moral rules which restrained states in their relations with one another, did not arise.'[6] Further along the continuum, international society or the 'society of states' exists, as Bull notes in his now classic and oft quoted formulation, 'when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive of themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.'[7] Buzan explains 'just as individuals live in societies which they both shape and are shaped by, so also states live in an international society which they shape and are shaped by.'[8] This socially constructed nature of society is captured by Wendt's phrase 'anarchy is what states make of it'.[9] The international society vision of global political order is therefore traditionally based upon an understanding of states as the primary actors but where their interactions are regulated by agreed rules in furtherance of shared ambitions. The existence of international law is therefore a central feature of international society, representing the subjection of politics and power to the rule of law, which Lauterpacht argued was also a feature of Grotius' *De Jure Belli ac Pacts,*[10] hence international society is described as Grotian.[11] Bull explains that international society represents a desire among states to establish a substitute for world government by agreeing 'constitutional principles of international order'.[12] While the shared ambitions of states were previously limited to the maintenance of peaceful coexistence and stable interactions,[13] they increasingly came to be

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[4] E. Newman, 'What prospects for common humanity in a divided world? The scope for RtoP in a transitional international order', (2016) 53(1) *International Politics* 32-48, 35. *See also,* Newman and Zala, 'Rising powers and order contestation', 872.
[5] Buzan, *An Introduction to the English School,* 12.
[6] B. Porter and G. Wight, *International Theory: The Three Traditions,* (Leicester University Press, 1991), xi-xii.
[7] H. Bull, *The Anarchical Society. A Study of Order in World Politics,* (Columbia University Press, 2002), 13.
[8] Buzan, *An Introduction to the English School,* 13.
[9] A. Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics', (1992) 46(2) *International Organization* 391-425.
[10] B. Kingsbury and A. Roberts, 'Introduction: Grotian Thought in International Relations' in A. Bull, B. Kingsbury and A. Roberts (eds), *Grotius and International Relations,* (Clarendon Press, 1992), 28.
[11] H. Bull, 'Hans Kelsen and International Law' in R. Tur and W. Twining (eds), *Essays on Kelsen,* (Clardendon Press, 1986), 323 - ' [i]n between these extremes there is the Grotian tradition which rejects the description of international relations as a Hobbesian state of nature, and contends that states form together an anarchical society without government.. .The society of states or international society, in the account of the Grotians, is a primitive or imperfect one, but it is still a society, and the rules by which its members are bound in their relation with one another, include rules of law.' *See also,* B. Kingsbury, 'The International Legal Order' in P. Cane and M. Taushnet (eds), *The Oxford Handbook of Legal Studies,* (OUP, 2003), 282.
[12] Bull, *The Anarchical Society*, 230.
[13] Bull, *The Anarchical Society*, 17-19.

cosmopolitan in nature including, for example, the universal protection of human rights and the implementation of international criminal justice. Furthermore, the dominance of states as societal actors was challenged by the evolution of international organisations. This process of societal development will be considered in greater detail shortly.

Finally, the world society conception of global political order 'takes individuals, non-state organizations and ultimately the global population as a whole as the focus of global societal identities and arrangements and puts the transcendence of the state system at the centre of IR theory.'[14] Linklater and Suganami argue that the 'Kantian tradition represents the progressivist tendency in international thought since its members believe in the existence of a latent *community* of humankind and are confident that all political actors have the capacity to replace strategic orientations with cosmopolitan political arrangements'.[15] While world society is under-theorized within the English School,[16] Bull having dedicated scant attention to it in his canonical text, *The Anarchical Society,* it is primarily understood in cosmopolitan terms, in that it represents a society of individuals as opposed to a society of states, with individuals being the key moral referent.[17] Furthermore, as Ralph argues, '[w]here moral *diversity* underpins international society, world society rests on a common conception of *humanity*.'[18] However, different understandings of world society have been articulated but, as Buzan explains, '[w]hat unites these is that all stand as alternative visions to the Westphalian society of states, and all move towards the creation of the global equivalent of domestic politics, the question being whether the form is a stateless society, a (con)federation of some sort or an empire.'[19] Specifically, Ralph identifies two types of world society 'a *revolutionary conception of world society* where the state no longer mediates human relationships and...a *Kantian conception of world society,* where the state complements the work of other supranational institutions' (original emphasis).[20] We will return to consider in more detail the international society conception of global political order, which has been the dominant focus of the English School as a means of examining recent political developments, and its relationship with world society, after considering briefly another important aspect of English School theory, the concept of 'institutions'.

[14] Buzan, *An Introduction to the English School,* 13.
[15] Linklater and Suganami, *The English School of International Relations,* 117-118.
[16] Special Issue of International Politics, 'Conceptualizing World Society', (2018) 55(1) *International Politics* 1-140.
[17] Porter and Wight, *International Theory: The Three Traditions,* 40-48.
[18] J. Ralph, *Defending the Society of States. Why American Opposes the International Criminal Court and its Vision of World Society*, (OUP, 2007), 17.
[19] B. Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation,* (CUP, 2004), 35.
[20] Ralph, *Defending the Society of States,* 18.

1.2.2. The Role of 'Institutions' in the English School

Another key aspect of English School theory is the concept of 'institutions'. The term institutions is used is a variety of ways throughout the international relations and other literatures, but in the English School it refers specifically to 'relatively fundamental and durable practices, that are evolved more than designed' and which 'are constitutive of actors and their patterns of legitimate activity in relation to each other.'[21] Similarly, Holsti describes institutions as 'patterned *practices,* or practices that are routinized, typical and recurrent' which are based 'on coherent sets of *ideas and/or beliefs*', reflect norms, include rules and etiquette and prescribe how the critical actors and agents should behave,[22] and Reus-Smit defines them as 'generic structural elements of international societies.'[23] There is no agreed list of what constitutes primary institutions and they have been treated differently across various works in the English School. Bull initially identified five primary institutions of Westphalian international society comprising war, diplomacy, the balance of power, international law and great power management.[24] These have since been supplemented and re-categorised by other scholars[25] and Buzan's table, below, provides an overview.[26]

Table 1. *Candidates for primary institutions of international society by author*[c]

Wight	Bull	Mayall[a]	Holsti[b]	James	Jackson
Religious sites and festivals					
Dynastic principles					
Trade			Trade (P)		
Diplomacy	Diplomacy	Diplomacy (I)	Diplomacy(P)	Diplomacy	Diplomacy
Alliances					
Guarantees					
War	War		War (P)		War
Neutrality					
Arbitration					
Balance of Power	Balance of Power, Great power management	Balance of Power (I)			
International Law	International Law	International Law (I)	International Law (F)	International Law	International Law
	The State		The State (F)		
Sovereignty		Sovereignty (P)	Sovereignty (F)	Sovereignty	Sovereignty
		Territorial Integrity (P)	Territoriality (F)	Political boundaries	
		Nonintervention (P)			
		Self-Determination (P)			
		Non-Discrimination (P)			
		Human Rights (P)			
			Colonialism (P)		Colonialism

[21] Buzan, *From International to World Society?,* 167. *See also*, Bull, *The Anarchical Society,* 74; T. B. Knudsen, 'Solidarism, pluralism and fundamental institutional change' in P. Wilson (ed), 'Review Symposium – The English School in retrospect and prospect: Barry Buzan's *An Introduction to the English School of International Relations: The Societal Approach*', (2016) 51(1) *Cooperation and Conflict* 94-136, 103.

[22] K. J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics,* (CUP, 2004), 20-22.

[23] C. Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions', (1997) 51(4) *International Organization* 555-589, 555.

[24] Bull, *The Anarchical Society,* 74.

[25] *See,* Mayall, *World Politics. Progress and its Limits* and Holsti, *Taming the Sovereigns.*

[26] Buzan, *From International to World Society?,* 174. *See also,* Buzan, *An Introduction to the English School,* 105-112; Mayall, *World Politics: Progress and its Limits,* 150.

As was mentioned in the research design, primary institutions are not permanent or fixed, they change and evolve in their internal content and their relationship to one another, and they also disappear, in the case of colonialism, and come into existence, such as human rights, over a period of time.[27] As Buzan explains, '[p]rimary institutions form the social structure of international society, which is dynamic and always evolving, albeit usually slowly and with a great deal of continuity.'[28] Furthermore, the different types of global political order described by the English School framework, as identified above, have different configurations of primary institutions,[29] as will be discussed shortly. This demonstrates the socially constructed nature of primary institutions and international society, an ontological assumption the English School shares with social constructivism.[30]

Primary institutions can therefore be used as markers of change in global political order,[31] although this is a fairly newly approach to the study of change in the English School tradition, gaining more serious traction only in the last few years.[32] It is particularly important, it is suggested, to identify and analyse conflicts, contradictions and tensions between primary institutions because they create a pressure for change both *of* and *in* institutions and thus 'are a key driving force in the evolution of interstate society.'[33] An example is the conflict between sovereignty and human rights, and how the evolution of latter and contestation of absolute sovereignty has forced a reconceptualisation of sovereignty and a loosening in the norm of non-intervention. Furthermore, it is also important to note state contestation of primary institutions is a 'driving force behind the evolution of international society'.[34]

In addition to primary institutions, the term 'secondary institutions' refers to 'intergovernmental

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[27] Buzan, *From International to World Society?,* 181-182. *See also,* Bull, *The Anarchical Society,* 169; C. F. Parrat, 'On the Evolution of Primary Institutions of International Society. Theory Note', (2017) 61(3) *International Studies Quarterly* 623-630, 624.

[28] B. Buzan, 'China in International Society: Is 'Peaceful Rise' Possible?', (2010) 3(2) *The Chinese Journal of International Politics* 536, 6-7.

[29] Buzan, *From International to World Society?,* 168-173.

[30] C. Reus-Smit, 'Imagining Society: Constructivism and the English School', (2002) 4(3) *British Journal of Politics and International Relations* 487-509. *See also,* R. Jackson, *The Global Covenant: Human Conduct in a World of States,* (OUP, 2000), 49 - '[t]he normative world of human relations is made by people; it is not given in the nature of things. It is artificial rather than natural and consists, significantly, of the thoughts and ideas of the people involved regarding how they ought to live their lives in proximity with each other'.

[31] Holsti, *Taming the Sovereigns,* 17. *See also,* Buzan, *From International to World Society?,* 172.

[32] *See,* for example, Buzan, From *International to World Society?',* Holsti, *Taming the Sovereigns;* T. B. Knudsen, 'Solidarism, pluralism and fundamental institutional change'; T. B. Knudsen, 'Master Institutions of International Society: Theorizing continuity and change'., paper prepared for the 8th Pan-European Conference on International Relations 18-21 September 2013, Warsaw; K. Spandler, 'The political international society: Change in primary and secondary institutions', (2015) 41(3) *Review of International Studies* 601-622; C. F. Parrat, 'Changing before our Eyes and Slipping between our Fingers: International Organisations and Primary Institutions', paper prepared for the International Studies Association Annual Conference 2014, Toronto; C. F. Parrat, 'On the Evolution of Primary Institutions of International Society. Theory Note', (2017) 61(3) *International Studies Quarterly* 623-630.

[33] Buzan, *From International to World Society?,* 186, 195, 250-251. *See also,* A. Hurrell, 'Norms and Ethics in International Relations' in W. Carlsnaes, T. Risse and B. A. Simmons, *Handbook of International Relations,* (Sage, 2002), 143-144.

[34] Buzan, 'China in International Society: Is 'Peaceful Rise' Possible?', 7.

arrangements consciously designed by states to serve specific functional purposes', which manifest primarily in the form of international organisations, and 'include the United Nations, the World Bank, [and] the World Trade Organization'.[35] As will be discussed in greater detail shortly, but particularly in Chapter Two, whereas secondary institutions were initially designed to facilitate inter-state engagement and did not exercise significant authority and control over states, they have since become increasingly powerful and pose a challenge to state sovereignty and the primacy of the state and inter-state diplomacy in global governance.

1.2.3. International Society: Pluralism and Solidarism

The focus of the English School research agenda has centred upon the international society conception of global political order.[36] It has been described as a *via media* between the realism which characterises the international system and the revolutionism of world society, and it best reflects the general state of contemporary international politics in that in proffers a view that the once completely anarchic nature of international politics, in the sense of there being no framework to regulate states interactions and guide their behaviour, has come to be governed by normative principles, institutions and rules of international law 'in light of which states can, and to a remarkable degree do, behave reasonably towards one another'.[37]

In order to better understand the nature of the international society conception of global political order and how contemporary international society has developed and continues to evolve, it is further sub-divided within the English School framework. First, it is divided into 'pluralist' and 'solidarist' conceptions of international society. Second, 'solidarist-international society' is further sub-divided into 'state-solidarist' and 'cosmopolitan-solidarist' international society.[38] Each conception, from pluralist international society to cosmopolitan-solidarist international society, represents a stage in the evolution of the global political order towards world society along the English School continuum. It is therefore important to stress that they are not mutually exclusive positions divided by bright white lines but are rather 'interlinked sides in an ongoing debate about the moral construction of international order',[39] which will now be explored in greater detail. These

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[35] Buzan, *An Introduction to the English School,* 17.

[36] T. Dunne, *Inventing International Society: A History of the English School,* (Macmillan, 1998), 10; Buzan, *From International to World Society?,* 1.

[37] Linklater and Suganami, *The English School of International Relations,* 28-30.

[38] *See,* Buzan, *An Introduction to the English School,* 114-120. See also, Y. Zhang, 'Pluralism, solidarism and the yin-yang of international society' in P. Wilson (ed), 'Review Symposium - The English School in retrospect and prospect: Barry Buzan's *An Introduction to the English School of International Relations: The Societal Approach* ', (2016) 51(1) *Cooperation and Conflict* 94-136.

[39] Buzan, *An Introduction to the English School,* 113. *See also,* Buzan, *From International to World Society?,* 139, 154 and Knudsen, 'Solidarism, pluralism and fundamental institutional change', 106 - pluralism and solidarism 'should rather be seen as endpoints on a continuum with many possible combinations, or as two sets of principles and institutions that can be (and historically have b een) combined and mixed in the political organization of international society'.

concepts are essential tools for understanding the BRICS states' views on international society and, more particularly, for analysing their relationship with international criminal justice and the ICC. As Zhang notes, a 'vocabulary of pluralism and solidarism has been increasingly used to empirically describe, theoretically explain and normatively evaluate the transformation of international society.'[40]

First, the fundamental distinction between the pluralist and solidarist conceptions of international society 'is about the nature and the potentiality of international society, and particularly about the actual and potential extent of shared norms, rules and institutions'.[41] As we progress from pluralist society to solidarist society the number of shared values and interests increase and also broaden to cover a range of issues.[42] Buzan describes this as the shift from a 'thin' to a 'thick' conception of international society.[43] Pluralist society, which is located after international system and before solidarist international society or, in other words, it 'leans towards the realist side of rationalism',[44] 'presupposed that states are *de facto* the dominant unit of human society'[45] and sees international society as having minimal shared rules and norms, which are predominately directed towards maintaining the peaceful coexistence of states or 'order under anarchy',[46] on the basis that states have different values and interests.[47] As Mayall argues, pluralism is 'the view that states, like individuals, can and do have differing interests and values, and consequently that international society is limited to the creation of a framework that will allow them to coexist in relative harmony'.[48] Pluralism is thus 'confined largely to agreements about mutual recognitions of sovereignty, rules for diplomacy, and the promotion of the non-intervention principle'[49] and it 'stresses the instrumental side of international society as a functional counterweight to excessive disorder.'[50] Similarly, as Hurrell and Alderson explain:

> '[t]his *pluralist* conception of international society was built around the goal of coexistence and reflected an ethic of difference. It was to be constructed around the mutual recognition of sovereignty and aimed at the creation of certain minimalist rules, understandings, and institutions designed to limit the inevitable conflict that was to be expected within such a fragmented political system. These rules and norms provided a structure of coexistence, built on the mutual recognition of states as independent and legally equal members of

[40] Zhang, 'Pluralism, solidarism and the yin-yang of international society', 95-96.
[41] Buzan, *From International to World Society?,* 45.
[42] Buzan, *From International to World Society?,* 155.
[43] Buzan, *From International to World Society?,* 59.
[44] Buzan, *From International to World Society?,* 46.
[45] Buzan, *An Introduction to the English School,* 89.
[46] Buzan, *From International to World Society?,* 46.
[47] R. H. Jackson, *The Global Covenant: human conduct in a world of states,* (OUP, 2000), 23.
[48] Mayall, *World Politics: Progress and its Limits,* 14.
[49] Buzan, *An Introduction to the English School,* 90.
[50] Buzan, *From International to World Society?,* 47. *See also,* Newman and Zala, 'Rising powers and order contestation', 881 - 'pluralism reflects a commitment (in theory) to Westphalian norms of non-intervention and respect for state sovereignty, and the idea that values and rights are essentially domestic matters within national communities'.

> society, on the unavoidable reliance of self-preservation and self-help, and on freedom to promote their own ends subject to minimal constraints. The dominant values of this society of states were, to quote Vattel, 'the maintenance of order and the preservation of liberty'.[51]

In contrast, solidarist international society, which is located after pluralism but before world society or, in other words, 'lean[s] towards the Kantian side of rationalism',[52] is characterised by the existence of a much greater number of shared values than mere coexistence and as a result has a much greater volume of norms and rules of law, and sees cooperation occurring over a wide range of issues 'whether it pursuit of joint gains (e.g. trade), or realisation of shared values (e.g. human rights).[53] As Buzan explains '[s]olidarism is about 'thick' international societies in which a wider range of values is shared, and where the rules will be not only about coexistence, but also about the pursuit of joint gains and the management of collective problems in a range of issue areas.'[54]

Solidarist international society is primarily associated with liberal cosmopolitan morality, although not necessarily so.[55] As Mayall notes, 'solidarists root their thinking in cosmopolitan values',[56] and this is the interpretation that is adopted in this thesis. The cosmopolitan progression from pluralism to solidarism involves an increased focus on the individual as a key moral referent, as opposed to states being solely concerned about their peaceful coexistence, which can be described as the individualisation of society. This is reflected, for example, in the development of the concept of individual rights.[57] It has been argued that human rights evolved as a primary institution in solidarist international society[58] and, as will be argued in the next chapter, building on the work of Ralph,[59] criminal justice should also be considered to have such a status, existing alongside pluralist institutions such as sovereignty and diplomacy. As Bull explained in his Hagey Lectures, 'in the second half of the twentieth century the question of justice concerns what is due not only to states and nations but to all individual persons in an imagined community of mankind'.[60] For this reason, solidarism is described as being concerned with the pursuit of *justice* in addition to the pluralist priority of maintaining *order* among states,[61] and it represents moral progress for those with a

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[51] A. Hurrell and K. Alderson, *Hedley Bull on International Society,* (Macmillan Press Limited, 2000), 7-8. *See also,* A. Hurrell, 'Conclusion: International Law and the Changing Constitution of International Society' in M. Byers (ed), *The Role of Law in International Politics. Essays in International Relations and International Law,* (OUP, 2000), 336.

[52] Buzan, *From International to World Society?,* 4.

[53] Buzan, *From International to World Society?,* 49.

[54] Buzan, *From International to World Society?,* 59.

[55] Buzan is keen to emphasise that solidarism doesn't have to be about cosmopolitan values and that cooperation can take place on the basis of a range of shared values and objectives, and it's for this reason that he created the separate categories of state-centric and cosmopolitan solidarism - Buzan, *An Introduction to the English School,* 114-120.

[56] Buzan, *An Introduction to the English School,* 113.

[57] *See,* A. Hurrell, *On Global Order: Power, Values, and the Constitution of International Society,* (OUP, 2007), 154-155.

[58] Knudsen, 'Master Institutions of International Society'; Knudsen, 'Solidarism, pluralism and fundamental institutional change'.

[59] J. Ralph 'Anarchy is What Criminal Lawyers Make of It: International Criminal Justice as an Institution of International and World Society' in S. C. Roach, *Governance, Order and the International Criminal Court,* (OUP, 2009), 137-141.

[60] H. Bull, *Justice in International Relations: 1983-4 Hagey Lectures,* (University of Waterloo, 1984), 12.

[61] Buzan, *An Introduction to the English School,* 16, 85 - 'pluralism is about order and solidarism as about justice'.

cosmopolitan disposition.[62]

In addition to the expansion of common values as we move from pluralism to solidarism, the transition also involves a development in the institutions and nature of governance in society, and this is something that is overlooked in English School scholarship, as will be explained in greater detail in the literature review.[63] Put simply, whereas in pluralist international society the primary actors are states, in solidarist society governance functions and authority are increasingly shared between states and international organisations, and individuals are subjects of international law. Moreover, whereas pluralism entails an absolutist conception of sovereignty, solidarism involves a more conditional and limited understanding which permits intervention in states' internal affairs by international society in order to uphold common values. As Buzan argues, '[s]olidarism focuses on the possibility of shared moral norms underpinning a more expansive, and almost invariable more interventionist, understanding of international order.'[64] However, this describes a particular type of solidarist international society and so here it is necessary to introduce concepts of 'state-solidarist' and 'cosmopolitan-solidarist' international society.[65]

While both conceptions share the solidarist notion of states striving to adopt and implement common values which reach beyond the mere maintenance of peaceful coexistence, which is the overriding feature of pluralism, they are divided by the governance frameworks that underpin them and how cosmopolitan values are implemented. State-solidarism is located adjacent to and leans towards pluralist international society on the English School continuum, and shares with it a defence of pluralist primary institutions, such as sovereignty and diplomacy, as underpinning structures of international society. Therefore, while it accepts cosmopolitan moral progress, unlike pluralism, such as the protection of human rights or criminal justice, it insists that it is managed and implemented at the state-level.[66] In this society, as Buzan argues, human rights are granted only by the state and compliance cannot be imposed by international society.[67] Therefore, while international organisations exist is state-solidarist international society, states are the primary actors and international organisations have none to limited ability, depending on the stage of progress that has been achieved along the continuum, to enforce state compliance.

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[62] *See also,* T. Nardin, *Law, Morality and the Relations of States,* (Princeton University Press, 1983), 4-5 and W. Bain, 'One order, two laws: recovering the 'normative' in English School theory', (2007) 33(4) *Review of International Studies* 557-575, 558.

[63] In his most recent work, Amitav Acharya identifies how international relations scholars have grappled with the issue of defining what international order means and he highlights that it includes 'normative' (values), 'situational' (norms, procedures and institutions) and 'descriptive' (the distribution of power) elements, all of which the English School approach seeks to capture - A. Acharya, *Constructing Global Order. Agency and Change in World Politics,* (CUP, 2018), 5-6.

[64] Buzan, *From International to World Society?,* 47

[65] Alex Bellamy has noted the need to examine 'different types of solidarism' - A. Bellamy (ed), *International Society and its Critics,* (OUP, 2005), 292.

[66] Knudsen described it as the 'state-controlled' implementation of the common values associated with solidarism - Knudsen, 'Solidarism, pluralism and fundamental institutional change', 106.

[67] Buzan, *An Introduction to the English School,* 117

As we progress into cosmopolitan-solidarist international society, moving towards world society, cosmopolitan values are increasingly embedded in international governance frameworks for the purpose of better implementation[68] on the basis 'cosmopolitan solidarism is about 'a disposition to give moral primacy to "the great society of humankind", and to hold universal, natural law, moral values as equal to or higher than the positive international law made by states'.[69]As will be examined in more detail in Chapter Two, in practical terms, human rights are thus granted to individuals by international society through international law, rather than being voluntarily conferred by states, and they are enforced by international society through increasingly powerful international organisations and courts, rather than relying upon state self-enforcement. This involves the juridification of international politics and represents a progressive shift from horizontal inter-state governance to vertically implemented global governance.

The evolutionary process also involves the reconstitution of primary institutions of international society. For example, sovereignty is reconstituted - it being a juridical rather than an essentialist condition - to accommodate cosmopolitan values. More specifically, international law circumscribes the freedom and authority of states, such as by imposing obligations upon them as to how they should treat their citizens. Furthermore, sovereign authority is partially ceded to international organisations to implement human rights obligations. In this process, sovereignty becomes conditional on a state upholding fundamental human rights standards as opposed to being absolute, as it is in pluralist and state-solidarist conception of international society. As a result, intervention into a states' internal affairs becomes more legitimate and permissible.[70] As Hurrell argues, 'sovereignty in the sense of the power of a state over its nationals has been eroded by human rights law and the increased availability of variety of national and courts and international tribunals.'[71] Moreover, as Ralph notes, states are 'expected to give up their sovereignty to supranational or world institutions' which are charged with protecting 'humanity'.[72] This development also manifests in 'an easing of the degree to which states can only be bound by rules to which they have given their explicit consent - a move from consent to consensus' in the making and implementation of international law[73] or, as Hurrell also says, there is 'a chipping away at the hard edge of state consent'.[74] Thus, another way of distinguishing between the two types of solidarist international society is that state-solidarism is based upon the voluntary compliance of

[68] Hurrell, 'Conclusion: International Law and the Changing Constitution of International Society', 337.
[69] Knudsen, 'Solidarism, pluralism and fundamental institutional change', 106.
[70] Buzan, *From International to World Society?,* 219.
[71] Hurrell, *On Global Order,* 65.
[72] Ralph, *Defending the Society of States,* 18.
[73] Hurrell and Alderson, *Hedley Bull on International Society,* 10. *See also,* Bull, 'Hans Kelsen and International Law', 335 - '[w]e have seen the development of the idea that consensus rather consent is the basis for changing international law'.
[74] Hurrell, *On Global Order,* 61.

states with cosmopolitan values and cosmopolitan-solidarism is more coercive. However, it must be noted that in cosmopolitan-solidarist international society there is a complex dynamic where states and international organisations continue to compete for authority in governance matters, where politics and diplomacy interact often uncomfortably with law, and there is tension between international legal standards and domestic ones. This is part of the transition from international to world society.

This development where individuals and international organisations are part of cosmopolitan-solidarist international society in addition to states, and sovereignty is curtailed, reflects solidarism's, and particularly cosmopolitan solidarism's, close association with the world society conception of global political order.[75] As Buzan notes, solidarist society ties together state and non-state actors, and draws on cosmopolitan notions of individual rights and a community of humankind and, in doing so, 'it cannot help but blur the boundary between international and world society.'[76] The view is part of the Vincentian tradition of the English School which views society as progressing from a 'Westphalian type interstate society, defining itself as an exclusive club of states, gives way to a world society that is defined by an inclusive, somewhat neomediaeval, mixture of states, groups, transnational entities, and individuals, all sharing some key values and having legal standing in relation to each other.'[77] Dunne and Wheeler 'see solidarism as intimately bound up in the transition from international to world society, extending the Grotian line that solidarism crosses the boundary between international and world society'[78] and Reus-Smit argues 'instead of international society and world society being two distinct social categories standing is a dichotomous relationship, the two are deeply enmeshed.'[79] For this reason Zhang describes solidarism 'with its ethically cosmopolitan values' as a 'mid-wife' to world society.[80]

Where cosmopolitan-solidarist international society progresses into world society, states cede their sovereignty entirely to international organisations and merely act as agents for them in enforcing laws that protect common values and interests on behalf of individuals,[81] becoming something more akin to a domestic political structure. Ralph describes this as 'Kantian world society'[82] and he argues that while 'Kant argued that the state and the society of states were insufficient institutions

[75] Buzan, *An Introduction to the English School,* 113.
[76] Buzan, *From International to World Society?,* 47-48 and Buzan, *An Introduction to the English School,* 114.
[77] Buzan, *An Introduction to the English School,* 125; R. J. Vincent, *Human Rights and International Relations,* (CUP, 1986), 92-104.
[78] Buzan, *An Introduction to the English School,* 125, 128. *See also,* Linklater and Suganami, *The English School of International Relations,* 155-169.
[79] C. Reus-Smit, 'The Anarchical Society and Human Rights' in H. Suganami, M. Carr and A. Humphreys (eds), *The Anarchical Society at 40: Contemporary Challenges and Prospects,* (OUP, 2017), 82. *See also,* Buzan, *An Introduction to the English School of International Relations,* 126.
[80] Zhang, 'Pluralism, solidarism and the yin-yang of international society', 97.
[81] Ralph, *Defending the Society of States,* 19.
[82] Ralph, *Defending the Society of States,* 19.

to sustain the moral progress that was required to move towards perpetual peace...it is clear that Kant sought to work with a reformed conception of international society rather than overthrow it.'[83] Beyond a Kantian conception of world society is revolutionary world society in which the state ceases to exist in any form and a new governance structure evolves, such as a world government.

I argue, as will be substantiated with reference to empirical developments in international society in the next chapter, that far from being purely theoretical, as Bull considered in 1977 and in his later writings,[84] society has progressed significantly along the English School continuum into cosmopolitan-solidarist international society and the ICC is an example of such a development. This is a view which is shared by Schouenborg who argues 'it is not impossible to imagine that international society, in time, will undergo a more fundamental change so that states, individuals and transnational actors (NGOs, companies, transnational associations), acquire equal standing in international relations.'[85] It should, however, also be noted that while there has been significant cosmopolitan-solidarist progress, there has not been a revolution of the state-based international society underpinned by entrenched pluralist values and institutions. The result of this, Hurrell argues, is that '[w]e are therefore not dealing with a vanished or vanishing Westphalian world, as much transformationist writing suggests, but rather with a world in which solidarist and cosmopolitan conceptions of governance coexist, often rather unhappily, with many aspects of the old pluralist order.'[86] Ralph argues that this 'uneasy compromise' is reflected in the make -up of the Rome Statute of the ICC.[87] Moreover, as this thesis shall demonstrate, progress towards cosmopolitans-solidarism is contested by some states, including the BRICS.

1.2.4. The Role of Power and Legitimacy in the Evolution of International Society

In addition to understanding the changes in the characteristics of global political order and, specifically, changes in the nature and content of primary institutions, it is necessary consider *how* such changes occur. As was mentioned earlier, global political order is a social construct built by human beings, primarily through the edifice of the state. The ability of states to contribute to the construction and re-construction of international society or, in more specific terms, to contribute to the elaboration and evolution of the primary institutions, norms and rules which structure

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[83] Ralph, *Defending the Society of States,* 10.
[84] Bull, *Justice in International Relations: 1983-4 Hagey Lectures,* 13 - '[t]he world society of individual human beings entitled to human rights as we understand them exists only as an ideal, not as a reality'.
[85] L. Schouenborg 'The English School and Institutions: British Institutionalists?' in C. Navari and D. M. Green, *Guide to the English School of International Studies,* (Wiley, 2014), 78.
[86] A. Hurrell, *On Global Order,* 9.
[87] *See,* Ralph, *Defending the Society of States* and J. Ralph, 'International Society, the International Criminal Court and American foreign policy', (2005) 31(1) *Review of International Studies* 27-44.

international society, which Acharya refers to as normative and ideational agency,[88] is determined by their political power. In essence, the more powerful the state or group of states, the more they will be able to influence the construction of international society in accordance with their own values and normative bents. As Morris argues, 'international society is a purposive entity, the normative content of which is, to a significant degree, determined by the great powers of the day'[89] and furthermore '[t]he global distribution of power is indeed crucial in determining the shape and changing nature of international society.'[90] Furthermore, Hurrell argues '[i]t is therefore a mistake to view 'law' as something that is, or can be, wholly separated from 'power' or 'power-political interest'.[91] This is the realist element of English School thinking.

As will be discussed in more detail in Chapter Two, the dominant position of liberal powers in the post-World War Two settlement made possible the solidarist evolution of international society. As Buzan argues, 'the development of a global interstate society has been the function of the expansion of the West...[t]he triumph of European power meant...that Western norms and values and institutions dominated the whole system.'[92] For this reason, shifts in the power balance within international society are critical to societal evolution, which is a central focus of this thesis with its examination of the rise of emerging powers, namely the BRICS states.[93] As Newman argues, '[r]elative changes in the 'power' and influence of states and regions, and the corresponding changes in prevailing institutions and norms, may constitute changes in international order.'[94]

Whilst it is accepted that established norms and rules work to constrain and inform the exercise of political power by states, and other actors such as international and non-governmental organisations are playing an increasingly significant role in international society and thereby diluting the absolute power of states, resulting in a complex framework within which societal evolution occurs, state power remains an important factor.[95] Moreover, while power is an important factor in how society evolves, the stability and sustainability of progress, including of specific developments such as the evolution of human rights and criminal justice as primary institutions of international society, and their associated norms and rules, or the creation of the ICC, a secondary institution, is dependent

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[88] Acharya, *Constructing Global Order,* 33.
[89] J. Morris, 'Normative Innovation and the Great Powers' in A. Bellamy (ed), *International Society and its Critics,* (OUP, 2004), 280.
[90] Morris, 'Normative Innovation and the Great Powers', 265.
[91] Hurrell, 'Conclusion: International Law and the Changing Constitution of International Society', 330-331. *See also,* C. Layne, 'The US-Chinese power shift and the end of Pax Americana', (2018) 94(1) *International Affairs* 89-111, 110.
[92] Buzan, *From International to World Society?,* 122.
[93] *See,* I. Clark, 'International Society and China: The Power of Norms and Norms of Power', (2014) 7(3) *Chinese Journal of International Politics* 315-340, 316, 336.
[94] Newman, 'What prospects for common humanity in a divided world?, 35.
[95] Hurrell, On Global Order, 115. *See also,* A. Hurrell, 'Legitimacy and the use of force: can the circle be squared?', (2005) 31(1) *Review of International Studies* 15-32, 16 - 'legitimacy has for a long time focused on the beliefs of those who are complying and on the reasons why they come to accept a rule or a political order as appropriate and legitimate. Legitimacy therefore refers to a particular kind of rule following or obedience, distinguishable from purely self-interested or instrumental behaviour on the one hand, and from straightforward imposed or coercive rule on the other'.

on a widely accepted understanding and consensus among states as to its legitimacy; as Clark argues, legitimacy constitutes society.[96] Furthermore, Buzan explains that 'legitimacy is crucial to the stability of any political order'[97] and argues that where developments are based on coercion or calculation rather than a shared sense of legitimacy they will be less durable, more vulnerable to change of circumstance[98] and liable to contestation.[99]

Legitimacy is thus a social construct. As Clark argues '[t]o ask whether a particular international action is legitimate is not to ask a question of moral philosophy or jurisprudence. It is to ask a factual question about how it is regarded by the members of the international society'[100] or, in other words, 'legitimacy is what states make of it.'[101] Similarly, Franck argues that '[t]he legitimacy of a rule, or of a...rule-applying institution, is a function of the perception of those in the community concerned that the rule, or the institution, has come into being endowed with legitimacy'[102] and Suchman explains legitimacy as a 'generalised perception, or assumption, that the actions of an entity are desirable, proper and appropriate in some socially constructed system of norms, values, beliefs and definitions.'[103] Societal developments are thus conferred with legitimacy where there is a widely shared view and understanding amongst states that it is right and appropriate in that it reflects shared beliefs, goals or values.[104] However, as Hurrell notes, the interests of states also factor into their view of legitimacy.[105] This is a view shared by Morris who argues that a state's decision to promote or support a norm or a change in international society is both instrumental in the sense that it will benefit the state in question but is also driven by a belief in its intrinsic value, which is the normative dimension.[106] This demonstrates the mix of normative and practical reasons that lay behind state decision-making which reflects the English School's use of both realist and constructivist thought.

Importantly for this thesis, a distinction is drawn between substantive and procedural legitimacy.

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[96] I. Clark, *Legitimacy in International Society,* (OUP, New York: 2007), 6.

[97] Buzan, *From International to World Society?,* 253. *See also,* Clark, *Legitimacy in International Society,* 15-16; I. Clark, 'Legitimacy in Global Order', (2003) 29(1) *Review of International Studies* 75-95, 83; Hurrell, *On Global Order,* 78.

[98] Buzan, *From International to World Society?,* 103.

[99] Although much has been written about the effect of power in international politics, this will not be explored in any detail here as this thesis is not concerned with understanding how the particular exercise of power affects the construction of society in micro-analytic terms but rather takes the idea that power influences societal evolution as an ontological position which underpins this thesis - the shift in the balance of power can affect the construction of international society.

[100] Clark, *Legitimacy in International Society,* 255. *See also,* T. Franck, 'Legitimacy in the International System', (1988) 82(4) *American Journal of International Law* 705-759, 711.

[101] Clark, 'Legitimacy in Global Order', 81, 84.

[102] Franck, 'Legitimacy in the International System', 711.

[103] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', (1995) 20(3) *Academy of Management Review* 571610, 574.

[104] Hurrell, 'Legitimacy and the use of force: can the circle be squared?', 20, 24. *See also,* M. Finnemore and S.J. Toope, 'Alternatives to 'Legalization': Richer Views of Law and Politics', (2001) 55(3) *International Organization* 743-758, 749.

[105] Hurrell, 'Legitimacy and the use of force: can the circle be squared?', 16.

[106] J. Morris, 'Normative Innovation and the Great Powers', 269.

Substantive legitimacy refers to the content of a particular normative development, for example, the evolution international criminal justice as an institution, and procedural legitimacy refers to how it should be implemented. As Clark argues, there is a need for 'consensus around the substance of normative principles, and separately a consensus about how they are to be implemented.'[107] Ralph and Gallagher draw this distinction in their work on the Responsibility to Protect, arguing that the relevant debate is not about whether *there is* a responsibility to protect but rather *how* it should be implemented including the issue of 'who *decides* how international society should meet its responsibilities' (emphasis added).[108]

Therefore, legitimacy is not only relevant to ideas, norms, rules and primary institutions but also to international organisations. International organisations are conferred with legitimacy by states and organisations thus strive to present themselves as legitimate as a means of securing support and cooperation from states.[109] This is important as, in the absence of the existence of a world society, international organisations are dependent on states to exist - states fund them, states are their members and most often, states carry out their mandate, and the conferral of legitimacy promotes compliance; as Hurrell explains, legitimacy transfers power to authority.[110] Moreover, Roach argues, 'international legal institutions will require strong forms of legitimacy to function effectively'[111] and 'to compensate for the lack of enforcement at the global level.'[112] The ICC, for example, does not have its own police force and has limited resources to conduct investigations, and so it is wholly reliant on states to function effectively, and therefore it needs to be recognised as a legitimate organisation as widely as possible in order to function effectively.

So, how can international organisations acquire the status legitimacy or act in ways that will result in them being labelled as illegitimate? First, the reason for the organisation's existence and its mandate need to be widely accepted as legitimate. The second aspect has to do with its practices. Hurrell argues that organisations need to implement 'the values of participation, transparency, representation and accountability.'[113] Furthermore, organisations need to act fairly. As Roach argues '[l]egal institutions enjoy a high degree of legitimacy because of the strong perception of impartiality and fairness, or because most people tend to consider their judgement to be free from

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[107] Clark, *Legitimacy in International Society,* 191.

[108] J. Ralph and A. Gallagher, 'Legitimacy faultlines in international society: The responsibility to protect and prosecute after Libya', (2015) 41(3) *Review of International Studies* 553-573, 554. *See also* Clark, *Legitimacy in International Society,* 3 and J. Welsh, 'Norm Contestation and the Responsibility to Protect', (2013) 5(4) *Global Responsibility to Protect* 365-396, 382.

[109] I. Hurd, 'Legitimacy and Authority in International Politics', (1999) 53(2) *International Organisation* 379, 383. *See also,* S. C. Roach, *Politicizing the International Criminal Court: The Convergence of Powers, Ethics and the Law,* (Rowman and Littlefield, 2006), 3-4.

[110] Hurrell, 'Legitimacy and the use of force: can the circle be squared?', 16.

[111] Roach, *Politicizing the International Criminal Court*, 4.

[112] Roach, *Politicizing the International Criminal Court,* 86.

[113] Hurrell, 'Legitimacy and the use of force: can the circle be squared?', 19.

outside political influence.'[114] For example, the UN Security Council has been criticised for its lack of representation, it being dominated by the former great powers and failing to recognise the shift in the balance of power in global order by affording states such as India, Brazil or South Africa permanent seats and veto power. Previously, the IMF's legitimacy was queried because of what was perceived by some states to be an unfair distribution of weighted voting in favour of Western states when rising powers, such as China, were performing much better economically.[115] Concerns have also been raised regarding the politicisation of organisations whereby powerful nations are able to exercise influence in their favour and to the detriment of others, perpetuating structural inequalities in international society. Furthermore, an organisation needs to operate within the powers that are granted to it by states. Finally, a further aspect of legitimacy is effectiveness.[116] An international organisation needs to discharge its mandate effectively in order to be considered legitimate.

1.2.5. The Order versus Justice Debate in the English School

One of the main debates within the English School is a normative one about which type of global political order is the 'ideal one', and therefore in addition to the continuum providing descriptions of the different types of society, it also identifies different normative positions.[117] As Buzan explains in relation to pluralism and solidarism, '[b]oth positions express preferences about how things should be'.[118] Whilst this thesis does not contribute to normative debate or expressly take a position within it, understanding the normative views helps us when analysing and trying to understanding the BRICS states' positions towards the ICC and international criminal justice more generally, as will become evident throughout the course of the thesis.

Those who defend a pluralist governance structure for international society, including state-solidarists, do so on the basis the institution of sovereignty and the corollary norms prohibiting intervention in states' internal affairs provides order in anarchy.[119] They also argue that 'there can be a tension between order and individual justice',[120] and that the coercive implementation of cosmopolitan values by international society within a cosmopolitan-solidarist or world society

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[114] Roach (ed), *Governance, Order, and the International Criminal Court*, 229.
[115] N. Woods, 'Order, Justice, the IMF and the World Bank' in R. Foot, J. Gaddis and A. Hurrell, *Order and Justice in International Relations,* (OUP, 2003), 84.
[116] Hurrell, 'Legitimacy and the use of force: can the circle be squared?', 22.
[117] Bull explained that '[o]rder is not merely an actual or possibly condition or state of affairs in world politics, it is also very generally regarded as a value.' - Bull, *The Anarchical Society,* 74-75. *See also,* H. Bull, 'Order vs Justice in International Society', (1971) XIX(3) *Political Studies* 268-283, 269.
[118] Buzan, *An Introduction to the English School,* 84.
[119] In the remainder of this section the use of 'pluralist' refers to those who defend a pluralist governance framework, including state-solidarist.
[120] Newman, 'What prospects for common humanity in a divided world?, 38.

conception of global political order has the potential to threaten order among states.[121] This is because cosmopolitan progress undermines sovereignty which is the basis of order and stability in international society[122] and, further, that deferring to pluralist proscriptions is the most responsible way of managing a society of states.[123] Foot, Gaddis and Hurrell explain that '[f]or most of the twentieth century, states and international society depicted the relationship [between order and justice] as one of tension...[t]he pursuit of justice was seen as secondary, and often as a direct challenge to the maintenance of international order.'[124] Vincent said the pluralist norm of non--intervention places 'order between states before justice for individuals within them'[125] and similarly, Williams notes that, for pluralists, '[catastrophic breakdowns in international order cannot be countenanced in the name of an idea of justice that is contested and specific.'[126] This order versus justice framing was developed by Bull and is used throughout this thesis as a means of understanding the evolution of international society and the BRICS states' views.

Taking human rights as an example, the primary means through which the order versus justice debate has been theorised by English School scholars, pluralists argue the granting of rights to individuals beyond the state (i.e. through international human rights law which makes individuals subjects of law) is subversive of sovereignty on the basis that the state no longer retains absolute authority over citizens. Moreover, by making the protection of human rights a matter of legitimate concern for the international society it precipitates intervention in states' internal affairs which is contrary to the pluralist's and state-solidarist's belief in the absoluteness of sovereignty and is destabilising, in their view, or world order. As Wheeler explains, '[p]luralist international society theory is deeply suspicious of a doctrine of humanitarian intervention because it argues that attempts to realize it in practice are deeply subversive of interstate order.'[127] Furthermore, Buzan notes that 'any serious attempt to develop a world society (by advancing a universalist human rights law for example), will tend to undermine the states that are the foundation of international society.'[128] This argument was initially made by Bull. He expressed concern:

> [c]arried to its logical extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organised as a society of sovereign states. For if the rights of each man can be asserted on the world political stage

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[121] Jackson, *The Global Covenant,* 127. *See also,* C. Reus-Smit, 'Society, power, and ethics' in C. Reus-Smit (ed), *The Politics of International Law,* (CUP, 2004), 277.
[122] Buzan, *An Introduction to the English School,* 95. *See also,* Bull, *Justice in International Relations: 1983-4 Hagey Lectures,* 12.
[123] Buzan, *An Introduction to the English School,* 91.
[124] Foot, Gaddis, and Hurrell (eds), *Order and Justice in International Relations,* 1.
[125] R. J. Vincent, *Non Intervention and International Order,* cited in Dunne, *Inventing International Society,* 165.
[126] J. Williams, 'The International Society-World Society Distinction' in C Navari and D. M. Green, *Guide to the English School of International Studies,* (Wiley, 2014), 135.
[127] N. J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society,* (OUP, 2002), 309. *See also,* Buzan, *From International to World Society?,* 29.
[128] Buzan, *From International to World Society?*, 29.

> over and against the claims of his state, and his duties proclaimed irrespective of his position as a servant or citizen of that state, then the position of the state as a body sovereignty over its citizens, and entitled to command their obedience, has been subject to challenge, and the structure of the society of sovereign states has been placed in jeopardy.[129]

It is for this reason that Bull rejected the argument individuals should be subjects of international law and preferred the approach of Oppenheim to Grotius.[130] The point has also been made in relation to international criminal justice with Megret arguing the principle of individual criminal responsibility potentially 'contributes to the realization of Hedley Bull's prophecy that 'carried to its logical extreme' - surely something that the ICC purports to do - 'the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organised as a society of sovereign states.'[131] Bull also expressed a concern enforcing purportedly universal values that were not in fact such would undermine the state-based global political order.[132] He said '[t]he conflict between international order and demands for justice arises in those cases where there is no consensus, or no sufficiently overwhelming consensus, as to what justice involves' and he went on to argue that '[w]hen then, demands for justice are put forward in the absence of consensus within international society as what justice involves, the prospect is opened that the consensus that does exist about order or minimum coexistence will be undone.'[133] This is, in a sense, a recognition by Bull of the political limits of moral progress; as Hoffman explains, Bull 'was painfully aware not only of the gap between moral imperatives and political reality but also of the multiplicity of moral perspectives in the contemporary world.'[134] Furthermore, as Hurrell and Alderson explain:

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[129] Bull, *The Anarchical Society,* 152.

[130] H. Bull, 'The Grotian Conception of International Society' in H. Butterfield and M. Wight (eds), *Diplomatic Investigations. Essays in the Theory of International Politics,* (Allen and Unwin, 1966), 68-70. Bull argued that: '[f]or Oppenheim international society is composed of states, and only states possess rights and duties in international law. Individuals, in his view, may be regarded as objects of international law, as and when rights and duties are conferred upon them by international agreements.. .In Grotius' system, however, the members of international society are ultimately not states but individuals.. .The rights and duties of individuals may therefore be directly asserted in the transactions between states.. .It may be argued that of the Grotian conception in this event not merely that it is unworkable but that it is positively damaging to international order; that by imposing on society a strain which it cannot bear, it has the effect of undermining those structures of the system which might otherwise be secure. And it may be said of the pluralist doctrine that so far from constituting a disguised form of *Realpolitik*, it presents a set of prescriptions more conducive to the working of the international order than those of Grotians. ' *See also,* Buzan, *An Introduction to the English School,* 92.

[131] F. Megret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', (2001) 12(2) *European Journal of International Law* 247-268, 263.

[132] Bull, *Justice in International Relations: 1983-4 Hagey Lectures,* 13 - '[t]he promotion of human rights on a world scale, in a context in which there is no consensus as to their meaning and the priorities among them, carries the danger that it will be subversive of coexistence among states, on which the whole fabric of world order in our time depends... [t]he cosmopolitan society which is implied and presupposed in our talk of human rights exists only as an ideal, and we court great dangers if we allow ourselves to proceed as if it were a political and social framework already in place'. This was a concern shared by Vincent who explained that a 'human rights policy which, misjudging the extent of solidarity among states, sets out to improve the international order by enriching the quality of justice within states, might end by placing at hazard the minimal order already achieved' - R. J. Vincent, *Human Rights and International Relations,* (CUP, 1986), 70. *See also,* C. Reus-Smit, 'The Anarchical Society and Human Rights' for a thorough analysis of Hedley Bull's concern about human rights in international society.

[133] H. Bull, 'Order vs. Justice in International Society', (1971) XIX(3) *Political Studies* 269-283, 281-282.

[134] S. Hoffman, 'Hedley Bull and international society' in J.D.B. Miller and R.J. Vincent, *Order and Violence. Hedley Bull and International Relations,* (Clarendon Press, 1990), 21.

> [c]entral to Bull's analysis of international society was therefore the tension between inherent pluralist conceptions of international society and aspirations towards more solidarist schemes. From his early discussion in 'The Grotian Conception' to *The Hagey Lectures* there is an abiding concern with the disjuncture between the vaulting normative ambitions of contemporary international society and its precarious power - political, institutional and cultural foundations; between a legal order still built largely around mutual respect for each other's sovereignty and independence on the one hand and attempts to construct far reaching legal regimes that impinge heavily on the ways in which domestic societies are organised on the other. Despite the increased density of the rules, institutions, and organizations that make up international society, there is a continued awareness of the dangers of what Bull calls *premature global solidarism,* of placing too great a strain on the thin fabric of international society.[135]

It has been argued that human rights and state sovereignty can coexist without conflict and, in broader terms, the pursuit of cosmopolitan values can take place within the context of a society of states, as long as individuals are not granted rights beyond the state[136] and rights are not enforced from the outside by other states or international organisations. This is a state-solidarist position. The issue, however, is that this would potentially weaken human rights protection as it relies solely upon voluntary compliance with human rights standards by states with no external mechanism for guaranteeing enforcement. As Linklater and Suganami argue, '[t]he idea of territorial sovereignty - the cardinal principle of pluralist [as well as state-solidarist] international society - creates the obligation to refrain from intervening in others' internal affairs: what any one states regards as a serious violation of human rights must therefore go unpunished'.[137] Furthermore, they explain that: [t]he nature of the dilemma is well known: to maintain that sovereignty should never be breached is to abandon the victims of human rights to their fate; to argue that a state forfeits its sovereignty when it commits serious violations of human rights may open the floodgates to intervention whenever a state concludes the threshold between acceptable and unacceptable behaviour had been crossed.[138]

It is a fundamental concern of cosmopolitan-solidarists, that pluralism is unable to meet the pressing needs of the international society, including in relation to human rights protection.[139] The issue is therefore whether one attaches the primacy of right to the individual or to the state, which is arguably the division between state-solidarist international society and cosmopolitan-solidarist international society. Bull argued that the competing values of order and justice either have to be

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[135] Hurrell and Alderson, *Hedley Bull on International Society*, 15.
[136] Buzan, *An Introduction to the English School,* 83, 117.
[137] Linklater and Suganami, *The English School of International Relations,* 132.
[138] Linklater and Suganami, *The English School of International Relations,* 140.
[139] Hurrell, *On Global Order,* 297.

ordered in priority or have to be reconciled,[140] the latter of which he expressed preference for in his later writing on the basis of his opinion that order cannot be achieved without justice.[141] Many subsequent English School scholars have taken on this mantle and sought to find a way to get beyond the order versus justice impasse and to find a means of securing human rights protection without undermining sovereignty and other pluralist institutions, but at the same time harnessing the agency of the state. As Buzan explains:

> [m]uch of the debate around pluralism and solidarism is about how to find ways of reducing the tension between the needs and imperatives of states and the needs and imperatives of humankind...Most English School writers operate within this debate, taking the tension between the imperatives of order and justice as the core problem to be addressed'.[142]

This need to address concerns about the protection of order in the promotion of cosmopolitan values has been captured in various ways. Mayall describes the need for prudence on the basis that '[w]ithout prudence all visions of the future degenerate into mere utopia, with all its attendant dangers.'[143] Hurrell emphasises the need for 'pragmatism'[144] and, more recently, Ralph discusses the demand for 'pragmatic constructivism' as a means of pursuing cosmopolitan values in a global political order that continues to be dominated by states. This has arguably become even more important with the emergence of rising powers who fall very squarely within the state -solidarist camp and seek to defend its pluralist values and institutions as will be addressed in more detail in Chapter Three.

1.2.6. The Realist Critique of the English School's Claim to Progress

While realist thinking is incorporated in the English School, including informing its international system and pluralist international society conceptions of global political order, some realists would challenge the progressive thinking of the solidarist wing of the English School that focuses on cosmopolitan moral and institutional progress in international society. E. H. Carr was an early and leading critic of what he described as the utopian vision of international politics, a vision in which the role of state power and interests are marginalised in understanding and explaining the

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[140] Bull, *Justice in International Relations: 1983-4 Hagey Lectures,* 18. *See also,* Bull, 'Order vs Justice in International Society', 281.
[141] N. J. Wheeler and T. Dunne, 'Hedley Bull's Pluralism of the Intellect and Solidarism of the Will', (1996) 72(1) *International Affairs* 91-107, 100-101. *See also,* W. Bain, 'The Pluralist-Solidarist Debate in the English School' in C. Navari and D. M. Green (eds), *Guide to the English School of International Studies,* (Wiley, 2014), 161 - 'In the end, Bull voiced a preference for a middle way, as is a characteristic of English School scholarship, which charted a course between the "conservative" prioritization of order and the "revolutionary" prioritization of justice and, in doing so, sought refuge in the liberal belief that "order in international relations is best preserved by meeting the demands for justice, and that justice best realised in a context of order". '
[142] Buzan, *An Introduction to the English School,* 86. *See also,* Linklater and Suganami, *The English School of International Relations,* 133.
[143] Mayall, *World Politics: Progress and its Limits,* 156.
[144] Hurrell, *On Global Order,* 163.

motivations behind state actions and the construction of international society in favour of an understanding that focuses substantially or wholly on states moral beliefs and normative commitments.[145] Some would ascribe such utopian thinking to the cosmopolitan-solidarists within the English School.

Although few realists, including Carr,[146] would advance the view that beliefs and morals have no role in informing state actions and foreign policy decisions, they differ from more progressive thinkers in that they would argue that concerns about power, security and national interest are ultimately determinative factors in state decision-making and,[147] as Mearsheimer explains, history bears this out.[148] Realists would also argue that states use moral and normative rhetoric to justify decisions and actions that are, in reality, ultimately informed by concerns about power and taken in furtherance of the national interest. As Dunne and Hanson note, 'great realists of the early part of the twentieth century argued... exhortations to obey the universal moral law are simply techniques to hide the pursuit of narrow selfish interests.'[149] While it is accepted that states can and do act in such duplicitous ways, this is not always the case. The motivations of a state in taking a particular decision are complex and multifaceted but we can attempt to understand them by examining the justifications given by the state, particularly looking at them in the wider context of previous justifications for similar courses of action and a state's material actions.

On matters of international governance, realists would argue that universal principles are nothing more than 'unconscious reflexions of national policy based on a particular interpretation of national interest at a particular time' and, as Carr argues, 'international order' and 'international solidarity' 'will always be slogans of those who feel strong enough to impose them on others.'[150] Similarly, realists would argue that the construction of international law and its implementation is simply a manifestation of political power in that the content and structure of law, and its application in particular situations, is controlled by the most powerful nations. As Sylvest succinctly notes, '[f]or realists, law is a function of power'.[151] While it is accepted that power does inform the development of the law, as explained above, power is not only exercised by states in a self-interested manner but can be used to advance a moral and normative agenda within the law and in its implementation. It

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[145] E.H. Carr, *The Twenty Years' Crisis 1919-1939. An Introduction to the Study of International Relations,* (Macmillan Press, 1946), 8, 40.

[146] Carr, *The Twenty Years' Crisis 1919-1939,* 93 - '[w]e therefore return to the conclusion that any sound political thought must be based on elements of both utopia and reality.. .pure realism can offer nothing but a naked struggle for power which makes any kind of international society impossible.'

[147] W. C. Wohlforth, 'Realism' in C. Reus-Smit and D. Snidal (eds), *The Oxford Handbook of International Relations,* (OUP, 2008), 133,152-154

[148] J. Mearsheimer, 'E.H. Carr vs. Idealism: The Battle Rages On', (2005) 19(2) *International Relations* 139-152, 142-143.

[149] T. Dunne and M. Hanson, 'Human Rights and International Relations' in M. Goodhart, *Human Rights: Politics and Practice,* (OUP, 2016), 63. *See also*, Carr, *The Twenty Years' Crisis 1919-1939,* 88.

[150] Carr, *The Twenty Years' Crisis 1919-1939,* 87.

[151] C. Sylvest, 'Realism and international law: the challenge of John H. Herz', (2010) 2(3) *International Theory* 41-445, 411.

is argued in this thesis that the BRICS states' engagement with international criminal law and the ICC is driven by both moral and material concerns. The material being a desire to stake a claim to being great powers in international society and to be regarded as such by others, and the normative being a desire to support the development of international criminal law and its permanent enforcement mechanism in accordance with their vision of how international society should be governed. The contestation of criminal justice and the ICC by the BRICS states is principally informed by normative considerations rather than material, self-interested ones, as will be examined within the course of this thesis.

1.3 The Literature Review

This literature review is structured as follows: first there is an overview of the international relations literature on rising powers and international society, including work on the BRICS states, and this is then followed by a more specific review of the English School literature on the same topic for the purpose of situating the English School approach and contributions within the wider debate about rising powers and the BRICS. Second, there is a broad overview of the diverse literature on the ICC which highlights the contributions of both international lawyers and international relations scholars. This is then again followed by a more focused review of the English School literature on the Court in order to situate and highlight its specific contributions to the wider debates. Finally, the deficiencies and limitations of the English School literature are identified and it is then shown how this thesis proposes to contribute to addressing those deficiencies and limitations, thereby making an original contribution to knowledge.

1.3.1. The Literature on Rising Powers and the BRICS

1.3.1.1. *Research on Rising Powers and the BRICS outside of the English School*

There is a substantial and growing interest in rising powers in international law and international relations research which is reflected in the burgeoning academic literature on the topic. The existing international relations scholarship has so far primarily focussed on mapping the emergence of rising powers, including the BRICS states, and the related decline of Western influence in international affairs, particularly of the United States. It has also been concerned with theorising the effect of these developments on the future of international society, particularly the state power dynamics that exist within it.[152] The importance and relevance of this topic is demonstrated by the fact that in 2018

[152] *See*, for example, O. Stuenkel, *Post Western World,* (Polity Press, 2016); O. Stuenkel, *The BRICS and the Future of the Global Order, (*Lexington, 2015); J. Gaskarth (ed), *Rising Powers, Global Governance and Global Ethics,* (Routledge, 2015); S. J. Burki, *Rising Powers and Global Governance: Changes and Challenges for the World's Nations,* (Palgrave, 2017); F. Zakaria, *The Post-American World and*

there were two special issues of leading journals dedicated to examining the future of the liberal world order and the role of rising powers.[153]

The general consensus within the literature is that while rising powers have disrupted liberal hegemony and have contributed to establishing a multipolar global order, their ambitions are limited to reforming international society, not precipitating a revolution. For example, Ikenberry argues that rising powers are not seeking a 'post-liberal order'[154] and, moreover, that while 'liberal order is weakening…the more general organizing ideas and impulses of liberal internationalism run deep in world politics',[155] namely its open rule-based nature,[156] and because this has been accepted by rising powers it is resilient.[157] He further argues that '[i]nstead the pressures and incentives for change are motivated by a desire to rearrange the way roles and responsibilities are allocated in the system',[158] particularly to reflect the greater status and the voice sought by rising powers 'in the governance of the expanding liberal order.'[159] This argument has been made in respect of the BRICS states specifically.[160] It has been argued that rather than articulating an alternative vision of global political order or governance, the BRICS states prefer working to bring about reform incrementally from the inside, both in their interests and in the interests of emerging states generally.[161] Stephen, for example, argues that the BRICS 'pose a within-system challenge to global governance: they challenge its most liberal content, while becoming dependent on, and engaging with, its existing institutional structures.'[162] Furthermore, Newman and Zala have emphasised the BRICS states seek

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the Rise of the Rest, (Penguin, 2009); A. H. Amsden, *The Rise of "The Rest": Challenges to the West from Late Industrialising Economies,* (OUP, 2004); A. S. Alexandroff and A. F. Cooper, *Rising States, Rising Institutions: Challenges for Global Governance,* (Brookings Institution Press, 2010); T. V. Paul (ed), *Accommodating Rising Powers: Past, Present and Future,* (CUP, 2016); A. Acharya, *The End of American World Order,* (Polity Press, 2014); M. A. Smith, *Power in the Changing Global Order,* (Polity Press, 2012); G. J. Ikenberry, *Liberal Leviathan. The Origins, Crisis and Transformation of the American World Order,* (Princeton University Press, 2011); K. M. Kenkel and P. Cunliffe (eds), *Brazil as a Rising Power: Intervention norms and the contestation of global order,* (Routledge, 2016); J. Kirton and M. Larionova (eds), *BRICS and Global Governance,* (Routledge, 2018).

153 G. J. Ikenberry and S. Tang (eds), 'Special Issue: Rising Powers and International Order', (2018) 32(1) *Ethics and International Affairs* 1-117 and 'Ordering the World? Liberal Internationalism in Theory and Practice', (2018) 94(1) *International Affairs* 1-231.

154 G. J. Ikenberry, 'The Future of Liberal World Order', (2015) 16(3) *Japanese Journal of Political Science* 450-455, 452.

155 G. J. Ikenberry, 'The end of liberal international order?', (2015) 94(1) *International Affairs* 7-23, 8. *See also*, Ikenberry, *Liberal Leviathan,* 349.

156 G. J. Ikenberry, 'The Faces of Liberal Internationalism' in A. S. Alexandroff and A. F. Cooper (eds), *Rising States, Rising Institutions: Challenges for Global Governance,* (Brookings Institution Press, 2010), 43.

157 For a contrary view to the 'lock in' theory advanced by Ikenberry with which I disagree, see Layne, 'The US-Chinese power shift and the end of Pax Americana'.

158 Ikenberry, 'The Faces of Liberal Internationalism', 43.

159 Ikenberry, 'The end of the liberal international order?'. 19. *See also,* G. J. Ikenberry, 'Why the Liberal Order Will Survive', (2018) 32(1) *Ethics and International Affairs* 17-29, 18-21. *See also*, Buzan, 'China in International Society', 29; Q. Yaging, 'International Society as a Process: Institutions, Identities and China's Peaceful Rise', (2010) 3(2) *The Chinese Journal of International Politics* 129-153, 137. *See*, for example, Stuenkel, *The BRICS ad the Future of Global Order,* 156; Newman and Zala, 'Rising powers and order contestation', 881; N. Duggan, 'BRICS and the Evolution of a New Agenda Within Global Governance' in M. Rewizorski, *The European Union and the BRICS: Complex Relations in an Era of Global Governance,* (Springer, 2015), 21-22.

160 *See*, for example, Stuenkel, *The BRICS ad the Future of Global Order,* 156; Newman and Zala, 'Rising powers and order contestation', 881; N. Duggan, 'BRICS and the Evolution of a New Agenda Within Global Governance' in M. Rewizorski, *The European Union and the BRICS: Complex Relations in an Era of Global Governance,* (Springer, 2015), 21-22.

161 A. E. Abdenur, 'Rising Powers and International Security: the BRICS and the Syrian Conflict', (2016) 1(1) *Rising Powers Quarterly*109-133, 118. *See also*, Stuenkel, *Post Western World,* 60 and M. A. Glosny, 'China and the BRICs: A Real (but Limited) Partnership in a Unipolar World', (2010) 42(1) *Polity* 100-129, 116.

162 M. D. Stephen, 'Rising powers, global capitalism and liberal global governance: A historical materialist account of the

to reform global governance in order to make space for their participation in the norm-making and the decision-taking processes of global governance, particularly as the representatives of the non-Western world.[163] Similarly, Thakur argues, that the BRICS states coalesced around 'the common interest in checking US/Western power and imperialist impulses'.[164]

The literature's reflections on the future of global political order has, however, typically be done without a focus on rising power engagement with specific regimes and institutions in international society which allow us to draw empirically-backed conclusions about the impact of the shift in power balances on the future of global political order. The recent research in this area is limited to studies of the engagement of rising powers in discreet issue areas including particularly global economics, trade, development, climate change, and peace and security.[165] There have also been numerous studies looking at the engagement of BRICS states with the Responsibility to Protect which has demonstrated how these states have contested or sort to reform the norm.[166] This is part of a developing research agenda which is concerned with understanding non-Western agency in global order building which has, until recently, be largely overlooked in favour studying Western state contributions; as Acharya argues, there has been a 'general neglect of weaker actors, including non-Western ones, in the mainstream literature on global order'.[167] His most recent contribution to this area of research examines the involvement of non-Western states in the development of sovereignty, R2P and security matters.[168]

This literature remains deficient, however, in its consideration of the interaction of rising powers with international courts, including the ICC, as well as international criminal justice as an element of the global political order. By way of example, neither of the two special issues just mentioned considered international criminal justice within their discussions, and in the book, *BRICS and*

BRICS challenge', (2014) 20(4) *European Journal of International Relations* 912-938, 914.

[163] Newman and Zala, 'Rising powers and order contestation'.

[164] R. Thakur, 'How representative are the BRICS?', (2014) 35(10) *Third World Quarterly* 1791-1808, 1793.

[165] *See*, for example, J. Kirton and M. Larionova (eds), *BRICS and Global Governance,* (Routledge, 2018).

[166] *See*, for example, K. M, Kenkel and C.G. Stefan, 'Brazil and the Responsibility While Protecting Initiative: Norms and Timing of Diplomatic Support', (2016) 22(1) *Global Governance: A Review of Multilateralism and International Organizations* 41-58; C. Stefan, 'On Non-Western Norm Shapers: Brazil and the Responsibility while Protecting', (2017) 2(1) *European Journal of International Security* 88-110; M. Tourihno, O. Stuenkel and S. Brockmeier, '"Responsibility while Protecting": Reforming R2P Implementation', (2016) 30(1) *Global Society* 134-150; B. Moller, 'India and the responsibility to protect', (2017) 38(8) *Third World Quarterly* 1921-1934; A. Garwood-Gowers, 'China and the "Responsibility to Protect": The Implications of the Libyan Intervention', (2012) 2(2) *Asian Journal of International Law* 375-393; A. Garwood-Gowers, 'China's "Responsible Protection" Concept: Reinterpreting the Responsibility to Protect (R2P) and Military Intervention for Humanitarian Purposes', (2016) 6(1) *Asian Journal of International Law* 89-118; R. Zongze, 'Responsible Protection: Building a Safer World', (2012) *China International Studies* 19-41; K. Smith, 'South Africa and the Responsibility to Protect: from champion to sceptic', (2016) 30(3) *International Relations* 391-405; A. Beresford, 'A responsibility to protect Africa from the West? South Africa and NATO's intervention in Libya', (2015) 52(3) *International Politics* 288-304; V. Baranovsky and A. Mateiko, 'Responsibility to Protect: Russia's Approaches', (2016) 51(2) *Italian Journal of International Affairs* 49-69; D. Averre and L. Davies, 'Russia, humanitarian intervention and the Responsibility to Protect: the case of Syria', (2015) 91(4) *International Affairs* 813-834.

[167] Acharya, *Constructing Global Order,* 23.

[168] *See*, Acharya, *Constructing Global Order*.

Global Governance, published in 2018, there are similarly no chapters dedicated to looking at the BRICS engagement with international criminal justice or secondary institutions of international society, apart from a chapter on the New Development Bank. This thesis makes an original contribution to the rising power literature by examining the role of non-western states in global order building and the threat they pose to liberal international society through an assessment of the relationship between the BRICS states and the ICC, which is a new empirical case study.

1.3.1.2 *English School Research on Rising Powers and the BRICS*

The focus on the BRICS states is also a contribution to the English School literature. The English School has long been fascinated with the evolution of international society including how it grew from its European origins and where it has been subject to contestation, articulated in Bull's conception of 'The Revolt against the West'.[169] This referred to 'the struggle of non-European or non-Western states, peoples and political movements to challenge the dominant position of the Western nations in the international system'[170] and, more specifically, was about the fight for equality by non-Western, and particularly Third World states, and involved the fight against colonialism, primarily by South American and African states.[171] Bull was interested in understanding what affect this revolt had on international society[172] and he argued Western states responded by seeking to accommodate the demands in order to preserve international order.[173]

In his Hagey Lectures delivered in 1983, Bull spoke specifically about power shifting to emerging states such as China, India and Brazil, and the effect this could potentially have on international society but this research agenda was not substantially taken up within the English School; as Hurrell explained, '[l]ess commented on but equally central is the question of what has happened to the states and societies that were in the vanguard of the revolt against Western dominance – the developing world in general and especially large developing states such as China, India, and Brazil.'[174] Buzan has also noted that '[t]here are many gaps in the expansion story to be filled' and he refers to the 'rise of the rest' and 'the decline of the west' but without taking the discussion much further.[175] This study of the BRICS is therefore a continuation and revival of the English School's 'revolt' research agenda; as Hurrell has recently noted: 'the BRICS do not stand as some unique

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[169] H. Bull and A. Watson, *The Expansion of International Society,* (Clarendon Press, 1984).
[170] Bull, *Justice in International Relations: 1983-4 Hagey Lectures,* 19.
[171] Bull, *Justice in International Relations: 1983-4 Hagey Lectures,* 22-25. *See also*, Bull and Watson, *The Expansion of International Society,* 217-222.
[172] D. B. Miller, 'The Third World' in D.B. Miller and R.J. Vincent (eds), *Order and Violence. Hedley Bull and International Relations,* (Clarendon Press, 1990), 65.
[173] Bull, *Justice in International Relations: 1983-4 Hagey Lectures,* 32-33.
[174] Hurrell, *On Global Order,* 43.
[175] Buzan, *An Introduction to the English School,* 186.

and novel development, but rather as one element in a longer-term story.'[176]

Hurrell has significantly advanced this research agenda, arguing that the BRICs states are worth studying because they all seem to possess 'some capacity to contribute to the production of international order, regionally or globally; and some degree of internal cohesion and capacity for effective state action', 'share a belief in their entitlement to a more influential role in world affairs' and 'have all historically espoused conceptions of international order that challenged those of the liberal developed West', noting that the move 'from a traditional pluralist view of international society to one characterized by greater solidarism have undoubtedly represented a substantial challenge to countries such as Brazil, Russia, India and China.'[177] Hurrell has a co-edited collection with Foot and Gaddis which includes chapters on Russian, Chinese and Indian approaches to order and justice,[178] he has written on the impact of rising powers on global order, the role of emerging powers in climate change politics, the effect of the rising powers concept on the role of the Third World and Global South as a political force, how rising powers should engage with US hegemony, and on the effect global power shifts, including the rise of the BRICS states, have of conceptions of global justice.[179] In the last article here he argues that liberal international order is being 'pushed back in a broadly Westphalian direction'.[180] Most recently, Hurrell has defended continued study of the BRICS states on the basis that they continue to pose a challenge to liberal international order.[181]

Hurrell also briefly touches on the BRICS states in his monograph *On Global Order* which is essentially a detailed explanation of how international society has evolved in a solidarist and transnational direction as a consequence of globalisation, which he says involves the development of complex beyond the state governance, albeit it is one that neglects to address international criminal justice. It also examines the limits of such progress and Hurrell argues that we are 'not dealing with a vanished or vanishing Westphalian world…but rather with a world in which solidarist and cosmopolitan conceptions of governance coexist, often rather unhappily, with many

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[176] A. Hurrell, 'Beyond the BRICS: Power, Pluralism and the Future of Global Order', (2018) 32(1) *Ethics and International Affairs* 89-101, 93

[177] A. Hurrell, 'Hegemony, Liberalism and Global Order: What Space for Would-be Great Powers', (2006) 82(1) *International Affairs* 1-19, 1-4. In his piece Hurrell discusses only Brazil, Russia, India and China (BRIC), as South Africa was not added to the grouping until 2010.

[178] R. Foot, J. Gaddis and A. Hurrell, *Order and Justice in International Relations,* (OUP, 2003).

[179] A Hurrell, 'Global Liberalism in Harder Times', (2010) 6(1) *International Public Policy Review* 16-24; A. Hurrell, 'Rising powers and the emerging global order' in J. Baylis, S. Smith and P. Owens (eds), *The Globalization of World Politics: An Introduction to International Relations,* (OUP, 2013), 80-99; A. Hurrell and S. Sengupta, 'Emerging powers, North-South relations, global climate change politics', (2012) 88(3) *International Affairs* 453-484; A. Hurrell, 'Narratives of emergence: Rising powers and the end of the Third World', (2013) 33(2) *Brazilian Journal of Political Economy* 203-221; A. Hurrell, 'Hegemony, liberalism and global order'.

[180] A. Hurrell, 'Power Transitions, Global Justice and the Virtues of Pluralism', (2013) 27(2) *Ethics and International Affairs* 189-205, 193.

[181] A. Hurrell, 'Beyond the BRICS: Power, Pluralism and the Future of Global Order'.

aspects of the old pluralist order.'[182] In this context, Hurrell explains how 'Russia, India, and Brazil have continued to share a preference for relatively hard conceptions of national sovereignty and, although sometimes professing a liking for multilateralism, have tended to resist the effective delegation of authority to international bodies'[183] and he also notes how 'liberal interest-driven accounts of the problems of global governance all too often disguise or evade the deep conflict over values, underlying purposes, and ways of seeing the world.'[184] These are insights this thesis carries forward and explores in the context of international criminal justice.

Other scholars, including Ralph and Keating, have also raised the issue of the BRICS and rising powers in international society. Keating has noted 'emerging powers, including China, India and Brazil, have added a new set of interests and values into the governance process' and argues that '[t]o ignore difference over substantive values in an effort to construct a solidarist international society that entrenched cosmopolitan principles at the risk of alienating these emerging powers might impede an opportunity to strengthen the fabric of a vibrant pluralistic international society.'[185] In a very short contribution entitled, *Another Revolt Against the West*, Ralph identifies the BRICS phenomenon as something of interest to English School scholars, noting that it 'represents some kind of psychological awakening'.[186] Most recently, Newman examined the rise of the BRICS and their relationship with international society from an English School perspective, with a focus on the states' views on R2P. He concluded that the BRICS defend a pluralist vision of international society and are primarily concerned with 'the manner in which Western countries have promoted the principle' of R2P and, furthermore, that it 'raises tensions in relation to the question of how, and by whom, norms are diffused.'[187]

Newman picked up on this issue in his 2017 article co-authored with Zala. In this article Newman and Zala explain that the BRICS states defend a pluralist vision of international society and seek reforms to make its governance structures more representative of the shift in the balance of power away from the West. Their core argument, however, is that contestation of liberal international society by the BRICS 'is geared more towards contestation over representation than it is about contesting the actual norms that underpin the existing order.'[188] It is, they argue, procedural rather than substantive contestation. They conclude by noting that 'analysing the different approaches that various rising powers are currently taking in contesting the existing order will be an important

[182] Hurrell, *On Global Order*, 10.
[183] Hurrell, *On Global Order,* 292.
[184] Hurrell, *On Global Order,* 10.
[185] Keating, 'Pluralism and International Society', 101.
[186] J. Ralph, 'Another Revolt Against the West' in R. W. Murray, *System, Society and the World. Exploring the English School of International Relations,* (E-International Relations Publishing, 2015), 87.
[187] Newman, 'What prospects for common humanity in a divided world?, 44.
[188] Newman and Zala, 'Rising powers and order contestation', 871, 882.

analytical task in the years ahead',[189] and this is what this thesis does. It makes a contribution and differs from Newman and Zala's recent work by providing a thorough examination of the BRICS states' engagement with a particular aspect of liberal international society and identifying their criticisms of it and objections to it. This take us beyond the existing analysis which is pitched at a more general and superficial level.

1.3.2. The Existing Literature on the ICC

While there is a great amount of literature on the ICC, the vast majority of this is written by lawyers and from an international law perspective. As Ralph noted in 2007, there is a significant lack of research on the ICC within the discipline of international relations[190] and this still holds true today; the IR community has generally paid relatively little attention to the Court. This part of the chapter will provide an overview of the literature on the ICC with a focus on English School scholarship for the purpose identifying the English School's approach and contribution to the wider literature on the topic.

1.3.2.1 *Research on the ICC Outside of the English School*

The research on the ICC outside of the English School which is relevant the themes and issues raised in this thesis mainly comes from international lawyers, and particularly international criminal lawyers, but also from other IR theoretical perspectives. Sedat's contribution argues that the Court represents an uneasy revolution that 'has the potential to profoundly transform the landscape of international law' but at the same time is also constrained by classical aspects of it including 'traditional Westphalian notions of State sovereignty', and she offers a thorough, technical analysis of the Rome Statute regime to support her thesis.[191] Broomhall's book, *International Justice and the International Criminal Court,*[192] similarly provides a technical legal analysis of various elements of the Rome Statute including its approach to amnesties, its immunity rules and the Court's relationship with the Security Council. Moreover, like Sedat, Broomhall seeks to demonstrate how the tension between the Rome Statute's aspirations to promote justice is at times in tension and conflicts with the post-war Westphalian state system, particularly state sovereignty, and he argues this has the potential to hinder the implementation of international criminal law. He also identifies the politics of international law, including the continued influence of national interests, as likely to impact justice outcomes because the Court is wholly reliant on state cooperation to function; as

[189] Newman and Zala, 'Rising powers and order contestation', 882.
[190] Ralph, *Defending the Society of States,* 1.
[191] L. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium,* (Transnational, 2002).
[192] B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Role of Law,* (OUP, 2004).

Broomhall explains, 'the needs of justice will have to compete with other priorities in the decision-making of states.'[193] The work is in a sense an account of the political limits of international criminal law as implemented through the Rome Statute, an interest that this thesis shares. However, apart from a rather brief analysis of US opposition to the Court, Broomhall does not examine his claim with reference to state practice, thus his work remains at a theoretical level, although he does draw upon some occurrences in the history of international criminal justice to substantiate his arguments. This thesis goes a step further by examining how states have responded to some of the issues Broomhall identifies, to some extent empirically testing his prophecies. Further, there is a substantial literature that has grown from these early works that analyses the Rome Statute from a legal perspective, including the provisions concerning the ICC's relationship with the UN Security Council, complementarity, immunity, and aggression,[194] and also examines the history of its creation.[195]

There has also been work in international relations examining the creation of the ICC, particularly from a constructivist perspective. One contribution is Caroline Fehl's analysis of the construction of the Rome Statute regime entitled '*Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches'*[196]. While Fehl's article contains some interesting and useful contributions, its primary purpose is not empirical but rather to test the ability of rationalist and constructivist theories in explaining the evolution of the Court; it is focused on explaining *how* the ICC was designed and not *what happened* during the negotiations. More specifically, Fehl looks at the role of 'norm entrepreneurs' in the negotiations and how the 'logic of appropriateness' guided some states approaches to the discussions.[197] The relevance of the article is limited for this project on the basis that this thesis is concerned with understanding what happened during the negotiations, specifically the approaches and contributions of the BRICS states, and what that tells us about their views of international society and how it should be organised and governed. Kurt Mills and Alan Bloomfield in their article, 'African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm', examine from a constructivist perspective the evolution of the anti-impunity norm codified in Article 27 of the Rome Statute.

Another contribution to the literature in respect of the development of the ICC is Benjamin Schiff's monograph, *Building the International Criminal Court.*[198] Schiff uses a number of theoretical views including realism, institutionalism and constructivism, 'not as fully developed theories' but rather

[193] Broomhall, *International Justice and the International Criminal Court,* 185.
[194] *See*, for example, W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute',* (OUP, 2010).
[195] *See*, for example, B. Schiff, *Building the International Criminal Court,* (CUP, 2008).
[196] C. Fehl, '*Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches*', (2004) 10(3) *European Journal of International Relations* 357-394.
[197] Fehl, 'Explaining the International Criminal Court', 371-374.
[198] B. N. Schiff, *Building the International Criminal Court,* (CUP, 2012).

'to explain different aspects of an extremely complicated world'.[199] In the book, Schiff explores the evolution of the Court and in doing so identifies the challenges that it faced and the issues that arose such as the 'judicial-political dilemma', the 'justice-sovereignty' paradox, and the 'peace versus justice' debate. He argues that the Rome Statute 'represents the outer limits – as of 1998 – of an incomplete but very significant international consensus over international criminal justice' but that it also 'incorporates a broad range of elements that are not fully compatible with each other, and hence build frictions in the Court's operations',[200] which is something that this thesis also explores. Schiff also takes a cursory look at the Court's approach to its initial situations and examines the Court's relationship with states; Schiff makes some very limited observations about China and Russia's approach to the Court but its main focus, as with other works, it on the US's position on the Court. It should be noted, however, that Schiff's contribution is more an analysis of the Court as an institution, rather than about the interactions between the ICC and individual states, and in any event, its findings on the Court's relationship with particular states are now rather out of date given that it was published in 2008.

The IR literature has examined the engagement between specific states and the ICC, in addition to having analysed the Court's creation, structure and how it reconceptualises international society. Wippman's contribution to Reus-Smit's edited volume *The Politics of International Law* assesses the role that both politics, including national interests, and law play in the negotiation and constitution of the Rome Statute. More specifically, Wippman identifies the use of both legal and political argumentation by states in negotiations, focuses his attention on the negotiation of a number of key aspects of the Rome Statute, including the Court's relationship with the Security Council and complementarity and, like many other scholars, is particularly concerned with understanding the views and approach of the US. He does, however, very briefly touch upon the views of other states including India, Russia and China, as well as the NGO community.[201] In a more recent contribution to the literature, *Rough Justice: The International Criminal Court in a World of Power Politics,* David Bosco 'examines how the world's most serious attempt at achieving international criminal justice meshes with the realities of power politics' and it 'focuses in particular on the relationship between the ICC and states with global interests and influence', which he refers to as 'major powers'.[202] Bosco does not adopt an explicit or narrow theoretical perspective, and he acknowledges that '[i]ts theoretical ambitions are modest. It does not seek to test a general theory bit instead deploys existing theory to help understand and analyse the court's first decade. Its approach and historical'.[203] The book is largely realist in its theoretical approach, concerned with

[199] Schiff, *Building the International Criminal Court*, 4.
[200] Schiff, *Building the International Criminal Court*, 12.
[201] D. Wippman, 'The International Criminal Court' in C. Reus-Smit, *The Politics of International Law*, (CUP, 2004), 165-203.
[202] D. Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics*, (OUP, 2014), 1.
[203] Bosco, *Rough Justice*, 8.

the interests of major powers, but it draws on constructivist and institutional studies thinking. In this sense, it is closely aligned to the theoretical approach of this thesis and the approach of the English School more generally. More specifically, Bosco identifies how states have sought to marginalise and control the Court, or have accepted it, and he does so by analysing the major events in the Court's history, from early discussions about establishing a permanent international criminal court in the wake of the Nuremberg Trials, to the Rome Conference, and through to 2013 including, *inter alia,* the Sudan, Georgia and Libya interventions.

This existing scholarship is deficient, however, in that it fails to substantially engage with state contestation beyond the US and is particularly deficient in its analysis of the relationship between the Court and the BRICS countries. While there has been some research on the engagement between particular BRICS states with the ICC, mostly China, Russia and, more recently, South Africa, this is often in the context of, or combined with, wider studies, and are therefore more limited in detail,[204] such as those articles concerning the relationship between Africa and the ICC[205] or the Responsibility to Protect.[206] There are also some articles dedicated to assessing the engagement of BRICS states with the ICC but these are limited in detail and in scope,[207] and moreover, they focus on individual states and do not reflect upon the interactions between BRICS states on ICC issues, common positions they adopt or divergences in their approaches, and therefore do not address the relationship between the BRICS collectively and the ICC, something which this thesis achieves. Others articles are written from an international law perspective, particularly in the case of South Africa, and therefore fail to address in detail states' concerns about the ICC as an organisation and its practices.[208]

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[204] K. Mills and A. Bloomfield, 'African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm', (2017) 44(1) *Review of International Studies* 101-127; J. A. Grant and S. Hamilton, 'Norm dynamics and international organisations: South Africa in the African Union and the International Criminal Court', (2016) 54(2) *Commonwealth and Comparative Politics* 161- 185, 171-172.

[205] *See*, for example, K. Mills, 'Bashir is Dividing Us': Africa and the International Criminal Court', (2012) 34(2) *Human Rights Quarterly* 404-447; M. Ssenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', (2013) 13(2) *International Criminal Law Review* 385-428; L. Oette, 'Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond', (2010) 8(2) *Journal of International Criminal Justice* 346-364; C. Jalloh, D. Akande and M. du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', (2011) 4(1) *African Journal of Legal Studies* 5-50.

[206] Ralph and Gallagher, 'Legitimacy faultlines in international society'; K. Ainley, 'The Responsibility to Protect and the International Criminal Court: counteracting the crisis', (2015) 91(1) *International Affairs* 37-54.

[207] A. R. Saibaba, 'India and the International Criminal Court: Re-Invigorating and Re-Visiting the Non-Ratification Debate', (2011) 11 *ISIL Yearbook of International Humanitarian and Refugee Law* 189-214; U. Ramanathan, 'India and the ICC', (2005) 3(3) *Journal of International Criminal Justice* 627-634; L. Jianping and W. Zhixiang, 'China's Attitude Towards the ICC', (2005) 3(3) *Journal of International Criminal Justice* 608-620; Z. Dan, 'China, the International Criminal Court, and International Adjudication', (2014) 61(1) *Netherlands International Law Review* 43-67; B. B. Jia, 'China and the International Criminal Court: Current Situation', (2006) 10 *Singapore Yearbook of International Law* 1-11.

[208] *See*, for example, E. de Wet, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law', (2015) 13(5) *Journal of International Criminal Justice* 1049-1071; D. Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir Under South Africa and International Law. A Perspective from International Law', (2015) 13(5) *Journal of International Criminal Justice* 2017-1047.

For example, Kirsten Ainley identifies Russia and China's contestation of the ICC's intervention in Libya and their subsequent veto of a referral of the situation in Syria to the Court which she attributes to Russia's protection of Assad, 'China's reluctance to breach norms of state sovereignty' but, most importantly, 'shared beliefs about P3 abuses of R2P and the ICC', including regime change in Libya which 'stoked the embers of long-held suspicions over the trust-worthiness of western powers with neo-imperial proclivities'. She also notes that India shares such suspicions.[209] Mills and Bloomfield in their recent article examine from a constructivist perspective contestation of the anti-impunity norm by African states which includes some limited focus on South Africa and its objections to the way in which the ICC implements its anti-impunity agenda. However, in the constructivist tradition, and like Fehl's article, Bloomfield and Mills have an overtly theoretical objective in their work which is to correct the 'norm dynamics' approach developed in the constructivist literature with the development of their 'norm entrepreneur / antipreneur' theoretical framework. The thrust of the article is concerned with attempting to explain *how* resistance to the ICC's anti-impunity norms occurs generally and the effect of that resistance upon the Court and the anti-impunity norm; in this sense it can be said that the focus of the article is about theorising resistance rather providing deep empirical results. It does, however, make a number of empirical findings regarding the resistance of African states to the application of Article 27 of the Rome Statute but it is confined to that very narrow, albeit important, part of the Court's legal regime.

Andrew Grant and Spencer Hamilton, in their article entitled 'Norm dynamics and international organisations: South Africa in the African Union and the International Criminal Court',[210] which uses a constructivist theoretical framework, make a very important contribution to understanding South Africa's engagement with the ICC. Grant and Hamilton show how by better understanding South Africa's interests and identity, and particularly its numerous conflicting identities, we can better analyse and understand South Africa's approach and views on the ICC and its activities. The article does, however, have a different, more theoretical focus than this thesis in that it sought to demonstrate that:

> it is quite possible that a state may contain more than one distinctive normative orientation in relation to its membership in a particular IO. As a result, there is a high probability that this plurality of normative orientations will result in conflicting pronouncements from different branches of government…constructivism encourages scholars to incorporate analyses that seek to understand how different branches of government influence norm dynamics and foreign policy formulation. In the case of the ICC, the norm misalignment between South Africa and the IO in question is driven, in large measure, by the norm misalignment between the country's 'ruling party' that dominates the executive branch and its judiciary, supported by key voices in the wider community of human rights civil society

[209] Ainley, 'The Responsibility to Protect and the International Criminal Court', 40-41.
[210] Grant and Hamilton, 'Norm dynamics and international organisations'.

organisations.[211]

This approach has been utilised in this thesis, albeit within an English School theoretical tradition, to assist in interpreting and understanding the approaches and views of the BRICS states on the ICC. The article's empirical contributions in relation to South Africa's engagement with the ICC are, however, rather limited and leave scope for further, more detailed analysis to be conducted, although the limited empirical findings have been utilised herein.

In respect of Bosco's work, Kersten notes that his 'exposition is noticeably light on the relationship between the Court and other major powers, including Russia, China and India'.[212] Furthermore, where Bosco does consider the views and positions adopted by states such as China, Russia and India, his view is rather pessimistic and he fails to identify many of the positive contributions made by these states, as will be identified in this thesis. Moreover, the research does not consider the impact of state contestation on the Court's contribution to the advancing cosmopolitan solidarist progress. Instead it looks at the two matters separately. While Bosco explains how the ICC goes further than any other organisation, including international courts, in constraining power politics through the application of the rule of law, his work, unlike this thesis, is not concerned with understanding the ICC in its wider societal context and specifically, how the ICC contributes to cosmopolitan-solidarist progress and how this is received by states. While the research that has already been conducted is useful in many ways, and this thesis therefore draws upon it, it goes much further in presenting a more comprehensive understanding of the relationship between the ICC and the BRICS states.

In addition to the above and for the purpose of comprehensiveness, there are studies which examine the impact of the ICC's interventions on specific situation countries and analyse the ICC and the Rome Statute regime from a normative perspective. These studies utilise varying theoretical perspectives including peace studies, critical international relations studies and African area studies. Examples of this type of work include Mark Kersten's *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* which examines the 'peace vs justice' paradigm from a normative perspective as well as the impact of the ICC's interventions in Sudan, Uganda and Libya.[213] Similarly, Phil Clark, a leading scholar on criminal justice in Africa, has analysed the ICC's engagement in Uganda and the DRC.[214] Sarah Nouwen

[211] Grant and Hamilton, 'Norm dynamics and international organisations', 175.

[212] M. Kersten, "David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*", (2014) 12(4) *Journal of International Criminal Justice* 887-899, 888. D. Bosco, *Rough Justice. The International Court in a World of Power Politics,* (OUP, 2014).

[213] Kersten, M., *Justice in Conflict. The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace,* (2016, OUP).

[214] P. Clark, 'Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda', in C; Stahn

and Wouter Werner in their article, '*Monopolizing Global Justice. International Criminal Law as a Challenge to Human Diversity*', demonstrate how the ICC's interventions in Sudan and Uganda have marginalised alternative conceptions of justice.[215] While such studies are contextually relevant and assist in understanding the positions adopted and concerns expressed by the BRICS states, they differ from the thrust of this thesis in that they are principally concerned with normative analysis and understanding the effect of the ICC's operations, rather than offering an understanding of state views of the ICC.

1.3.2.2 *English School Research on the ICC*

The first thing to note is that there is very little research on international criminal justice generally in the English School tradition. Instead, the vast majority of the research on the evolution of global political order and, more specifically, the relationship between pluralism and solidarism, and order and justice, has been undertaken in relation to human rights, humanitarian intervention and, more recently, the Responsibility to Protect.[216] As Buzan notes, '[t]he main empirical issue at stake in this debate has been human rights, and particularly the question of humanitarian intervention'[217] and its relationship to the sovereignty and non-intervention primary institutions.[218] This is problematic because, as Buzan notes, the 'relentless focus on human rights by both pluralists and solidarists has kept the whole theory discussion in a much narrower frame than the general logic of the topic would allow' and, as a result, many other issues have been neglected.[219] International criminal justice is one of those neglected areas of study. Except for Ralph's 2007 book, *Defending the Society of States: Why America Opposes the International Criminal Court,* there has not been a sustained analysis of international criminal justice within the English School tradition. While many English School works make reference to international criminal law and international criminal courts, including citing them as evidence of the cosmopolitan-solidarist evolution of international society, these are brief and lack detail.[220] This thesis contributes to addressing this broad deficiency within the literature with its detailed focus on international criminal justice within the English School tradition.

In light of the above, it is unsurprising that there is also very little research that has been conducted

(ed), *The International Criminal Court and Complementarity: From Theory to Practice,* (CUP, 2011).

[215] S. M. H. Nouwen and W. G. Werner, 'Monopolizing Global Justice. International Criminal Law as a Challenge to Human Diversity', (2015) 13(1) *Journal of International Criminal Justice* 157-176.

[216] *See*, for example, Reus-Smit, 'The Anarchical Society and Human Rights'.

[217] Buzan, *An Introduction to the English School,* 170.

[218] Buzan, *An Introduction to the English School,* 140. See also, Zhang, 'Pluralism, solidarism and the yin-yang of international society', 96 and Wheeler, *Saving Strangers,* 11.

[219] Buzan, *From International to World Society?,* 45.

[220] *See*, for example, Linklater and Suganami, *The English School of International Relations,* 141, 180; Hurrell, *On Global Order,* 146-147.

on the ICC in the English School tradition. The primary focus of that research is on examining the nature of the ICC as a secondary institution and what it tells us about the status and evolution of the global political order. Ralph's 2005 article on the ICC, a forerunner to his monograph on the subject, considers the extent to which the ICC should be considered an organisation of world society and concludes that whilst 'the Court can theoretically transcend the state system and the society of states' and 'helps to legally constitute a world society of humankind' on the basis of the Prosecutor's *proprio motu* powers, it should nevertheless be regarded as an 'evolutionary' rather than a 'revolutionary' organisation, caught in between international and world society. This is based on the centrality of the complementarity principle in the Rome Statute and the Court's relationship with the Security Council.[221]

Ralph's book, *Defending the Society of States,* takes this argument forward and is the most sustained analysis of the ICC in the English School tradition.[222] The central argument is that the Rome Statute helps to constitute a Kantian world society by establishing criminal justice as a primary institution and the ICC as an organisation. In reaching the conclusion, Ralph examines how the development of international criminal justice and the marginalisation of state consent in the making of customary international law has contributed to constituting Kantian world society but the central contribution is an explanation of how the Rome Statute furthers this process. Ralph argues it does so by 'setting up a system of justice that is independent of the society of states' and he points to the defining of the core crimes and the 'provision of a prosecutor that can act without the authorisation of the UN Security Council' in support of the argument. The book also explains how the Court's revolutionary potential is constrained by the continuing role of state consent with respect to its jurisdiction and that the complementarity principle reflects the Court's Kantian nature on the basis states give up their sovereignty to the Court by becoming States Parties but are still expected to be the agents of humanity by shouldering the primary responsibility for investigating and prosecuting crimes under the Court's jurisdiction, the ICC being a court of last resort. Whilst Ralph's work recognises the function of institutions in constituting global political order and acknowledges that they can be used to distinguish different types of society, it does not focus on examining how the Rome Statute reconstitutes primary institutions in a more solidarist, cosmopolitan form. It also does not address how the ICC's practices contribute to that process of reconstitution primarily because at the time of writing, pre-2007, the ICC had not done any work which could be analysed in such a way. In this sense Ralph's work is both limited in its scope and out of date. The thesis seeks to address those deficiencies and takes Ralph's work forward, particularly adopting and employing Knudson's theoretical approach, as is discussed below.

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[221] Ralph, 'International society, the International Criminal Court and American foreign policy', 28.
[222] Ralph, *Defending the Society of States*.

Two other works on the ICC which are closely aligned with the English School tradition are a monograph by Steven Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics and Law*,[223] and an edited collection produced by the same author, *Governance, Order, and the International Criminal Court*.[224] In *Politicizing the International Criminal Court,* which is seemingly a work of political theory as opposed to an analysis of the ICC as an institution, Roach's primary empirical contribution is interrogating the political nature of the ICC in the context of a global order in which law, ethics and power are enmeshed, and one of his core arguments is that the Court needs to be political in its activities 'to counter external attempts to politicize it'. Moreover, Roach tentatively attempts to portray the ICC as a cosmopolitan institution of world society which contributes to the reconstruction of international society by drawing on the scholarship of Buzan. He fails to do so in any comprehensive manner, however, instead narrowly focussing his attention on the Court's approach to particular crimes and complementarity, from which he concludes that the ICC is a form of 'weak cosmopolitanism'. *Governance, Order, and the International Criminal Court,* published in 2009, picks up on this idea of the cosmopolitan nature of the ICC and how it contributes to constructing international society, and is particularly concerned with advancing an understanding of how this process is affected by *realpolitik*. The diverse collection of essays speak to different degrees to this overriding concern, one that is shared with this thesis, from a variety of different perspectives, some of which are more empirically focused than others. The contributions by Ralph and Franceschet makes the greatest strides towards grappling with the problematique proposed by Roach, and are most relevant to this thesis.

Firstly, drawing on his earlier work, Ralph explains how international criminal justice evolved as a primary institution of international society, arguing 'its institutionalization both responds to, and helps to reaffirm, a cosmopolitan consciousness based on the idea of humanity',[225] and briefly surveys the ICC's contribution to this development. Ralph goes on to argue the Court 'should be conceived as an evolving part of a Kantian world society',[226] straddling state and non-state conceptions of global political order. He then identifies political limits to its cosmopolitan aspirations, including through its relationship with the Security Council and with a specific focus on US opposition to the Court. Similarly, Franceschet explains how the ICC contributed to the cosmopolitanisation of international law and, therefore, to the constitutionalisation of international society. His chapter does not, however, extend to assessing the Court's impact on other primary institutions, such as diplomacy or sovereignty. Franceschet is also interested in understanding the

[223] Roach, *Politicizing the International Criminal Court*.
[224] Roach (ed), *Governance, Order, and the International Criminal Court*.
[225] Ralph, 'Anarchy is What Criminal Lawyers Make of It', 136.
[226] Ralph, 'Anarchy is What Criminal Lawyers Make of It', 146.

support and resistance for the change he identifies among states but, like Ralph, his analysis of resistance is confined to the US. Neither of these works consider the practice of the ICC as a contribution to cosmopolitan progress.

In addition to examining the Rome Statute legal regime, English School scholars have also looked at the relationship between the ICC and states. The focus of Ralph's monograph, consistent with all other works on the ICC, is the US's position and engagement with the Court. Ralph has commented that China and India share the US's concern about the Court threatening national sovereignty and in a more recent contribution, Ralph and Gallagher briefly identify the BRICS' backlash against the ICC's intervention in Libya in 2011.[227] However, as is evident, there is very little consideration of the relationship between the ICC and rising powers, specifically, the BRICS states in the English School tradition, as is the case with other international relationship scholarship, as identified above, and addressing this deficiency in the existing literature is one of the main contributions of this thesis.

1.3.2.3 *The English School and the Study of Secondary Institutions*

In addition to this thesis' primary empirical focus on understanding the relationship between the ICC and the BRICS states, it also seeks to address the lack of concern in existing English School scholarship for the role of secondary institutions in international society and, more specifically, how they contribute to the evolution of that international society. The literature on this specific issue is therefore explored.

While the concept of secondary institutions has been raised, the literature has been almost wholly focussed on primary institutions and the associated norms, rules and principles.[228] As Buzan notes, the place and role of transnational units within 'increasing degrees of solidarism...have not really been fully explored in English School writing'[229] on the basis that they have typically been viewed as of greater concern to liberal internationalist scholarship.[230] Moreover, Spandler argues that 'the School has failed to clarify the role of secondary institutions such as international organisations and regimes as autonomous objects of analysis'[231] and, similarly, Parrat notes that 'there is often a tendency for scholars in the tradition to pay limited attention to international organisations as objects of study'.[232] Buzan has noted that the English School neglect of the EU, an example of 'advanced solidarism', is 'nothing short of astonishing'.[233] Very tellingly, in the most recent

[227] Ralph and Gallagher, 'Legitimacy fautlines in international society'.
[228] *See*, Holsti, *Taming the Sovereigns*.
[229] Buzan, *From International to World Society?*, 51.
[230] Buzan, *An Introduction to the English School*, 30.
[231] Spandler, 'The political international society', 602.
[232] Parrat, 'Changing before our Eyes and Slipping between our Fingers', 2.
[233] Buzan, *An Introduction to the English School*, 58.

contribution to the English School, *The Anarchical Society at 40,* published in August 2017, there is no engagement with international criminal justice or the role of international organisations.[234]

This is likely the result of Bull downplaying the importance of international organisations in *The Anarchical Society*, the English School's canonical text,[235] and Wight's assertion that their importance is overrated.[236] It is also the result of continued failure within the School to properly address the concept of 'world society' and its relationship with international society.[237] In this sense, the English School has struggled to break out of a vision of society consisting solely of states and as such its analysis is constrained by this paradigm.[238] This is highly detrimental to the School's contribution to international relations theory and its analytical potential, given the diverse range of actors that now exist in international society,[239] particularly as compared to the time at which Wight and Bull were writing. As Buzan explains, 'providers of world order are now not just states, but states plus the whole array of IGOs and INGOs that provide and support global governance…history has moved on, and the sources of international order have evolved substantially since Bull was observing the international system.'[240] Furthermore, Knudson argues that we should not confine ourselves to thinking about purely state-based society on the basis '[c]osmopolitan solidarism as rights and duties of the individual under international law is already a fact and so is the move to collective enforcement based on international organizations and international criminal jurisdiction'.[241] Moreover, international organisations, and particularly international courts, exercise substantial power and authority *vis-à-vis* states in implementing cosmopolitan values, such as criminal justice and human rights, limiting state control more than if such values are applied voluntarily or through state pressure, and as such international organisations pose the most significant obstacles to reconciling order and justice, and are thus deserving of sustained analysis in the English School tradition.

Buzan has attempted to address this deficiency within his work by opening up a research agenda on world society and its relationship with international society[242] and, more recently, by expressly addressing the relationship between primary and secondary institutions, a research agenda

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234 Suganami, Carr and Humphrey's (eds), *The Anarchical Society at 40: Contemporary Challenges and Prospects*.
235 Bull, *The Anarchical Society,* xiv. Bull saw international society as being state-based with transnational actors falling into the realm of world society, to which he directed little attention given his view that 'it only exists as an ideal, not as a reality' (p.13) and that they did not yet threaten historical primary of the states-system and international society (p.270-3, 276-81). *See also*, T. B. Knudsen, 'Master Institutions of International Society'.
236 M. Wight, *Power Politics*, (H. Bull and C. Holbraad (eds), Penguin, 1978), 216.
237 Y. A. Stivachtis and A. McKeil, 'Conceptualizing world society', (2018) 55(1) *International Politics* 1-10.
238 As Buzan notes, within the English School 'there is not much of the liberal enthusiasm for giving practical priority to global civil society, and much more commitment to working through states.' – Buzan, *An Introduction to the English School*, 30.
239 Tim Dunne has suggested '[i]t is time that the English School jettisoned the ontological primary is (sic) attaches to the state' – T. Dunne, 'New thinking on international society', (2001) 3(2) *British Journal of Politics and International Relations* 223-244, 227.
240 B. Buzan, *From International to World Society?,* 96.
241 Knudsen, 'Solidarism, pluralism and fundamental institutional change', 109.
242 Buzan, *From International to World Society?,* 27-62.

established but not taken up by Bull.[243] Buzan has been criticised, however, for his underdeveloped and inconsistent reflections on these issues[244] and, as a result, there have been more recent attempts to address the continuing deficiencies within the literature.[245] Knudson articulates an understanding of the relationship between primary and secondary institutions which goes beyond that put forward by Bull and Buzan.[246] He argues that international organisations contribute to reconstituting the primary institutions of international society, like sovereignty,[247] stating that international organisations are 'the most important frameworks for the reproduction and change of fundamental institutions'.[248] Moreover, he argues international organisations can contribute to the cosmopolitan evolution of international society[249] and this supports his position that it is possible to think beyond a narrow, state-centric conception of solidarism and progress towards cosmopolitan-solidarism.[250] Spandler also takes up this mantle, noting that '[w]ith a view to explaining institutional change…it has to be studied more intensively how secondary institutions relate to primary institutions in order to determine their respective roles in institutional change'[251] and he emphasises the role of secondary institutions in constituting primary ones and, more specifically, he argues primary institutions can be reproduced by international organisations or amended by them.[252]

It is also emphasised how states play a mediating role in the reconceptualisation of primary institutions of international society, either supporting or disrupting that process.[253] Moreover, identifying views of states can provide an indication as to the level of support for a particular development. As Keating argues, '[i]n contemplating the future balance between a more pluralist or solidarist international society, attention to the practice of individual states is of critical importance', especially those states that have the power to influence change in society, because 'state practice provides the clearest reading on the acceptability and meaning of these solidarist principles'.[254]

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[243] Buzan, *An Introduction to the English School,* - arguing that primary institutions are supported and operationalised by, but also constrain, secondary institutions and he further explains that secondary institutions have the necessary agency 'to implement and defend universal rights.' He also notes that primary institutions are durable but not fixed, and can evolve with the changing practices of states.
[244] K. Spandler, 'The political international society', 607.
[245] *See* Special Issue of International Politics, 'Conceptualizing World Society', (2018) 55(1) *International Politics* 1-140.
[246] C.Navari, 'Primary and secondary institutions: Quo vadit', in in P. Wilson (ed), 'Review Symposium – The English School in retrospect and prospect: Barry Buzan's *An Introduction to the English School of International Relations: The Societal Approach*', (2016) 51(1) *Cooperation and Conflict* 94-136, 123.
[247] *See*, C. Navari, 'Primary and secondary institutions: Quo vadit', 125.
[248] Knudsen, 'Master Institutions of International Society', 34. *See also*, Knudsen, 'Solidarism, pluralism and fundamental institutional change'.
[249] Knudsen, 'Solidarism, pluralism and fundamental institutional change', 107; Knudsen, 'Master Institutions of International Society', 19, 26-27.
[250] T. B. Knudsen, 'Solidarism, pluralism and fundamental institutional change', 107.
[251] Spandler, 'The political international society', 603.
[252] Spandler, 'The political international society'. *See also*, C. F. Parrat, 'Changing before our Eyes and Slipping between our Fingers', 2 – '[i]nternational organisations influence how, and whether, primary institutions emerge, develop and play out. This means that international organisations, although created by states, subsequently become determinants of primary institutions.'
[253] Spandler, 'The political international society', 615-616.
[254] T. Keating, 'Pluralism and International Society' in R. W. Murray, *System, Society and the World. Exploring the English School of International Relations,* (E-International Relations Publishing, 2015), 101.

However, while Knudson and others have offered a theory or 'conceptualisation' of change in international society[255] from pluralism to solidarism, there is a distinct lack of empirical work. For example, in developing his theoretical framework Knudson only discusses briefly and quite superficially the shift towards limited and conditional sovereignty as a result of the evolution of international human rights and criminal justice, including the creation of the ICC, as evidence of this development.[256] Furthermore, he only mentions in passing how the Rome Statute reflects the evolution of international society along solidarist lines and hints at contestation of the ICC in the form of the 'African critique'.[257] Similarly, apart from a short, half-page discussion about The European Political Cooperation and a few passing references to other international organisations, including the UN, Spandler's contribution is also confined to theorising institutional change.

Some more detailed empirical studies have been undertaken but these are very limited in number. Parratt has utilised the theoretical framework developed by Knudson to examine UN reform identifying how the primary institutions of sovereignty, diplomacy, equality of peoples, and great power management have shaped debates on the reform of the Security Council and the Human Rights Council. She concludes that the defence of primary institutions by states in the context of debates on UN reform, which she refers to as the 'pluralist backlash', has hindered reform and reproduced, or 'locked in', primary institutions of pluralist international society.[258] Brutsch's research 'examines the interplay between intergovernmental organisations (IGO) and the 'master institutions' of the anarchical society'.[259] It 'focuses on the IMF as an institution and seeks to show how 'secondary' institutions like the IMF affect the relations between the members and select stakeholders of the anarchical society.'[260] Most recently, Newman and Zala recognised the need to engage with the issue of the contestation of secondary institutions of international society 'such as the cosmopolitan and operating principles of international organisations' on the basis of their understanding that rising powers are contesting the way in which global governance operates more so than the solidarist principles that underpin it. However, whilst they rightly identify this as an important issue that requires further research, they do not go on to explore the issue with respect to a particular organisation, focusing instead upon the BRICS' general views on global governance.[261]

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[255] Knudsen, 'Master Institutions of International Society', 16.

[256] Knudsen, 'Solidarism, pluralism and fundamental institutional change', 107; Knudsen, 'Master Institutions of International Society', 26-27.

[257] Knudsen, 'Solidarism, pluralism and fundamental institutional change', 108.

[258] C. F. Parrat, 'The Pluralist International Society: Solidarist renegotiation and pluralist backlash', (Working Paper 2013:6), pp.15-16. *See also*, C. F. Parrat, 'International Organization in International Society: UN Reform from an English School Perspective', (2014) 5(2) *Journal of Information and Organizational Sciences* 7-21 and Parrat, 'Changing before our Eyes and Slipping between our Fingers'.

[259] C. Brutsch, 'Technocratic manager, imperial agent or diplomatic champion? The IMF in the anarchical society', (2014) 40(2) *Review of International Studies* 207-266, 207.

[260] C. Brutsch, 'Technocratic manager, imperial agent or diplomatic champion?, 210.

[261] Newman and Zala, 'Rising powers and order contestation', 872.

Therefore while Knudson, Spandler and others have articulated an evolving and exciting new research agenda within the English School, which gives much greater recognition to the role of international organisations, further empirical research is needed to take it forward, something Knudson acknowledges.[262] Buzan also notes that understanding the prospects for the evolution of a cosmopolitan-solidarist society, or 'hybrid forms of international/world society', 'should be a key point of enquiry and debate' for the English School[263] and Buranelli argues establishing the relationship between primary and secondary institutions in international society is an important new research agenda for the English School.[264] The validity and importance of this research agenda is further evidenced by the very recent publication of an edited collection on the topic of international organisations in international society.[265]

This thesis makes a contribution to this evolving research agenda by providing an original empirical case study in the form of an analysis of the ICC's contribution to the reconstituting of the pluralist primary institutions of international society, through both the creation of the Rome Statute which established the Court and the Court's subsequent practice. It also examines the intervention of the BRICS states in that process by looking at their relationship and engagement with the Court from its inception to date. The particular focus on the BRICS states, as opposed to any other group, is also a contribution to the ICC and international criminal justice literatures, given its almost exclusive focus on the United States to date, as well as a contribution to the rising powers literature, both within and outside of the English School, as will be considered shortly.

1.3.3 The Positioning of this Research Project

This thesis draws on all of the above scholarship but principally builds upon Ralph's and Bosco's empirical work. It advances it by adopting and taking forward Knudson's new research agenda and approach, by examining how the ICC, as a secondary institution, contributes to reconstituting the pluralist primary institutions of international society, and therefore advances cosmopolitan progress in international society. It also examines how the ICC has contributed to establishing criminal justice as a new primary institution. Furthermore, the thesis examines how states have supported and contested this process. However, whereas the existing scholarship is largely confined to

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[262] Knudsen, 'Solidarism, pluralism and fundamental institutional change', 105.

[263] B. Buzan, 'Taking the English School forward' in P. Wilson (ed), 'Review Symposium – The English School in retrospect and prospect: Barry Buzan's *An Introduction to the English School of International Relations: The Societal Approach*', (2016) 51(1) *Cooperation and Conflict* 94-136, 129-130.

[264] F. C. Buranelli, 'The State of the Art of the English School' in R. W. Murray, *System, Society and the World. Exploring the English School of International Relations,* (E-International Relations Publishing, 2015), 12.

[265] T. B. Knudsen and C. Navari (eds), *International Organization in the Anarchical Society. The Institutional Structure of World Order,* (Palgrave, 2019). Due to the very recent publication of this text it has not been possible to review it and incorporate it into the thesis. However, it should be noted that there is no contribution on the topic of the ICC or the BRICS states.

examining US opposition to the ICC, this thesis examines the engagement between the ICC and the BRICS, giving a more thorough understanding of the acceptance or contestation of cosmopolitan solidarist progress in society and the obstacles to such progress. The examination of the relationship between the ICC and the BRICS states represents an original contribution to the existing literature.

1.4. Summary of Contribution

In summation, the contributions of this thesis are outlined below:

(i) it addresses the lack of focus on the views and engagement of rising powers with specific aspects of liberal international society for the purpose of evaluating the threat they pose to its sustainability, as identified by Duncombe and Dunne, by closely examining the relationship between the BRICS states, as the representatives of rising powers, and international criminal justice, including its permanent enforcement mechanism, the ICC;

(ii) in doing the above, the research makes a contribution to the international criminal justice and ICC literatures which are currently lacking in detailed accounts of states ' engagement with the international criminal law framework and its permanent enforcement mechanism beyond the US and other non-Western powers;

(iii) it makes a contribution to rising powers literature on the basis that there has not been to date any detailed analysis of the engagement between rising powers and international criminal law or the ICC, and there has been only limited scholarly writings on rising powers' engagement with international organisations and global order building more generally;

(iv) it provides a new empirical case study to advance an evolving English School research agenda, driven by Knudson and others, which is concerned with interrogating the relationship between primary and secondary institutions in international society, particularly how secondary institutions reconstitute primary ones in the process of societal evolution and the role that states play in that process;

(v) it advances the English School's renewed 'expansion' research agenda with its focus on the BRICS states in international society and their contestation of cosmopolitan progress which has been identified as an issue on various occasions but without significant examination; and

(vi) finally, it makes a contribution to interdisciplinary scholarship with its genuine and detailed use of both international relations and international law sources.

CHAPTER TWO

THE EVOLUTION OF LIBERAL INTERNATIONAL SOCIETY: SOLIDARIST PROGRESS AND PLURALIST LIMITS

2.1. Introduction

The previous chapter outlined the English School theoretical framework used in this thesis. It explained how global political order evolves, including the shift from pluralist to solidarist international society, and noted that this encompasses cosmopolitan progress and the shift towards a supranationalised global governance architecture increasingly resembling world society. It also highlighted the issues and challenges the process creates, specifically the conflict between, and the challenge involved in reconciling, the values of order and justice within international society.

The purpose of this chapter is to add some empirical flesh to the theoretical bones, charting the evolution of modern liberal international society from its pluralist origins to its solidarist state, and highlighting some of the key developments in that process. It begins by examining the post-World War II political settlement and the mainly pluralist governance framework that was established, including the creation of the United Nations (UN). The concept of cosmopolitan- solidarist progress is then introduced in its historical context and this is followed by a detailed analysis of its main features. This section of the chapter begins with an analysis of the supranationalisation and juridification of international society. This is followed by an examination of the cosmopolitan aspects of such progress which includes the rise of the individual in international politics and law, and the evolution of international criminal justice as a primary institution of international society.

Most importantly, this section of the chapter identifies the impact of cosmopolitan progress on pluralist primary institutions, namely sovereignty, multilateralism, diplomacy, international law, and war. It is argued the cosmopolitan solidarist reconstitution of pluralist primary institutions, such as the limiting of sovereignty, the development of more intrusive international legal rules and the marginalisation of diplomacy by law, seeks to promote the value of justice alongside that of order, and in doing so challenges the governance framework intended to promote stability and order in society. It is also argued that the shift from horizontal, inter-state governance to a hybrid governance framework compromising both states and increasingly powerful international organisations, where politics interacts uncomfortably with law, has resulted in an authority and legitimacy crisis for society. There is a distinct lack of consensus as to how society should be governed, who should exercise control as between states and international organisations, and how cosmopolitan values

should be implemented. This has had a detrimental impact on the effective protection of human rights and the implementation of international criminal justice. Moreover, it is shown that there is a divergence of opinion about the most appropriate approach to transitional justice. These issues will be explored in this chapter and then further examined throughout this thesis, specifically in relation to the evolution of the international criminal law framework and the creation of the ICC.

Importantly, it should be noted that this chapter does not intend to present a comprehensive examination of the evolution of international society, exploring all of its nuances, inconsistencies and challenges. There is not the space for it and such an approach is not integral to the aim of this thesis. Rather, the chapter seeks to present a macro-narrative, charting the general trajectory of the evolution of liberal international society and identifying its core components which, as will be demonstrated in the course of this thesis, became the sites of contestation of the BRICS states.

2.2. The Western Origins Liberal International Society

2.2.1. Liberal Ascendency and the Post-World War Two Settlement

There have been substantial efforts and important progress made towards realising a liberal vision of international society over the last two centuries,[1] which Ikenberry refers to as the 'liberal ascendency'.[2] While there were important developments in the early part of the twentieth century, the defeat of fascism at the end of World War Two ushered in a new world order. The United States assumed the role as the world's superpower and hegemon,[3] and together with its European[4] and other democratic allies set about constructing an international order based upon their shared liberal values and ideals.[5] The global political order that was established has been described as a 'liberal hegemonic order',[6] 'American-led liberal hegemonic order' and *'Pax Americana'*.[7] Ultimately, as Ikenberry argues, 'liberal international order was designed and built in the West.'[8]

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[1] G. J. Ikenberry, 'The Future of Multilateralism: Governing the World in a Post-Hegemonic Era', (2015) 16(3) *Japanese Journal of Political Science* 399-413, 400. *See also,* C. Reus-Smit, 'Society, power, and ethics' in C. Reus-Smit (ed), *The Politics of International Law,* (CUP, 2004), 285.

[2] G. J. Ikenberry, 'The logic of order: Westphalia, liberalism, and the evolution of the international order in the modern era', in G. J. Ikenberry (ed), *Power, Order and Change in World Politics,* (CUP, 2014), 91 and 100.

[3] I. Clark, *Hegemony in International Society,* (OUP, 2011), 123, 125-126

[4] O. W^ver, 'A Post-Western Europe: Strange Identities in a Less Liberal World Order', (2018) 32(1) *Ethics and International Affairs* 75-88, 75-76

[5] Ikenberry, 'The Future of Multilateralism', 407; A. Knight, 'US Hegemony' in T. G. Weiss and R. Wilkinson (eds), *International Organization and Global Governance,* (Routledge, 2014), 300; G. J. Ikenberry, 'Liberalism and empire: logics of order in the American unipolar age', (2004) 30(4) *Review of International Studies* 609-630, 620; G. J. Ikenberry, 'Power and liberal order: America's postwar world order in transition', (2005) 5(2) *International Relations of the Asia-Pacific* 133-152.

[6] G. J. Ikenberry, *Liberal Leviathan. The Origins, Crisis and Transformation of the American World Order*, (Princeton University Press, 2011), 9; Ikenberry, 'The Future of Multilateralism', 399.

[7] *See,* A. Acharya, *The End of American World Order,* (Polity Press, 2014).

[8] G. J. Ikenberry, 'The Future of the Liberal World Order. Internationalism after America' (2011) *Foreign Affairs,* May/June 2011, available online at https://www.foreignaffairs.com/articles/2011-05-01/future-liberal-world-order (accessed 20/06/2017).

The order established was one that was open, rule-oriented, and constructed on the basis of institutions and multilateralism;[9] as Wœver says, '[m]ultilateralism served as 'a foundational architectural principle' on which American postwar planners attempted to construct the postwar world'.[10] It was an order that sought to regulate the conduct of states, to manage and facilitate cooperation across borders, to address transnational issues, and ultimately, to avoid future international conflicts. The order went further than any previous one in tempering the anarchical nature of international society. It was underpinned by the primary institution of absolute state sovereignty: the state has supreme and exclusive authority within its territorial borders, and it cannot be bound by external law without its consent.[11] This institution is operationalised by the corollary norms of non-intervention in states' internal affairs, political independence and territorial integrity.[12] It can be said liberal international society was constructed using Westphalian foundations;[13] as Watson argues, society 'was not brought into being by a radical break with the past, but...inherited its organization and most of its concepts from its European predecessor.'[14]

2.2.2. The UN Charter: A Framework for a Pluralist International Society

The pluralist, Westphalian-inspired framework of post-war international society is enshrined in the UN Charter and the UN is the 'preeminent global multilateral organization'[15] and 'the central cite for multilateral diplomacy'.[16] It was established with the principal purpose of facilitating inter-state interaction and cooperation, particularly on matters of peace and security, and provided a forum for states to resolve their disputes and common problems peacefully.[17] More significantly, the Charter

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[9] Knight, 'US Hegemony', 297, 300; G. J. Ikenberry, 'The Future of Liberal World Order', (2015) 16(3) *Japanese Journal of Political Science* 450-455, 450; Ikenberry, 'The Future of Multilateralism', 399.

[10] O. Wrever, 'John G. Ruggie: transformation and institutionalization' in I. B. Neumann and O. Wrever (eds), *The Future of International Relations. Masters in the Making?,* (Routledge, 1997), 185; J. G. Ruggie, *Multilateralism Matters. The Theory and Praxis of an Institutional Form,* (Columbia University Press, 1993), 25; Ikenberry, 'The Future of Multilateralism', 404-405; Clark, *Hegemony in International Society,* 124; Ikenberry, 'The Future of Liberal World Order', 450; G. J. Ikenberry, 'The Rise, Character, and Evolution of International Order' in O. Fioretos (ed), *International Politics and Institutions in Time,* (OUP, 2017), 67.

[11] Ruggie defines sovereignty as 'the institutionalization of public authority within mutually exclusive jurisdictional domains' - J. G. Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis' in R. O. Keohane (ed), *Neorealism and its Critics,* (Columbia University Press, 1986), 131-157.

[12] For an explanation of the history of the development of state sovereignty *see* B. Buzan, 'Universal Sovereignty' in T. Dunne and C. Reus-Smit (eds), *The Globalization of International Society,* (OUP, 2017), 227-248.

[13] *See,* S. D. Krasner, 'Compromising Westphalia', (1995-1996) 20(3) *International Security* 115-151, 115; G. J. Ikenberry, 'The logic of order: Westphalia, liberalism, and the evolution of the international order in the modern era' in G. J. Ikenberry (ed), *Power, Order and Change in World Politics,* (CUP, 2014), 91-93.

[14] A. Watson, *The Evolution of International Society,* (Routledge, 2005), 272.

[15] E. Newman, *A Crisis of Global Institutions. Multilateralism and International Security*, (Routledge, 2007), 3.

[16] M. P. Karns and K. A. Mingst, *International Organizations. The Politics and Processes of Global Governance*, (Lynne Rienner Publishers, Inc., 2010), 95.

[17] The Preamble to the UN Charter states that one of the aims of the organisation is to 'save succeeding generations from the scourges of war' and Article 1 (1) confirms that one of the purposes of the UN is to 'maintain international peace and security.. .and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment of settlement of international disputes or situations'. Additionally, Article 1 (3) commits the UN to achieving 'international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights'.

laid the foundations for the evolution of a rule-based international society[18] and represented the start of the shift to legalist global governance which would evolve over the next seventy years. However, it should also be noted that the UN was conceived primarily as a political institution and it reflected the distribution of power and authority in international society at the time. The post-war great powers preserved their positions of authority by way of permanent seats on the Security Council and having the power to veto proposed resolutions.[19] This interaction and conflict between politics and law is central in the evolution of international society.

The UN Charter established a pluralist governance framework for international society which protected the primacy of the nation state and established the institution of state sovereignty and the corollary principle of non-interference in states' internal affairs as the underpinning basis of the global political order.[20] The purpose of this was to maintain order among a politically, morally, economically and culturally diverse group of states. However, the Charter also had a cosmopolitan element. It recognised the existence and worth of the individual, and the need for states to work towards the protection of human rights.[21] This was inspired by atrocities that had been perpetrated during the war and, particularly, the Holocaust. There was, however, debate and disagreement among states, including the great powers, as to whether the issue of human rights should be included with the Charter at all because, as Sikkink notes, 'states were wary of the sovereignty implications of the human rights issue',[22] as was discussed in Chapter One. The result of this was a lack of concrete commitments to safeguard human rights, evidenced by the absence of obligatory language and the omission of any provisions providing for action to be taken in response to human rights violations, as well as the exclusion of domestic matters from the purview of the UN by way of Article 2 (7) of the Charter, which reflects a deference to state sovereignty.

This aspect of the Charter nevertheless represented the beginning of cosmopolitan progress. Sikkink argues '[t]he inclusion of the human rights language in the Charter of the United Nations was a critical juncture that channelled the history of postwar global governance in the direction of setting international norms and law about the promotion of human rights.'[23] Furthermore, whilst the UN Charter confirmed the principle of state sovereignty, it also planted the seeds of conditionality,

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[18] The Commission on Global Governance, *Our Global Neighbourhood: The Report of The Commission on Global Governance*, (OUP, 1995), 303; Ikenberry, *Liberal Leviathan*, xii; A. Cassese, *International Law in a Divided World,* (Clarendon Press, 1986), 27.
[19] *See,* N. D. White, *The Law of International Organisations,* (Manchester University Press, 2017), 78.
[20] A. Acharya, 'Multilateralism, sovereignty and normative change in world politics' in E. Newman, R. Thakur and J. Tirman (eds), *Multilateralism under challenge? Power, international order and structural change,* (United Nations University Press, 2006), 96-97.
[21] Article 55(c) UN Charter. *See also,* E. de Wet, 'The International Constitutional Order, (2006) 55(1) *International and Comparative Law Quarterly* 51-75, 57 and UN Press Release, ''We Can Love What We Are, without Hating What - and Who - We Are Not', Secretary General says in Nobel Lecture, 10 December 2001, UN Doc. SG/SM/8071, available online at https://www.un.org/press/en/2001/sgsm8071.doc.htm (accessed 14/07/2018).
[22] K. Sikkink, 'Latin American Countries as Norm Protagonists of the Idea of International Human Rights', (2014) 20(3) *Global Governance* 389-404, 393-395.
[23] Sikkink, 'Latin American Countries Norm Protagonists', 395.

laying the foundations for the development of an understanding that respect for a state's sovereign rights would be subject to respect for human rights standards,[24] as Weiss and Daws emphasise, 'the UN has been responsible for both the triumph *and* the erosion of state sovereignty.'[25] The limits that were placed on state freedom by the rules in the UN Charter and the emphasis on human rights, combined with its near universal membership, led some to argue it amounted to a constitution for international society.[26]

2.2.3. The End of History: Post-Cold War Cosmopolitan Progress

Throughout the second half of the twentieth century international society evolved in a broadly solidarist direction which involved cosmopolitan progress and a shift towards global governance, although this was far from straightforward and not without contestation. It involved greater recognition for the status of the individual *vis-a-vis* states and improved human rights protection, as well as a shift from inter-state governance to a greater role for international organisations; as Hurrell explains:

> [b]umpy as it might be, the road seemed to be leading away from Westphalia—with an expanded role for formal and informal multilateral institutions; a huge increase in the scope, density, and intrusiveness of rules and norms made at the international level; an ever-greater involvement of new actors in global governance; a move toward the coercive enforcement of global rules; and fundamental changes in political, legal, and moral understandings of state sovereignty and of the relationships among the state, the citizen, and the international community.[27]

These developments challenged the pluralist foundations of international society, as enshrined in the UN Charter, which led Weiss to describe current international society as 'post-Westphalian'[28] and Clunan to describe it as 'liberal anti-pluralism'.[29] This will be explored in greater detail in the next section of this chapter, after some further elaboration here.

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[24] D. Held, 'Sovereignty, Political Authority, and Gridlock', (2015) 16(3) *Japanese Journal of Political Science* 414-428,415. *See also,* D. Held, 'The Diffusion of Authority' in T. G. Weiss and R. Wilkinson (eds), *International Organization and Global Governance,* (Routledge, 2014), 61.

[25] T. G. Weiss and S. Daws, 'World Politics: Continuity and Change Since 1945' in T. G. Weiss and S. Daws (eds), *The Oxford Handbook on the United Nations,* (OUP, 2007), 7.

[26] T. Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles of International Law', (2012) 81(2) *Nordic Journal of International Law* 79-132, 94. *See also,* B. Fassbender, 'The United Nations Charter as a Constitution of the International Community', (1998) 36(3) *Columbia Journal of Transnational Law* 529-619, 573; B. Fassbender, *The United Nations Charter as the Constitution of the International Community,* (Brill Nijhoff, 2009) and J. Habermas, *The Divided West,* (Polity Press, 2006), 160, 161-166.

[27] A. Hurrell, 'Power Transitions, Global Justice and the Virtues of Pluralism', (2013) 27(2) *Ethics and International Affairs* 189-205, 192. *See also,* A. Hurrell, 'Brazil: What Kind of Rising State in What Kind of Institutional Order' in A. S. Alexandroff and A. F.
Cooper (eds), *Rising States, Rising Institutions: Challenges for Global Governance,* (Brookings Institution Press, 2010), 138.

[28] T. G. Weiss, *Global Governance. What? Why? Whither?,* (Polity Press, 2013), 181.

[29] A. L. Clunan, 'Russia and the Liberal World Order', (2018) 32(1) *Ethics and International Affairs* 45-59, 47.

Whilst liberal order building was to some extent put on hold during the Cold War, the ultimate triumph of liberalism and the West at the turn of the century, which occurred with the fall of communism and described as the 'end of history',[30] re-established the US as the world's sole hegemon and ushered in a 'unipolar age'.[31] It also entrenched the political authority of European and other western democratic states within international society. This development gave renewed vigour to the liberal cosmopolitan project and created a sense of unstoppable progress, a sense of optimism that was captured in the report of the then UN Secretary General, Boutros Boutros-Ghali, *An Agenda for Peace*.[32] Foot argues, 'the ending of the Cold War led to a renewed interest in the promotion of a just world order'[33] and Hurrell explains 'the end of the Cold War witnessed a dramatic rise in support for the idea that international society could, and should, seek to promote greater justice, as in the broadening agenda of human rights, and the apparent determination and capacity to deal with the brutality within states'.[34]

It should however be noted the progressive evolution of liberal international society throughout the second half of the twentieth century, and particularly after the Cold War, was not solely the work of the US or its Western allies, but has been driven forward by a variety of different actors including non-governmental organisations (NGOs),[35] particularly in relation to human rights and human security matters,[36] as well as international organisations which play an important role in establishing, implementing and entrenching norms which guide state behaviour.[37] Furthermore, non-Western states made a significant contribution.[38] This led Ikenberry to argue the US 'presided

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[30] F. Fukuyama, *The End of History and the Last Man,* (Penguin, 2012); F. Fukuyama, 'The End of History?', (1989) *The National Interest* 1-18.

[31] Ikenberry, 'Liberalism and empire', 609; Ikenberry, 'Power and liberal order', 133; Clark, *Hegemony in International Society,* 3; Knight, 'US Hegemony', 300; A. Watson, *The Evolution of International Society,* (Routledge, 2005), 301.

[32] United Nations, *Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council of 31 January 1992, An Agenda for Peace. Preventative diplomacy, peacemaking and peace-keeping,* 17 June 1992, UN Doc. A/47/277.

[33] R. Foot, J. L. Gaddis and A. Hurrell (eds), *Order and Justice in International Relations,* (OUP, 2003), 1.

[34] A. Hurrell, 'Order and Justice in International Relations: What is at Stake?' in Foot, Gaddis and Hurrell (eds), *Order and Justice in International Relations*, 31-32.

[35] Held, 'Sovereignty, Political Authority, and Gridlock', 418-419; T. G. Weiss and R. Wilkinson, 'International Organization and Global Governance. What matters and why' in Weiss and Wilkinson (eds), *International Organization and Global Governance,* 12; J. A. Scholte, 'Civil Society and NGOs' in Weiss and Wilkinson (eds), *International Organization and Global Governance,322-334;* Acharya, 'Multilateralism, sovereignty and normative change in world politics', 107, M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics,* (Cornell University Press, 1998); Commission on Global Governance, *Our Global Neighbourhood;* R. McCorquodale, 'An Inclusive International Legal System', (2004) 17(3) *Leiden Journal of International Law* 477504, 493-497; Weiss, *Global Governance. What? Why? Whither?,* 13-20.

[36] A. Clark, 'Non-Governmental Organizations and their Influence on International Society', (1995) 48(2) *Journal of International Affairs* 508-525; T. Risse, S. C. Ropp, and K. Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change,* (Cambridge University Press, 1999); Karns and Mingst, *International Organizations. The Politics and Processes of Global Governance,*
454.

[37] Acharya, 'Multilateralism, sovereignty and normative change in world politics', 96.

[38] *See,* Acharya, *The End of American World Order,* 42; Sikkink, 'Latin American Countries as Norm Protagonists'; K. Sikkink, 'Reconceptualising Sovereignty in the Americas: Historical Precursors and Current Practices', (1997) 19 *Houston Journal of International Law* 705-729; O. Stuenkel, *Post Western World,* (Polity Press, 2016), 58; Cassese, *International Law in a Divided World,* 69-73.

over',[39] rather than enforced, the construction of liberal international society and that it 'was leading the world in a direction that much of the world wanted to go.'[40]

It should also be recognised that liberal Western states, such as the US, did not always support solidarist progress, particularly where cosmopolitan developments undermined the pluralist foundations on which liberal international society was constructed. This led Ikenberry to note that the 'liberal international "project" has evolved and periodically reinvented itself[41] and that 'global transformations were facilitated by the American-led liberal international order, but now they are also eroding the governing relations of that order... liberal internationalism has outgrown American hegemony.[42] Similarly, he also argues that liberal international order 'has helped usher in a world that has outgrown its political moorings.'[43]

2.3. Solidarist Progress: Institutional and Cosmopolitan Developments

Building on the above overview, this next section of the chapter provides a more detailed analysis of some specific features of cosmopolitan-solidarist progress in international society such as the improved status of the individual in international society, as seen in the evolution of international human rights and the Responsibility to Protect. It is also evident in the shift from multilateral towards supranational global governance and the legalisation and judicialisation of international politics. As Hurrell and Alderson argue, one dimension of solidarist progress is the increase in the implementation of moral ideas and values[44] which, as Hurrell explains, manifests in 'the move to institutions and the expansion of global rule-making'.[45] Similarly, Holsti argues that '[f]urther evidence of institutionalization appears when the rules, norms and rights are translated into binding obligations formalized in treaties and conventions, and when they are interpreted through court-like organizations and procedures.'[46]

2.3.1. The Shift from Multilateralism towards Supranationalism

The recognition by states of their shared ambitions and the need for cooperation in addressing

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[39] Ikenberry, 'The logic of order', 100.
[40] Ikenberry, 'The Future of Multilateralism', 408. *See also,* C. Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions', (1997) 51(4) International Organization 555-589.
[41] G. J. Ikenberry, 'Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order', (2009) 7(1) Perspectives on Politics 71-87, 71.
[42] Ikenberry, 'The Future of Liberal World Order', 451-452.
[43] G. J. Ikenberry, 'The end of liberal international order?', (2015) 94(1) *International Affairs* 7-23, 10. *See also,* Ruggie, *Multilateralism Matters. The Theory and Praxis of an Institutional Form,* 28.
[44] A. Hurrell and K. Alderson, *Hedley Bull on International Society,* (Macmillan Press Limited, 2000), 10.
[45] A. Hurrell, *On Global Order. Power, Values and the Constitution of International Society,* (OUP, 2007), 58.
[46] K. J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics,* (CUP, 2004), 144.

transnational issues resulted in the proliferation of multilateralism across many different areas in the post-war era,[47] which David Held described as a 'striking trend'.[48] While multilateralism takes different forms including taking place on an *ad hoc* basis, on both small and large scales, as well as formally and informally,[49] one of the ways in which it manifested in the second half of the twentieth century was in the proliferation of intergovernmental organisations (IGOs). As Cassese has argued, '[s]tates increasingly find it convenient to establish international machinery for the purpose of carrying out tasks of mutual interest'[50] and this is confirmed by the statistics. There has 'an increase in the number of multilateral intergovernmental organizations from fewer than 100 in 1945 to about 200 in 1960 and over 600 in 1980',[51] and by 2009 there were some 1,839 such organisations.[52]

It is important to note however that over time, and particularly since the end of the Cold War, there was a trend of multilateral organisations beginning to exercise increasing levels of power and influence *vis-a-vis* states,[53] and to operate with greater autonomy. This is described as a shift from multilateral to supranational governance. Tangney explained that 'a new internationalism is gradually emerging, an internationalism characterized by a marked trend towards supranationalism'[54] and Held says that 'there has been a proliferation of new types of global governance institutions...since the end of the Cold War. These are not multilateral, state-to-state institutions, but instead combine various actors under varying degrees of institutionalization.[55]

This shift towards supranationalism has had an impact on the relationship between states and international society and, therefore, the nature of our understanding of sovereignty. The move towards supranationalism broke down the distinction between domestic and international spheres, and reflects a willingness on the part of states to subject themselves to greater international oversight and to relinquish control of previously sovereign functions to organisations, even where this conflicts with interests of individual member states. This is done for the purpose of addressing more effectively common problems and shared objectives, such as in the realm of environmental protection and human rights. This differs from organisations of earlier years that principally served the interests of its members. This therefore reflects the consolidation of an international society and

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[47] Ikenberry, 'The Future of Multilateralism', 404-405. *See also,* R. Keohane, 'Multilateralism: An agenda for research', (1990) 45(4) *International Journal* 731-764, 371.
[48] Held, 'The Diffusion of Authority', 70.
[49] Newman, *A Crisis of Global Institutions. Multilateralism and International Security,* 11-12.
[50] A. Cassese, *International Law* (OUP, 2005), 135. *See also,* D. W. Bowett, *The Law of International Institutions,* (Stevens and Sons, 1982), 1 and H. G. Schemers and N. M. Blokker, *International Institutional Law,* (Martinus Nijoff, 2003), 1.
[51] Keohane, 'Multilateralism: An agenda for research', 371.
[52] K. Raustiala, 'Institutional Proliferation and the International Legal Order' in J. L. Dunoff and M. A. Pollack, *Interdisciplinary Perspectives of International Law and International Relation,* (CUP, 2013), 296.
[53] R. Collins and N. D. White, 'Moving Beyond the *Autonomy-Accountability* Dichotomy: Reflections on Institutional Independence in the International Legal Order', (2010) 7(1) *International Organizations Law Review* 1-8, 2.
[54] P. Tangney, 'The New Internationalism: Ceding Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany', (1996) 21(2) *Yale Journal of International Law* 395-458, 397.
[55] Held, 'Sovereignty, Political Authority, and Gridlock', 420.

the interest of states 'in having an orderly or just international community.'[56] This point is also made by Abbott and Snidal who argue that some organisations are more properly described as 'community organisations' on the basis they are established on shared values and pursue common interests, and 'develop and express community norms and aspirations.'[57]

This shift to supranationalism has impacted on our understanding of the nature of sovereignty. Whereas in the early-post war period multilateral organisations preserved and promoted norms of state sovereignty, including territorial integrity, sovereign equality and non-intervention, albeit in a less absolute form than had traditionally been the case, organisations subsequently came under increasing pressure to move beyond these principles 'as part of a transformative process in world politics'.[58] Acharya cites the emergence of new transitional challenges, many of which begin inside the territorial boundaries of states, as a reason for organisations' increased willingness 'to depart from strict adherence to sovereignty norms'.[59] Moreover, this reflects an acceptance on the part of states that sovereignty can no longer be absolute as they exist in a highly interdependent global environment which necessitates effective beyond the state governance.

No international organisation is yet completely supranational, however, and 'it is only possible to speak at the moment of 'relative' supranationality.[60] As such, there exists a complex interaction between states and organisations exercising governance functions. This resistance on the part of states towards supranationality is driven partly by concerns about the accountability deficit within such organisations and the inability of states to exercise sufficient control over their work. It therefore reflects the continuing support for a state-based international society.

2.3.2. The Juridification of International Society

The progressive shift towards global governance in the post-war era also involves the legalisation and judicialisation of international society. This comprises the development and expansion of international law, and the proliferation of international courts and tribunals.[61] It is also reflected in

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[56] J. H. H. H. Weiler, 'The Geology of International Law - Governance, Democracy and Legitimacy', (2004) 64 *ZaoRV* 546-562, 556.
[57] K. W. Abbott and D. Snidal, 'Why States Act Through Formal International Organizations', (1998) 42(1) *Journal of Conflict Resolution* 3-32, 24
[58] Acharya, 'Multilateralism, sovereignty and normative change in world politics', 95.
[59] Acharya, 'Multilateralism, sovereignty and normative change in world politics', 105.
[60] H. G. Schermers and N. M. Blokker, *International Institutional Law,* (Martinus Nijoff, 2011), 56-57. *See also,* E. De Brabandere, 'The impact of supranationalism on state sovereignty from the perspective of the legitimacy of international organisations' in D. French (ed), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law,* (CUP, 2013), who speaks of supranationalism in a looser, descriptive sense to refer to organisations which contain 'some elements of supranationalism [in that they] function in a way that goes beyond mere inter-state cooperation. *See also*, L. Gruber, *Ruling the World. Power Politics and the Rise of Supranational Institutions,* (Princeton University Press, 2000) who defines supranational organisations as those that have more open- ended founding charters and where members have agreed in advance that collective decision-making procedure will be utilised to determine how the terms of cooperation apply in a given situation.
[61] J. P. Trachtman, *The Future of International Law. Global Government,* (CUP, 2013), 1.

the commitment expressed by a large number of states to the international rule of law.[62] As Hurrell notes, there has 'been a steady expansion in the number of international courts and tribunals' and '[international law has begun to shift from a horizontal, dyadic, self-help system towards a thickening triadic or multilateral structure with an expanding array of arbitration, courts, and panels.'[63] Therefore, as we progress along the English School continuum, there is a shift from horizontal, inter-state governance to vertical, global governance which is administered through increasingly powerful international organisations. This development results in a reconfiguration of the relationship between international law and diplomacy wherein law enforced by international organisations marginalises and begins to replace diplomacy as a means of governing society as opposed to international law protecting its existence as an institution.[64]

Building on the foundations laid by the UN Charter in constituting a rule-based society, as well as the progress made in establishing and developing international law, driven particularly by European nations over the previous one hundred years,[65] international law proliferated in the post-war era. Neff argues that '[t]he post-1945 period witnessed a veritably explosive increase in international law-making'[66] and Karns and Mingst note that '[b]etween 1951 and 1995, 3666 new multilateral treaties were concluded'.[67] Similarly, Weiss and Daws explain that '[b]etween 1946 and 1975, the number of international treaties in force more than doubled from 6,351 to 14, 061',[68] and reached 45,000 by 2009.[69] This stands in sharp contrast to the positon in 1927 when the Permanent Court of International Justice stated in the Lotus case that states were ' permitted to do anything that they were not expressly prohibited from doing',[70] which reflected the distinct lack of legal rules that existed to regulate state behaviour.

Furthermore, it was not only the sheer amount of international law that increased but the areas into which it ventured. Whereas international law was traditionally concerned only with regulating the interactions of states and preserving their peaceful relations,[71] what can be referred to as classical

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[62] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (24 October 1970), UN Doc. A/RES/55/2; United Nations Millennium Declaration, UNGA Res. 55/2 (8 September 2000), UN Doc. A/RES/55/2, paras. 9, 24 and 30.

[63] A. Hurrell, *On Global Order*, 62. *See also,* A. Hurrell, 'Order and Justice' in C. Navari and D. M. Green, *Guide to the English School of International Studies,* (Wiley, 2014), 149.

[64] *See,* B. Buzan, *An Introduction to the English School of International Relations. The Societal Approach,* (Polity Press, 2014), 149150.

[65] S. C. Neff, 'A Short History of International Law', in M. Evans (ed), *International Law,* (OUP, 2006), 39. Writing in 1944, Brierly noted that: ' [i]n their normal relations most states do not bludgeon their way through the opposition; they use the processes of law. ' - J. L. Brierly, 'Vital Interests and the Law', (1944) 21 *British Yearbook of International Law* 51-57, 51

[66] Neff, 'A Short History of International Law', 50.

[67] Karns and Mingst, *International Organizations. The Politics and Processes of Global Governance*, 9.

[68] Weiss and Daws, 'World Politics: Continuity and Change Since', 14.

[69] Raustiala, 'Institutional Proliferation and the International Legal Order', 296.

[70] P. Sands, 'Turtles and Torturers: The Transformation of International Law', (2001) 33(2) *New York University Journal of International Law and Politics* 527-559, 548.

[71] K. Parlett, 'The Individual and Structural Legal Change in the International System', (2012) 1(3) *Cambridge Journal of International and Comparative Law* 60-80, 60.

international law, in the post-1945 era international law came to address a wide range of issues including those which traditionally fell squarely within the state's sovereign domain[72] as well as other transnational issues beyond the peaceful coexistence of states. Hurrell argues that '[r]ules are no longer about regulating state-state transactions but involve an ever-expanding range of 'beyond the border' issues that affect very deeply how societies are organized domestically' and they are 'increasingly about positive obligations involving extensive domestic, legal and administrative changes rather than limits or prohibition on international behaviour.'[73] Harris refers to this as the move toward more 'community-minded kind of law'[74] and represented a progression from international law *between* states to law *above* states,[75] which is part of the progress towards a world society conception of global political order.

In addition to the volume of law and the areas it covered, the nature of international law also evolved in the post-war era, reflecting the changing nature of international society in a solidarist direction. Since the move away from natural law theory towards positivism during the latter part of the nineteenth century,[76] it was accepted international law was created by states, between states, and that states were only bound by the laws to which they had expressly consented. This was a statist understanding of law where the morality or immorality of it was irrelevant to is status.[77] The consent-based nature of international law reflected the importance attached to sovereignty at that time; as Ikenberry notes, the '[t]he British- and American-led liberal orders have been built in critical respects around consent'[78] which is consistent with a pluralist conception of international society where the state is supreme and the highest authority.

This principle has however come under challenge by the development of *jus cogens* norms. These are rules of international law from which no derogation is ever permitted and which can only be amended by a new general norm of international law of the same value.[79] Such rules arguably have greater binding effect than standard international law and reflect a tentative shift away from the voluntarist or 'positivist' approach to law, and reflects the evolution of a legal community that

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[72] Raustiala, 'Institutional Proliferation and the International Legal Order', 306 - 'It is incontrovertible that international law increasingly addressed subjects traditionally thought of as domestic. '

[73] Hurrell, *On Global Orde*r, 60.

[74] D. J. Harris, *Cases and Materials on International Law,* (Sweet and Maxwell, 2004), 13.

[75] Neff, 'A Short History of International Law', 39.

[76] R. Collins, 'Classical Positivism in International Law Revisited' in J. D'Asprement and J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World,* (CUP, 2014), 23-50, 23.

[77] A. Paulus and B. Simma, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', (1999) 93(2) *American Journal of International Law* 302-316, 304-305. *See also,* 'Lotus', Judgment No 9, 1927, PCIJ, Ser A, No 10 - '[t]he rules of law binding upon States therefore emanate *from their own free will* as expressed in conventions or by usages generally accepted as expressing principles of law' and Nicaragua (1986) 135 '[i]n international law there are no rules, other than such rules as may be accepted by state states concerned. '

[78] Ikenberry, 'The logic of order', 88.

[79] D. Shelton, 'International Law and 'Relative Normativity'', in M. D. Evans (ed), *International Law,* (OUP, 2006), 164.

exhibits shared normative values[80] and in which the majority can impose law upon the rest in the absence of consent.[81] As Hurrell argues, there has been 'an easing of the degree to which states can only be bound by those rules to which they have given their explicit consent and a chipping away at the hard edge of state consent.' This reflects the fact that in the solidarist international society sovereignty is not absolute but is more limited in recognition of the existence of a society of states with shared values and a desire to deal with transitional issues and other matters of shared concern such as the protection of human rights.[82] Further, law-making by international courts and organisations challenges the traditional consensual approach to international law.[83]

In addition to, and a result of, the expansion of international law in the latter half of the twentieth century including into areas that were previously within the sovereign domain, there was a proliferation in the existence of international courts and tribunals.[84] Whereas traditionally states would resolve disputes by way of armed conflict, diplomacy or self-help - using acts of retorsion and countermeasures in an effort to induce compliance by another state with rules or agreements - [85] they have been increasingly willing to submit disputes to judicial or arbitral resolution. As Hurrell argues, '[international law has begun to shift from a horizontal, dyadic, self-help system towards a thickening triadic or multilateral structure with an expanding array of arbitration, courts, and panels.'[86] This is what can be described as the judicialisation of international politics.[87]

Whilst modern international courts have existed throughout the twentieth century, the Permanent Court of Arbitration having been established in 1899, followed by the Permanent Court of International Justice in 1920, and the International Court of Justice in 1945 as well as many others in the latter half of the century, there was a tremendous expansion of courts and tribunals in the post-Cold War period. Romano argues that it was the 'single most important development' in that era[88] brought about by the end of bi-polarism and the birth of a more liberal, open, ambitious, and cooperative international society. The UN General Assembly described the 1990s as the 'decade of international law'.[89] Furthermore as of 2009 there were 25 permanent international courts that were

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[80] C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', (1993) 241 *Recueil des Cours de l Academie de Droit International* 191, 210-211.
[81] J. A. Perkins, 'The Changing Foundations of International Law: From State Consent to State Responsibility', (1997) 15 *Boston University International Law Journal* 433-509, 470.
[82] *See,* M. Weller, 'The reality of the emerging universal constitutional order: Putting the pieces of the puzzle together', (1997) 10(2) *Cambridge Review of International Affairs* 40-63, 50.
[83] L. R. Helfer, 'Nonconsensual International Lawmaking', (2008) 1 *University of Illinois Law Review* 71-126.
[84] C. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', (1998) 31 *New York University Journal of International Law and Policy* 709-751, 728-729.
[85] Harris, *Cases and Materials on International Law,* 11.
[86] Hurrell, *On Global Order,* 62.
[87] Sands, 'Turtles and Torturers: The Transformation of International Law', 555.
[88] Romano, 'The Proliferation of International Judicial Bodies', 709.
[89] United Nations Decade of International Law, UNGA Res 44/23 (17 November 1989), UN Doc. A/RES/44/23.

operational[90] with 19 of them having been established after the Cold War[91] and by 2011 international courts had issued 37000 binding rulings with 84% of that total output issued since the end of the Cold War.[92] In addition, there are very many non-permanent courts and private arbitral tribunals dealing with international law issues. Sands notes [t]he international judiciary has evolved beyond recognition in the past two decades.'[93]

The courts and tribunals that exist today address a vast range of issues. They exist at both global and regional levels,[94] and have a wide variety of different powers and functions. Some deal with very technical matters, such as trade or investment disputes, others with large-scale, highly-politicised cases, including territorial claims, and many courts uphold fundamental human rights and implement criminal law. It can therefore be said that international judicial mechanisms have become a very significant part of the evolving global governance architecture.

It is not only the expansion in the number of international courts and the type of work that they undertake which has been remarkable, but also the transformation in their nature and competences.[95] Alter describes a shift from 'old style' to 'new style' international courts which have compulsory jurisdiction and permit access by individuals and other non-state actors, which she argues reflects a 'paradigmatic shift from a contract-based to a rule of law conceptualization of international law.'[96] International courts have become actors in society rather than merely forums for inter-state disputes to be resolved on a voluntary and *ad hoc* basis.[97] The extent of this change is evidenced by the fact that, as Romano notes, 'international judicial bodies that grant standing to non-state entities [now] far outnumber judicial bodies whose jurisdiction is limited to disputes between sovereign states'[98] and, as Alter confirms, 84% of international courts permit non-state actors to initiate litigation.[99]

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[90] K. J. Alter, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' in J. L. Dunoff and M. A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Law Relations. The State of the Art,* (CUP, 2013), 346.

[91] K. J. Alter, 'The Evolution of International Law and Courts' in O. Fiortos (ed), *International Politics and Institutions in Time,* (OUP, 2017), 256.

[92] Alter, 'The Multiple Roles of International Courts and Tribunals', 346-348. Note: the figures for judgments issued cited by Alter exclude the ECtHR and the ECJ.

[93] P. Sands, 'Turtles and Torturers', 553. *See also,* generally, R. McKenzie, C. Romano, Y. Shany, and P. Sands (eds), *The Manual on International Courts and Tribunals,* (OUP, 2010); C. Romano, K. Alter, Y. Shany (eds), *The Oxford Handbook of International Adjudication*, (OUP, 2014).

[94] Karns and Mingst, *International Organizations. The Politics and Processes of Global Governance*, 91. Of the 25 permanent international courts in existence, 4 have global reach (the International Court of Justice, the International Tribunal of the Law of the Sea, the appellate body of the World Trade Organization, and the International Criminal Court) and the rest were regional bodies: 9 in Africa, 6 in Europe, 5 in Latin America and 1 in Asia - K. J. Alter, 'The Evolving International Judiciary', (2011) 7 *Annual Review of Law and*
Social Science 387-415, 389.

[95] Romano, 'The Proliferation of International Judicial Bodies', 710.

[96] K. J. Alter, *The New Terrain of International Law: Courts, Politics, Rights,* (Princeton University Press, 2014), 5-6.

[97] Alter, *The New Terrain of International Law. See also,* K. J. Alter, 'Private Litigants and the New International Courts', (2006) 39(1) *Comparative Political Studies* 22-49.

[98] Romano, 'The Proliferation of International Judicial Bodies', 710.

[99] Alter, *The New Terrain of International Law,* 4.

This development reflects the 'shift from a state-centered conception of international law to a more universalistic, human-centered, and individually accessible system'.[100] It is also important to note that courts are increasingly making the law, challenging the notion that international law-making is the preserve of sovereign states.

Some states have, however, been resistant to the creation of international courts or granting them substantial authority, particularly in relation to human rights. Some states have also been reluctant to submit disputes to judicial resolution or to accept the compulsory jurisdiction of international courts in fear of a losing control over the outcome of a dispute or over the development of the law.[101] Moreover, states contest the work of international courts. This reflects the ongoing tension and struggle between law and politics in international society, particularly the challenge of submitting *realpolitik* to law which, as Nollkaemper argued, '[i]t is the raison d'etre of international law to bring power under law',[102] and the establishing of the appropriate functions and powers of courts in international society. This is a central issue in the relationship between the BRICS and the ICC, as will be explored throughout the course of this thesis.

2.3.3. Cosmopolitan Progress and the Rise of the Individual

Cosmopolitan theory is characterised by its focus on the individual and, more specifically, a belief that humans are the ultimate units of moral concern (as opposed to, for example, states, empires, or tribes), and, moreover, that *all* persons are deserving of and entitled to protection (egalitarianism). While moral cosmopolitanism is limited to prescribing such values, institutional cosmopolitanism demands limits on our conduct and the conduct of sovereign states,[103] and involves changes to the institutional structure of international society to implement cosmopolitan values, such as placing limits on sovereignty.[104]

An element of institutional cosmopolitanism is cosmopolitan laws which give *all* individuals rights beyond those conferred by states or, in other words, at the 'world level',[105] which Bull referred to

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[100] Raustiala, 'Institutional Proliferation and the International Legal Order', 306.
[101] Alter, *The New Terrain of International Law*, 9-10.
[102] A. Nollkaemper, *National Courts and the International Rule of Law'*, (OUP, 2011), 1 citing M. Koskeniemmi, 'The Politics of International Law', (1990) 1(1) *European Journal of International Law* 77.
[103] T. Pogge, 'Cosmopolitanism and sovereignty', (1992) 103(1) *Ethics* 48-75, 48-49.
[104] G. Brown, *Grounding Cosmopolitanism. From Kant to the Idea ofa Cosmopolitan Constitution,* (Edinburgh University Press, 2013), 12. *See also,* G. W. Brown, 'Bringing the State Back into Cosmopolitanism: The Idea of Responsible Cosmopolitan States', (2011) 9(1) *Political Studies Review* 53-66; G. W. Brown, 'State Sovereignty, Federation and Kantian Cosmopolitanism', (2005) 11(4) European Journal of International Relations 495-522, 496; F. Teson, 'A Kantian Theory of International Law', (1992) 92(1) *Columbia Law Review* 52-102, D. Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace', (1995) 1(4) *European Journal of International Relations* 429456; A. Hurrell, 'Kant and the Kantian Paradigm in International Relations', (1990) 16(3) *Review of International Studies* 183-205.
[105] R. Beardsworth, *Cosmopolitanism and International Relations Theory,* (Polity Press, 2011), 39.

as promoting individual and human justice.[106] This emancipates the individual from the state in the sense the state no longer has ultimate power over the individual and the sole right to confer and withhold rights and protections. As Held and McGrew explain, '[c]osmopolitan law refers to those elements of law...which create powers and constraints, and rights and duties, which transcend the claims of nation-states and which have farreaching national consequences.'[107] Cosmopolitan law differs from classical international law in that it focuses on regulating an individual's relationship with the state and with international society, rather than regulating the relations between sovereign nations. More radical views, akin to a world society conception of global political order, hold that 'the world's political structure should be reshaped so states and other political units are brought under the authority of supranational agencies'[108] and, moreover, 'an overarching legal structure that upholds the interests of the international community' is put in place.[109] As Eckert explains, institutional cosmopolitanism is about 'disrupting the relationship between the individual and the state and, more significantly, seeking to dislodge the state from its status as the primary actor in the international system.'[110] The approach has been implemented to some extent, as will be explained below. Pierik and Werner therefore argue 'the ideals of moral cosmopolitanism have increasingly found their way into international legal institutions'[111] but they also note the limits of such developments and question whether it is 'really possible to translate the principles of normative individualism into effective global institutions?'[112]

Over the past one hundred years, and particularly since the end of World War Two, the individual has been afforded greater recognition, status and protection. As Ainley explains, '[t]he twentieth century saw the unprecedented individualization' in international relations[113] which challenged the state-centric nature of international society and international law. While international law was traditionally concerned solely with regulating inter-state interactions, hence it being referred to as

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[106] H. Bull, Order vs. Justice in International Society, (1971) XIX (3) *Political Studies* 269-283, 274. *See also,* C. Reus-Smit, 'The Anarchical Society and Human Rights' in H. Suganami, M. Carr and A. Humphreys (eds), *The Anarchical Society at 40: Contemporary Challenges and Prospects,* (OUP, 2017), 78 - Chris Reus-Smit says of Bull's articulation of the idea of human justice that it relates to 'the moral rules conferring rights and duties upon individual human beings' in contrast to 'international justice' which refers to 'the basic rules on interstate conduct', which he further notes reflects Bull's distinction between pluralism and solidarism.

[107] D. Held and A. McGrew, 'The End of the Old Order? Globalization and the Prospects for World Order', (1998) 24(5) *Review of International Studies* 219-245, 233.

[108] C. Beitz, 'Cosmopolitan Liberalism and the State System' in C. Brown (ed), *Political Restructuring in Europe: Ethical Perspectives,* (Routledge, 1994), 124.

[109] R. Pierik and W. Werner, 'Cosmopolitanism in context: an introduction' in R. Pierik and W. Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory,* CUP, 2010), 7. *See also,* B. Simma, 'From Bilateralism to Community Interest in International Law', (1994) 250 *Recueil des Cours de l Academie de Droit International* 217-384.

[110] A. E. Eckert, 'The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide' in S. C. Roach, *Governance, Order, and the International Criminal Court. Between Realpolitik and a Cosmopolitan Court,* (OUP, 2009), 216.

[111] Pierik and Werner, 'Cosmopolitanism in context: an introduction', 6. *See also,* Beardsworth, *Cosmopolitanism and International Relations Theory,* 30; P. Eleftheriadis, 'Cosmopolitan Law', (2003) 9(2) *European Law Journal* 241-263, 242; Held and McGrew, 'The End of the Old Order?, 234.

[112] Pierik and Werner, 'Cosmopolitanism in context: an introduction', 9-10.

[113] K. Ainley, 'Excesses of Responsibility : The Limits of Law and the Possibilities of Politics', (2011) 25(4) *Ethics and International Affairs* 407-431, 407

the 'Law of Nations',[114] over the course of the twentieth century individuals came to be granted the status of subjects of international law and both rights and obligations were conferred upon them.[115] This represented a return to natural law and cosmopolitan thinking, and it advanced the idea of an 'international community' based on the rule of law[116] and, as Brown argues, one of the genuine innovations in the normative foundations of international society is 'the emergence of the individual as a legally recognized international entity'.[117]

The consequence of the rise of the individual has been the disaggregation of the individual and the state. The individual has come to have a separate identity and legal personality, and is no longer 'primarily perceived as an anonymous component part of the self-standing state.'[118] The individual is no longer wholly reliant upon the state to guarantee its protection in law and instead derives rights directly from international society through, for example, international human rights law. As Orakhelashvili argues, '[t]here is no longer any doubt that the rights of the individual exist outside of the domestic jurisdiction of States and that these rights concern the whole international community.'[119] Similarly, Kleinlein argues '[t]he development of human rights law correlates with an enhanced international legal status of the individual'.[120] This change addressed what Lauterpacht referred to as the 'Achilles' heel' of the protection of the rights of man, the fact the validity and recognition of rights depended upon 'the controlled will of the sovereign State.'[121] This has been described as 'one of the most significant aspects of the post-war phase'.[122] In addition, individuals have been forced to assume duties and responsibilities under international law such as humanitarian law and criminal law.

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[114] J. L. Brierly, *The Law of Nations,* (Clarendon Press, 1963), 1 - '[t]he Law of Nations, or International Law, may be defined as the body of rules and principles of action binding upon civilized states in their relations with one another.'

[115] *See,* for example, H. Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man', (1943) 29 *Transactions of the Grotius Society* 1-33, 12, 30; Cassese, *International Law in a Divided World,* 63; K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law,* (CUP, 2011), 191-195.

[116] R. Collins, 'The Progressive Conception of International Law: Brierly and Lauterpacht in the *Interbellum* Period', in R. McCorquodale and J-P. Gauci (eds), *British Influences on International Law, 1915-2015,* (Brill Nijhoff, 2016). *See also,* J. L. Brierly, 'The Rule of Law in International Society', (1936) 7(1) *Nordisk Tidsskrift for International Ret* 3-17, 8; H. Lauterpacht, 'Brierly's Contribution to International Law', (1955) 32 *British Yearbook of International Law* 1-19, 3-6; H. Lauterpacht, 'Westlake and Present Day International
Law', (1924) 15 *Economica* 307-325; H. Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, 1927), H. Lauterpacht, *An International Bill of the Rights of Man,* (OUP, 2013); H. Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', (1944) 21 *British Yearbook of International Law* 58-95; M. Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', (1997) 8(2) *European Journal of International Law* 215-263, 231 referring to Lauterpacht as 'a champion of legal cosmopolitanism'. For contrasting pessimism, *see* E. H. Carr, *The Twenty Years' Crisis 1919-1939. An Introduction to the Study of International Relations,* (Palgrave Macmillan, 2001).

[117] C. Brown, 'Sovereignty versus Human Rights in a Post-Western World' in J. Gaskarth (ed), *China, India and the Future of International Society,* (Rowman and Littlefield International, 2015), 135

[118] P. Simons, 'The Emergence of the Idea of the Individualized State in the International Legal System', (2003) 5(2) *Journal of the History of International Law* 293-335, 293.

[119] A. Orakhelashvili, 'The Position of the Individual in International Law', (2001) 31(2) *California Western International Law Journal* 241-276, 242.

[120] T. Kleinlein, 'Between Myths and Norms', 82.

[121] Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man', 11.

[122] Cassese, *International Law in a Divided World,* 148.

The desire of states to protect individuals from gross human rights violations also manifested in acts of humanitarian intervention and, more latterly, the creation of the Responsibility to Protect in 2005 which is a political and moral commitment assumed by states to intervene in a state, militarily or otherwise, to prevent or stem ongoing genocide, war crimes, crimes against humanity or ethnic cleansing, if a state fails to discharge its primary responsibility to act.[123] While the RtoP has been described, perhaps slightly hubristically as 'the most dramatic normative development of our time',[124] it undoubtedly represented an important consolidation of the human rights movement. Furthermore, the UN Security Council has become increasingly willing to determine that human rights violations constitute a threat to international peace and security under Article 2(4) of the UN Charter and to mandate action.[125]

By conferring rights on individuals at the international level by way international treaties and providing the ability for individuals to vindicate those rights through international courts and other mechanisms, the international human rights law system 'pierced the veil of sovereignty that kept the relationship between the state and its citizens from the purview of international law'[126] and firmly established the issue of human rights protection as a matter of legitimate international concern. It was no longer a matter solely within the sovereign domain but one where competence for the monitoring and enforcement of human rights protection was shared between the state and international society, conferring a new responsibility on international society and contributing to the development of the global governance architecture.[127] This contributed to the transfer of power and authority from the state level to the international society, what has previously been referred to as shift to more vertical, above the state, governance.

Furthermore, the twin institutions of human rights and RtoP were informed by, and then consolidated, a change in the generally accepted understanding of the nature of state sovereignty from an absolutist conception, which provides that what occurs within a state is solely a matter of domestic jurisdiction, to one where the enjoyment of sovereign rights, including non-interference in states' internal affairs and territorial integrity, was conditional on respect for human rights; what Mills refers to as 'New Sovereignty'.[128] Ikenberry argues that the result of the human rights and

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[123] *See generally*, S. Chesterman, 'Humanitarian Intervention and R2P' in T. G. Weiss and R. Wilkinson (eds), *International Organization and Global Governance,* (Routledge, 2014), 488-499; A. J. Bellamy, *The Responsibility to Protect: the global effort to end mass atrocities,* (Polity Press, 2013); and A. J. Bellamy and T. Dunne (eds), *The Oxford Handbook on the Responsibility to Protect,* (OUP, 2016).

[124] R. Thakur and T. G. Weiss, 'R2P: From Idea to Norm - and Action?', (2009) 1(1) Global Responsibility to Protect 22-53, 23.

[125] de Wet, 'The International Constitutional Order', 64.

[126] M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State' in J. L. Dunoff and J. P. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance,* (CUP, 2009), 259

[127] McCorquodale, 'An Inclusive International Legal System', 487.

[128] K. Mills, 'Reconstructing Sovereignty: A Human Rights Perspective', (1997) 15(3) *Netherlands Quarterly of Human Rights* 267-290, 288. *See also,* K. Mills, *Human Rights in the Emerging Global Order. A New Sovereignty?* (Macmillan, 1998).

Responsibility to Protect 'revolution' was the erosion of Westphalian sovereignty and 'norms of sovereignty [being] seen as more contingent'.[129] Whilst the importance of sovereignty as a means of bringing order to international society continued to be accepted,[130] it came to be imbued with both a moral and legal responsibility 'to respect the dignity and basic human rights of all people within the state' which is captured in the concept of 'sovereignty as responsibility'.[131] Peters refers to this as 'humanized state sovereignty'[132] and she notes that '[t]he ongoing process of humanizing sovereignty is the cornerstone of the current transformation of international law into a system centred on individuals'.[133] Brown identifies it as another genuine innovation in the normative foundations of international society.[134]

Whilst there has been a clear normative shift in international society towards the greater protection of the individual, which has been accompanied by substantial progress in institutionalising human rights at the international level, there has been, and continues to be, some resistance to deeper, more fundamental change. There is an unwillingness on the part of some states to transfer substantial authority in respect of the monitoring and enforcement of human rights standards to international organisations and judicial bodies, partly due to concerns about the accountability of organisations but also the lack of control that states are able to exercise over them. Moreover, in the case of the RtoP, some states remain concerned that forcible intervention can only be authorised by the Security Council and such it is subject to the vagaries of its politics and is perceived to be a tool in the hands of only the most powerful states.[135] The issue is thus *who* decides if and where intervention takes place, rather than *whether* intervention to protect human rights is ever justifiable.[136] This issue limits the efficacy of human rights protection and renders the conditional nature of sovereignty more normative than empirical, ambition rather than reality.

This lack of, and resistance to, deep institutional reform in the realm of international human rights protection reflects a continued deference to sovereignty and the statist nature of the international

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[129] Ikenberry, 'Liberal Internationalism 3.0', 79. *See also,* Hurrell, *On Global Order,* 149; Held, 'Sovereignty, Political Authority, and Gridlock', 415; Held, 'The Diffusion of Authority', 61.

[130] International Commission on State Sovereignty, *The Responsibility to Protect. Report of the International Commission on Intervention on State Sovereignty,* (International Development Research Centre, 2001), available online at http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 19/08/2018).

[131] International Commission on State Sovereignty, *The Responsibility to Protect. Report of the International Commission on Intervention on State Sovereignty,* 8. *See also,* R. Cohen and F. Deng, 'Sovereignty as Responsibility: Building Block for R2P' in A. J. Bellamy and T. Dunne (eds), *The Oxford Handbook of the Responsibility to Protect',* (OUP, 2016).

[132] A. Peters, 'The Merits of Global Constitutionalism', (2009) 16(2) *Indiana Journal of Global Legal Studies* 397-411, 398-399.

[133] Peters, 'The Merits of Global Constitutionalism', 398-399.

[134] C. Brown, 'Sovereignty versus Human Rights in a Post-Western World', 135. However, there is disagreement there is genuine consensus on the norm of 'sovereignty as responsibility' - *see,* C. Duncombe and T. Dunne, 'After liberal world order', (2018) 94(1) *International Affairs* 25-42, 36.

[135] Ikenberry, 'Liberal Internationalism 3.0', 79.

[136] J. Ralph and A. Gallagher, 'Legitimacy fautlines in international society: The responsibility to protect and prosecute after Libya', (2015) 41(3) *Review of International Studies* 553-573, 554.

order on the part of states, as well as a discomfort with ceding substantial authority to international organisations. This reflects the continuing relevance of realist thinking in international relations. States are generally content to accept international human rights standards but reluctant to acquiesce to supranational enforcement that would curtail the authority and the supremacy of the nation state. As Franceschet argues, 'there is a profound moral tension between the human rights demands introduced into legal norms of international society since World War II and the Westphalian framework within which such norms are pursued'.[137] Moreover, Ikenberry argues '[t]he erosion of state sovereignty norms have not been matched by the rise of new norms and agreements about who in the international community should make good on human rights and the responsibility to protect'.[138] Moreover, he notes 'the great challenge to liberal international order is how to establish legitimate authority for concerted international action on behalf of the global community - and to do so when old norms of order are eroding' and to find ways to reconcile more intrusive rules and institutions with legitimate international authority'.[139] In this respect, cosmopolitan progress is still very much a work in progress and is subject to contestation.

2.4. The Evolution of International Criminal Justice

This section of the chapter examines the development of international criminal justice as part of the evolution of liberal international society. First, it argues that international criminal justice has evolved to become the primary response to gross human rights violations and, as a result, one of the primary institutions of international society. This has, however, marginalised alternative approaches to transitional justice and in doing so has created the circumstances for the backlash against it, particularly in light of its limitations including in facilitating the resolution of conflicts. Second, it is demonstrated how international criminal justice is part of cosmopolitan progress in international society and, more specifically, it demonstrates how criminal justice has contributed to the reconceptualisation of pluralist primary institutions in a cosmopolitan form.

2.4.1. International Criminal Justice as a Primary Institution

International criminal justice has evolved to become a primary institution of international society and the 'arch-response'[140] to gross human rights violations and the commission of mass atrocities, as well as violations of international humanitarian law that are committed in the context of armed

[137] A. Franceschet, 'Justice and International Organization; Two Models of Governance', (2002) 8(1) *Global Governance* 19-34, 27. *See also,* M. Koskenniemi, 'The Future of Statehood', (1991) 32(2) *Harvard International Law Journal* 397-410, 397 citing A. Cassese, *International Law in a Divided World,* (1986), 148 and H. J. Steiner, 'International Protection of Human Rights' in M. Evans (ed), *International Law,* (OUP, 2006), 757.
[138] Ikenberry, 'Liberal Internationalism 3.0', 79.
[139] Ikenberry, 'The Faces of Liberal Internationalism', 36-37.
[140] R. G. Teitel, *Globalizing transitional justice: contemporary essay,* (OUP, 2014), 12.

conflicts. As Turan notes, 'international criminal prosecutions are increasingly treated as part of the natural order of international things'.[141] Moreover, the use of international criminal justice has become routine, typical and recurrent; it is based on coherent sets of ideas and/or beliefs, namely that human rights and the laws of war should be upheld, and violations of such values should be punished. It has also evolved into a legal obligation with a failure by a state to conduct criminal prosecutions amounting to a violation of recognised human rights.[142] Furthermore, it reflects norms and rules including human rights and humanitarian law, and the principle of individual criminal responsibility. It proscribes how individuals should behave, namely in conformity with international law in times of armed conflict and with respect to the protection of peoples.

This is the product of over one hundred years of progressive development of international criminal justice. The principle of individual criminal responsibility was established at the Leipzig Trials, particularly with the attempted prosecution of Kaiser Wilhelm II, at the end of World War One.[143] This individualised approach to justice was subsequently adopted by the International Military Tribunals at Nuremberg and Tokyo at the conclusion of World War II[144] and, as Mamdani argues, the lesson established by Nuremberg was 'that criminal justice is the only politically viable and morally acceptable response to mass violence.'[145] This approach was subsequently codified in the Nuremberg Principles and the draft code of offences against the peace and security of mankind,[146] as well as in the Genocide Convention.[147]

International criminal justice was further entrenched as a primary institution during the course of the 1990s, first with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[148] and, one year later, the International Criminal Tribunal for Rwanda

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[141] G. Turan, ''Responsibility to Prosecute' in an age of global governmentality: The International Criminal Court', (2016) 51(1) *Cooperation and Conflict* 20-37, 26. *See also,* K. Engle, Z. Miller and D. M. Davis, 'Introduction' in K. Engle, Z. Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda,* (CUP, 2016), 1.

[142] *See,* K. Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Engle, Miller and Davis (eds), *Anti-Impunity and the Human Rights Agenda,* (CUP, 2016), 15, 21-26.

[143] J. G. Stewart and A. Kiyani, 'The Ahistoricism of Legal Pluralism in International Criminal Law', (2017) 65(2) *The American Journal of Comparative Law* 393-449. *See also,* M. Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950,* (OUP, 2014) and G. J. Bass, *Stay the Hand of Vengeance,* (Princeton University Press, 2000), 58-105.

[144] Article 6 of the Charter of the International Military Tribunal states that the Tribunal shall have 'the power to try and punish *persons*' (emphasis added) and that '[t]he following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual criminal responsibility'. *See also,* Judgment of the Nuremberg Tribunal which confirmed that '*individuals* can be punished for violations of International Law' and also further that '[c]rimes against International Law are committed by *men,* not by abstract entities, and only by punishing *individuals* who commit such crimes can the provisions of international law be enforced' (emphasis added) - Judgment of the Nuremberg International Military Tribunal 1946, available online at https://crimeofaggression.info/documents/6/1946 Nuremberg Judgement.pdf (accessed 16/07/2018), 55.

[145] M. Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa' in Engle, Miller and Davis (eds), *Anti-Impunity and the Human Rights Agenda*' 351-352.

[146] UNGA Res 177(II) (21 November 1947), UN Doc. A/RES/177(II).

[147] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 United Nations Treaty Series 277 (Genocide Convention).

[148] UNSC Res 827 (25 May 1993), UN Doc. S/RES/827(1993).

(ICTY),[149] which were created in response to the crimes committed during the dissolution of the Former Yugoslavia and the genocide in Rwanda respectively. In a self-aggrandizing manner that serves as evidence of the primacy afforded to criminal justice, the ICTY boldly claims that it has 'laid the foundations for what is now the accepted norm for conflict resolution and post -conflict development across the globe'.[150] The ICTR closed its doors on 31 December 2015 having concluded proceedings for 85 accused[151] and the ICTY closed on the same date two years later, it having indicted 191 individuals, secured 83 conventions, and with 19 acquittals.[152] Both Tribunals established a significant and unparalleled legacy for international criminal justice. The Tribunals contributed substantially to the development of international criminal law, both substantive and procedural.[153] Importantly, the prosecution of high level figures such as Milosevic, Karadzic and Mladic demonstrated that no one, no matter their position, was beyond the law.[154]

The creation of the *ad hoc* tribunals was followed only shortly thereafter by the establishment of the International Criminal Court (ICC) which was heralded as a defining moment in history; Hans Corell, the then UN Undersecretary for Legal Affairs, said of its creation: ' [a] page in the history of humankind is being turned'.[155] Mills subsequently argued that it 'represented a dramatic leap forward in the international community's commitment to prosecute individuals for the most horrible of crimes'[156] and Knudson noted that it gave the evolving institution of criminal justice 'permanent relevance'.[157] This development was furthered with the creation of numerous other *ad hoc* and hybrid tribunals[158] as well as the implementation of international criminal law through domestic legal systems under the principle of universal jurisdiction. This provides that a state may prosecute certain grave international crimes committed outside of its territory even where it does not have a connection to the particular crime.[159] While the practice of the norm has been relatively sparse,

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[149] UNSC Res 955 (8 November 1994), UN Doc. S/RES/955(1994).

[150] The International Criminal Tribunal for the Former Yugoslavia, About the ICTY, available online at http ://www. icty. org/en/about (accessed 30/04/2018).

[151] International Criminal Tribunal for Rwanda, Key Figures of Cases, available online at http://unictr.unmict.org/en/cases/key-figures-cases (accessed 29/11/2017).

[152] International Criminal Tribunal for the Former Yugoslavia, ICTY Facts and Figures, available online at http://www.icty.org/en/content/infographic-icty-facts-figures (accessed 29/11/2017).

[153] I. Simonovic, 'The Role of the ICTY in the Development of International Criminal Adjudication', (1999) 23(2) *Fordham Journal of International Law* 439-559, 444.

[154] C. Rudolph, *Power and Principle: The Politics of International Courts,* (Cornell University Press, 2017), 3.

[155] 'Ratification Ceremony at UN Paves Way for International Criminal Court', *UN News*, 11 April 2002, available online at http://www.un.org/apps/news/story.asp?NewsID=3360&Cr=icc&Cr1VPcXfS4V7ng (accessed 4 March 2015).

[156] K. Mills, 'Vacillating on Dafur: Responsibility to Protect, to Prosecute or to Feed', (2009) 1(4) *Global Responsibility to Protect* 532559, 538.

[157] T. B. Knudson, 'Master Institutions of International Society: Theorizing continuity and change'., paper prepared for the 8th Pan-European Conference on International Relations 18-21 September 2013, Warsaw, 30.

[158] Extraordinary Chambers in the Courts of Cambodia in 2003, the Special Court for Sierra Leone in 2004, the War Crimes Chamber of the Court of Bosnia and Herzegovina in 2005, the Special Tribunal for Lebanon in 2007 and, more recently, the Kosovo Specialist Chambers in 2014.

[159] R. O'Keefe, 'Universal Jurisdiction. Clarifying the Basic Concept', (2004) 2(3) *Journal of International Criminal Justice* 735-760, 745 - 'the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct..universal jurisdiction can be defined as prescriptive jurisdiction over offences committed abroad by persons who, at the time of the commission, are non-resident aliens, where such offences are not deemed to constitute the threats to the fundamental interests of

primarily due to its politically sensitive nature, there have been a number of notable occurrences which include Spain's attempt to prosecute General Pinochet,[160] Belgium's attempt to prosecute Mr Yerodia,[161] the various attempts to prosecute US citizens for torture perpetrated during the Iraq conflict[162] and the successful and widely heralded prosecution of former Chadian dictator, Hissene Habre, in Senegal.[163] Most recently, Sweden and Germany have taken the lead in prosecuting those accused of committing crimes in the Syrian civil war in the absence of the availability of international mechanisms, such as the ICC.[164] This dominance of criminal justice is also evidenced by the evolution of the 'responsibility to prosecute' norm.[165]

The development of the status of international criminal law 'as the road to global justice'[166] has, however, marginalised other approaches to addressing gross human rights violations, resolution of conflicts and post-conflict reconciliation, which have been developing since the middle of the twentieth century. The mechanisms included truth and reconciliation commissions and amnesties, and it was part of the evolution of transitional justice, emanating in Latin America[167] and on the African continent,[168] wherein the focus of justice moved beyond retribution and, according to Teitel, 'included questions about how to heal an entire society and incorporate diverse rule-of-law values, such as peace and reconciliation, that had previously been treated as largely external to the transitional justice project.'[169] Perhaps the most famous example being the South African Truth and

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the prescribing state or, in appropriate cases, to give rise to the effects within its territory.'

[160] The Pinochet decision was a landmark case in English and international law. It confirmed the applicability of universal jurisdiction under the Torture Convention 1984 and, more significantly, it was the first case in the world to deny a former head of state immunity before a foreign domestic court when charged with international crimes.

[161] *See,* Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) [2000] ICJ Rep 3.

[162] *See,* K. Gallagher, 'Universal Jurisdiction in Practice. Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture', (2009) 7(5) *Journal of International Criminal Justice* 1087-1116.

[163] For an overview of the practice of universal jurisdiction, *see* C. L. Sriram, 'Exercising Universal Jurisdiction: Contemporary Disparate Practice', (2002) 6(4) *International Journal of Human Rights* 49-76.

[164] Human Rights Watch, *"These are the Crimes we are Fleeing " Justice for Syria in Swedish and German Courts,* (2017) available online at https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/iustice-syria-swedish-and-german-courts (accessed 23/05/2018). *See also,* The Brief, 'Germany and Sweden 'at forefront of prosecuting Syria war crimes'', *The Times,* 23 September 2017, available online at https://www.thetimesbrief.co.uk/users/39175-the-brief-team/posts/20755-germany-and-sweden-at-forefront-of- prosecuting-syria-war-crimes (accessed 23/05/2018); Wayamo Foundation, 'Building Bridges and Reaching Compromise: Constructive Engagement in the Africa-ICC Relationship', (2018), 23, available online at http: //www. wayamo. c om/wp - content/uploads/2018/05/ICC-Africa-Paper May-2018-1 .pdf (accessed 23/05/2018).

[165] A. Birdsall, 'The Responsibility to Prosecute and the ICC: A Problematic Relationship', (2015) 26(1) *Criminal Law Forum* 51-72, 52. *See also,* Ralph and Gallagher, 'Legitimacy fautlines in international society', 559; J. Ralph, 'Symposium: International Criminal Justice and the Responsibility to Protect', (2015) 26(1) *Criminal Law Forum* 1-12, 2; Turan, ''Responsibility to Prosecute' in an age of global governmentality'.

[166] S. M. H. Nouwen and W. G. Werner, 'Monopolizing Global Justice. International Criminal Law as a Challenge to Human Diversity', (2015) 13(1) *Journal of International Criminal Justice* 157-176, 162-163.

[167] *See,* for example: Peruvian Truth and Reconciliation Commission, National Commission on the Disappearance of Persons (Argentina), The National Commission of Enquiry into Disappearances (Bolivia), National Truth and Reconciliation Commission (Chile), The Truth Commission (Ecuador), the Commission on the Truth for El Salvador, Historical Clarification Commission (Guatemala), the Haitian National Truth and Justice Commission, National Truth Commission (Brazil)

[168] *See*, for example: The Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habre, His Accomplices and/or Accessories (Chad), Truth and Reconciliation Commission of the Democratic Republic of Congo, The Truth, Justice and Reconciliation Commission of Kenya, Liberian Truth and Reconciliation Commission, Sierra Leone Truth and Reconciliation Commission, Commission of Inquiry into Violations of Human Rights (Uganda).

[169] R. Teitel, 'Transitional Justice Genealogy', (2003) 16(1) *HarvardHuma Rights Journal* 69-94, 77.

Reconciliation Commission created at the end of apartheid, which will be looked at in greater detail in Chapter Four.[170] Other mechanisms include the use of Gacaca Courts in Rwanda which is a 'novel judicial initiative to try those accused of participation in the genocide that builds upon traditional Rwandan mechanism for dispute resolution' and is delivered in a community base in 'an attempt to meld the desire for justice with the need for reconciliation'.[171]

The diverse mechanisms were developed and utilised as a response to the limitations of retributive justice approaches, particularly the need to establish objective comprehensive historical records and to promote reconciliation between persons and communities in order to transition to peace, which was not the primary goal of criminal justice processes. These could even potentially hinder such objectives being achieved.[172] Mamdani refers to it as 'survivors' justice' and argues that it 'must be two-pronged: Prioritize peace over punishment, and explore forms of justice - not criminal but political and social - that will make reconciliation durable.'[173]

There are thus competing conceptions of what we mean by, and how we achieve, 'justice'. The assertion of the primacy of the retributive form, as codified in the Rome Statute, at the expense of other approaches, which represents a claim about the universalism of liberal cosmopolitanism, creates the circumstances for a backlash against international criminal justice as its limitations manifest in practice. Nouwen and Werner argue '[w]ithin the pluralist global society, numerous articulations of justice coexist, overlap and compete. Conceptions of global justice that effectively silence or marginalize alternative interpretations of what is just are therefore deeply problematic'.[174] We see this in the characterisation of the ICC's interventions in Africa as 'neo -colonial' by some African states. This issue will be examined in this thesis in the context of the relationship between the BRICS states and the ICC.

2.4.2. International Criminal Justice as Cosmopolitan Progress

International criminal justice is a part of the cosmopolitan evolution of international society. Simpson argues, '[w]ar crimes law is...in the vanguard of a new project dedicated to establishing

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[170] For a more detailed examination of truth and reconciliation commissions, including those listed herein, *see* N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice,* (CUP, 2006); R. G. Teitel, *Transitional Justice,* (OUP, 2000); Teitel, *Globalizing transitional justice: contemporary essay.*

[171] T. Longman, 'Justice at the grassroots? Gacaca trials in Rwanda' in_N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice*, (CUP, 2006), 207.

[172] For a critical analysis of international criminal law and its limitations *see,* M. J. Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity', (2000) 22(1) *Human Rights Quarterly* 118-147 and J. Snyder and L. Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', (2003/04) 28(3) *International Security* 5-44.

[173] M. Mamdani, *Saviors and Survivors. Darfur, Politics and the War on Terror,* (Doubleday Religion, 2009), 268.

[174] Nouwen and Werner, 'Monopolizing Global Justice.', 158.

the conditions for a cosmopolitan legal order'[175] and Ralph explains that the creation of the *ad hoc* tribunals 'was testimony to the growing significance of a cosmopolitan consciousness that shared a common interest in the prevention and punishment of actions that offended a shared conception of humanity.'[176] As will be explored in the course of this section, international criminal justice has also furthered this evolutionary process by contributing to the reconceptualisation of pluralist primary institutions as it seeks to address obstacles to the effective protection of persons and the promotion of accountability; as Thakur and Popovski argue, the '[r]evulsion at the murder of large numbers of civilians in a range of atrocity crimes...led to a softening of. support for the norms and institutions that shield the perpetrators from international criminal accountability'.[177] Similarly, Ainley says of the ICC, that it 'significantly challenge[s] those theories of international relations that see states as governed only by norms of state sovereignty and non -intervention, where order, regrettably perhaps, but inevitably, takes priority over justice.[178] Moreover, the proliferation of international criminal courts 'signified a seismic shift in global governance'.[179]

First, and most simply, international criminal justice focuses on the individual as opposed to the state or other collective entities. Popovski argues '[t]he development of individual accountability for violations of human rights and humanitarian law, in terms of both codification and enforcement, is one of the most significant changes in contemporary world politics.'[180] Moreover, Simpson argues it represents 'the triumph of global individualism' and 'transforms of the soul of international law.'[181] It does this in two principal ways. Firstly, it is based on the principle of individual criminal responsibility. Individuals are prosecuted and punished for committing crimes which are essentially violations of the obligations imposed upon them by international law[182] and, as a result, guilt is individualised rather than collectivised.[183] The criminal justice process does not directly seek to establish state responsibility for crimes; as the ICTY found in the case of Kunerac

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[175] G. Simpson, *Law, War and Crime. War Crimes Trials and the Reinvention of International Law,* (Polity Press, 2007), 46. *See also,* Bass, *Stay the Hand of Vengeance*, 280.

[176] J. Ralph, 'Anarchy is What Criminal Lawyers and other Actors Make of it: International Criminal Justice as an Institution of International and World Society' in S. C. Roach, *Governance, Order, and the International Criminal Court. Between Realpolitik and a Cosmopolitan Court,* (OUP, 2009), 141.

[177] R. Thakur and V. Popovski, 'The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity', (2007) 1 *The Global Community Yearbook of International Law and Jurisprudence* 39-61, 39-40.

[178] K. Ainley, 'The International Criminal Court on trial', (2011) 24(3) *Cambridge Review of International Affairs* 309-333, 310.

[179] P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', (2013) 11(3) *Journal of International Criminal Justice* 527-536, 528.

[180] V. Popovski, 'International Criminal Court. A Necessary Step Towards Global Justice', (2000) 31(4) *Security Dialogue* 405-419, 405

[181] Simpson, *Law, War and Crime*, 57-58.

[182] Orakhelashvili, 'The Position of the Individual in International Law', 269 and A. Clapham, 'The Role of the Individual in International Law', (2010) 21(1) *European Journal of International Law* 25-30, 27. *See* also, M. C. Bassiouni, 'The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights', (1982) 9(1) *Yale Journal of International Law* 193-216.

[183] D. Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', (2013) 26(1) *Leiden Journal of International Law* 127-153, 132-133.

et al: 'the participation of the state becomes secondary, and generally, peripheral'.[184] As Koskenniemi explains, the individualisation of guilt also depoliticises it.[185]

Additionally, one of the purposes of international criminal justice is to vindicate the rights of individuals that have been violated by international crimes which have been perpetrated against them. As Thakur and Popovski explain of international criminal justice, '[t]he inter-related twin tasks are to protect the victims and punish the perpetrators.'[186] On the relationship between human rights and criminal law, Franceschet argues that 'cosmopolitanizing international law involves changing its rules, norms, principles, and practices in ways that enhance respect for individual rights globally' and that this is achieved by enhancing the international human rights law regime by enforcing rights through international criminal law.[187] Hurrell similarly argues that '[t]he move towards stronger systems of implementation [of human rights] can be seen in the marked, and normatively highly significant, shift towards individual criminal responsibility for grave human rights violations' and 'in the development of international courts and tribunals',[188] and Simpson argues international criminal law gives 'human rights law that bite it was thought to lack.'[189]

Second, international criminal justice contributes to the regulation and humanisation of armed conflict, and in doing so helps to reconceptualise the primary institution of war. More specifically, international criminal justice enforces the rules of humanitarian law which dictate how war should be conducted with the primary purpose of mitigating the impact of war on the individual, both combatants and civilians. More recently, international criminal justice has sought to prohibit the conduct of war, supplementing the law regarding the use of force by states, by criminalising acts of aggression. As Knudson has argued, 'changes in the constitutive principles of war have been underlined by...the steps taken to make the act of aggression by states a crime which individual state leaders may be held accountable for'.[190] The pluralist primary institution of war has become increasingly circumscribed as international law and cosmopolitan morality have evolved and have become embedded within international society. This will be looked at further in Chapter Six which is concerned with the criminalisation of aggression by the ICC.

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[184] Judgment, *Kunarac, Kovac and Vukovic,* (Case No. IT-96-23-T), Trial Chamber, 22 February 2001, para. 493 cited in R. McCorquodale, 'An Inclusive International Legal System', (2004) 17(3) *Leiden Journal of International Law* 477-504, 488.
[185] M. Koskenniemi, 'Between Impunity and Show Trials', (2002) 6(1) *Max Planck Yearbook of UN Law* 1-35.
[186] Thakur and Popovski, 'The Responsibility to Protect and Prosecute', 41. Similarly Teitel argues that 'protection of human rights is still thought to be attainable through international punishment processes' - Teitel, *Globalizing transitional justice,* 14.
[187] A. Franceschet, 'Four Cosmopolitan Projects: The International Criminal Court in Context' in S. C. Roach, *Governance, Order and the International Criminal Court. Between Realpolitik and a Cosmopolitan Court,* (OUP, 2009), 184.
[188] Hurrell, *On Global Order,* 146-147. *See also,* Turan, ''Responsibility to Prosecute' in an age of global governmentality', 25 who argues that international criminal justice 'signal that the earlier human rights discourse has been transformed into an accountability regime, within which an 'international community' has is ascribed the responsibility not only 'to protect' the victims of what is codified as 'crimes', but also 'to prosecute' the perpetrators as 'criminals'.
[189] Simpson, *Law, War and Crime,* 57.
[190] Knudson, 'Master Institutions of International Society', 24

Third, international criminal justice is a separate process from the diplomatic and political efforts to settle armed conflicts through negotiation. While criminal justice does aim to make a limited contribution to the peaceful resolution of conflicts and to post-conflict reconciliation,[191] it does so only as an ancillary, consequential objective through evidence-led, impartial prosecutions, rather than *via* intentional, politically motivated and strategic interventions aimed at facilitating political settlements and securing lasting peace. As Akhavan has argued, reconciliation 'can only be the incidental outcome of international criminal justice, and not its purpose.'[192] Further, the decision on whether to proceed with a criminal prosecution is not determined by its potential effect on peace or, in other words, considerations of peace and order do not shape the pursuit of justice. As Cassese has argued in relation to the ICC, 'the ICC and its organs do not have a diplomatic agenda...the Court is (essentially) a judicial body.'[193] It can therefore be said that the application of the rule of law is prioritised over political considerations, and the primary institution of diplomacy is required to compete with the institution of criminal justice; as Simpson argues, '[organizations like the ICC become the enemy of politics - calling for punishment instead of negotiation...and trial instead of immunity.'[194] Furthermore, Robertson said of the Tadic case, the first case before the ICTY, that it was 'a deeply symbolic moment: the first sign of a seismic shift, from diplomacy to legality, in the conduct of world affairs'.[195]

The supposedly a-political nature of international criminal justice is the basis of the independence and impartiality from which it derives its legitimacy. The approach is reflected in the deliberate absence of amnesty provisions in international criminal law, as amnesties are a mechanism which prioritises peace over justice. This prioritisation of justice over concerns about peace and order will potentially give rise to disputes and contestation. The pursuit of justice may interfere with delicate political and diplomatic processes aimed at achieving the peaceful settlement of an armed conflict, which may be facilitated by the use of amnesties and other non-criminal justice responses. The conflict between the cosmopolitan solidarist pursuit of justice and the pluralist emphasis on order, which involves peace within and between states, is something that we see play out in relation to the ICC, as will be explored in the course of this thesis.

Fourth, the development of international criminal law and the proliferation of international criminal

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[191] International Criminal Court, 'About', available online at https://www.icc-cpi.int/about (accessed 12/06/2018) - '[j]justice is a key prerequisite of lasting peace. International criminal justice can contribute to long-term peace, stability and equitable development in post-conflict societies.' The ICTY's legacy website states: '[t]he Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe' - International Criminal Tribunal for the Former Yugoslavia, 'About', available online http://www.icty.org/en/about (accessed 12/06/2018).

[192] Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', 532.

[193] A. Cassese, 'Is the ICC Still Having Teething Problems?', (2006) 4(3) *Journal of International Criminal Justice* 434-441, 441

[194] Simpson, *Law, War and Crime*, 22.

[195] G. Robertson QC, *Crimes against Humanity. The Struggle for Global Justice*, (2006), 373.

courts not only reflects the progressive shift towards supranationalised global governance, it also contributes to the reconceptualisation of state sovereignty and transforms the relationship between states and international society. As Donnelly argues '[s]tate sovereignty was further redefined by the creation of mechanisms for holding individuals criminally responsible for certain severe human rights violations'.[196] This is because, as Robinson notes, 'ICL entails the 'unmediated' application of law to individuals by international governance mechanisms', thereby transcending the state,[197] and Rudolph argues that the 'shift toward individual accountability represents a significant transfer of authority from sovereignty states to international institutions.'[198] This occurs in a number of ways, which are outlined below.

First, international criminal justice establishes that international society has a legitimate interest in what goes on within a state's territory and, more specifically, with the actions of its citizens, including members of the government and the military, and the decisions they make in armed conflicts. Such matters would have traditionally fallen within the state's *domain reserve* whereas now individuals are directly accountable for their actions to international society. The scrutiny by, and involvement of, international society pierces the sovereign veil. This is particularly the case when international courts implement international criminal law, and especially when done so without the state's consent, such as with the ICTY and the ICTR, which were established by the Security Council under Chapter VII of the UN Charter. As Simonovic argues, '[t]he establishment of the ICTY obviously implies a certain limitation upon sovereignty. No country easily accepts such conditions of its free will'.[199] Furthermore, Ainley argues that the existence of the ICC 'challenges the notion of state sovereignty more than any other institution in the contemporary global order.'[200]

Second, government officials cannot use sovereignty to justify the commission of acts which amount to international crimes or as a shield to avoid prosecution and punishment. This is evident in the denial of immunity to sitting heads of state and other senior government officials under international criminal law. The anti-impunity norm, established at the Leipzig trials,[201] consolidated

[196] J. Donnelly, 'State Sovereignty and International Human Rights', (2014) 28(2) *Ethics and International Affairs* 225-238, 231.
[197] Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', 146-147.
[198] Rudolph, *Power and Principle: The Politics of International Courts,* 1. *See also,* D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics,* (OUP, 2014), 2.
[199] I. Simonovic, 'The Role of the ICTY in the Development of International Criminal Adjudication', (1999) 23(2) *Fordham Journal of International Law* 439-559, 444.
[200] Ainley, 'The International Criminal Court in trial', 314.
[201] Stewart and Kiyani, 'The Ahistoricism of Legal Pluralism in International Criminal Law'. *See also,* Lewis, *The Birth of the New Justice*.

at Nuremberg,[202] adopted by the *ad hoc* and other hybrid tribunals,[203] applied by domestic courts,[204] and enshrined in the Rome Statute,[205] represents cosmopolitan progress in that it challenges sovereignty and reflects the normative prioritisation of justice over order. As Thakur and Popovski argue, the cosmopolitan pursuit of criminal justice requires 'substantial derogations from sovereignty, the first with respect to the norm of non-intervention and the second with respect to sovereign impunity up to the level of heads of state and government.'[206]

Heads of state were traditionally afforded immunity from criminal prosecution on the basis they were the embodiment of the sovereign state and in order to facilitate international relations between states. As Gaeta explains, rules on immunities 'have developed to ensure reciprocal respect among states for their sovereignty'[207] and Akande and Shah note that immunities 'ensure the smooth conduct of international relations...it is important that states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states.'[208] Therefore the denial of immunity to heads of state in respect of international crimes demonstrates the shift from absolute deference to state sovereignty and concerns about order between states, to the prioritisation of delivering justice and protecting human rights. As Cryer *et al* note, it became accepted that 'neither dignity nor political expediency is a compelling reason to exclude *a priori* accountability for serious international crimes' and '[t]he interests of the international community in the smooth functioning of international relations must be set against the interests of bringing international criminals to

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[202] Article 6 Charter of the International Military Tribunal. *See also,* Judgement of the Nuremberg International Military Tribunal 1946, available online at https://crimeofaggression.info/documents/6/1946 Nuremberg Judgement.pdf (accessed 16/07/2018), 55.

[203] Article 7(2) ICTY Statute, Article 6(2) ICTR Statute, Article 6(2) SCSL Statute. *See also,* Indictment in respect of Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Vlajko Stojiljkovic, *The Prosecutor* v *Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Vlajko Stojiljkovic* (IT-99-37), 22 May 1999; Indictment for Jean Kambanda, *The Prosecutor* v *Jean Kambanda* (ICTR-97-23-DP), 28 October 1997; Indictment for Charles Ghankay Taylor, *The Prosecutor* v *Charles Ghankay Taylor* (SCSL-2003-01-I), 7 March 2003.

[204] R v Bow Street Metropolitan Stipendiary Magistrate and Others, *ex parte Pinochet Ugarte (No.3)* [2000] 1 AC 147. For commentary, *see* A. Bianchi, "Immunity *versus* Human Rights: The Pinochet Case" (1999) 10(2) *European Journal of International Law* 237-277.

[205] Article 27 Rome Statute.

[206] Thakur and Popovski, 'The Responsibility to Protect and Prosecute', 41.

[207] P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest', (2009) 7(2) *Journal of International Criminal Justice* 315-332, 320. *See also,* D Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', (2010) 21(4) *European Journal of International Law* 815-852, 818 who argue that a Head of State is 'accorded immunity ratione personae not only because of the functions he performs but also because of what he symbolises: the sovereign state. The person and position of the Head of State reflects the sovereign quality of the state' and R v Bow Street Metropolitan Stipendiary Magistrate and Others, *ex parte Pinochet Ugarte (No.3)* [2000] 1 AC 147, *as per* Lord Millet at p.269a - '[t]he immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts and private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever'.

[208] Akande and Shah, 'Immunities of State Officials', 818. *See also,* R Jennings and A Watts (eds), *Oppenheim's International Law,* (OUP, 1996), 1034 and R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to the International Criminal Law and Procedure,* (CUP, 2007), 426-427 who argued the 'existing system of diplomatic relations has enabled representatives of States with historical antipathies and very different viewpoints to interact, to learn about each other and to reach mutual understandings. The system made possible global summits, the creation of international organizations, and development of treaties creating today's corpus of laws. It has enabled diplomats to work in antagonistic States to protect nationals and to avert escalating conflicts.'

justice".[209]

However, while Cryer *et al* argue 'priorities are shifting in favour of justice and accountability, and the balance in the law is tracking this with a corresponding evolution, with the scope of immunities gradually becoming narrower',[210] there continues to be disagreement as to the removal of head of state immunity. This reflects a continued defence to sovereignty and a disagreement about the nature of international society. As Needham argues, '[i]n the international context, there is an ongoing debate about the appropriate balance between upholding sovereign equality, which presupposes a system of immunity, and the need for accountability and protection of human rights'[211] and the 'challenge for international criminal law is to reconcile the competing objectives of maintaining stable international relations through immunity rules and ensuring that perpetrators of international crimes are held accountable'.[212]

Furthermore, it can be argued that the controversy surrounding head of state prosecutions in the absence of an immunity bar is partly due to the fact that it politicises justice. Whereas by individualising guilt criminal justice is supposed to avoid attributing state responsibility for human rights violations, for example, this in fact occurs when heads of state are prosecuted given they embody the state and would have employed state apparatus in committing criminal acts. A court is therefore, albeit indirectly, judging state conduct. Moreover, criminal justice processes can result in regime change by delegitimising a current or former regime through investigations and indictments, and legitimising a new one, or by physically removing regime figures through arrests and prosecutions at international courts. These acts have serious political consequences, even if done with purely legal objectives.[213] This debate plays out in the engagement between the BRICS and the ICC in respect of the arrest warrants issued by the ICC in respect of President al-Bashir of Sudan and Libya's Colonel Gaddafi, as will be explored in Chapters Seven and Eight.

2.4.3. The Limits of Cosmopolitan Progress

While international criminal justice attempts to replace international politics with the rule of law, it is shaped and affected by it in a structure-agency relationship. Unlike in the domestic sphere, the regime of international criminal justice is deeply embedded within the politics of international

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[209] Cryer, et al., *An Introduction to International Criminal Law and Procedure,* 426- 427

[210] Cryer, et al., *An Introduction to International Criminal Law and Procedure,* 428. *See also,* Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) [2000] ICJ Rep 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 74-75.

[211] J. Needham, 'Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law', (2011) 17 *Auckland University Law Review* 219-248, 229

[212] Needham, 'Protection or Prosecution for Omar Al Bashir?, 220

[213] Teitel, *Transitional Justice,* 29.

society, and its power structures and power relationships. Although international criminal justice focuses upon the individual and his or her culpability for international crimes, and in doing so marginalises the edifice of the state in the process, the state remains very much relevant to the construction and operation of the international criminal justice system. This reflects the fact, as argued in Chapter One, that particularly in respect of international criminal justice, current global political order exists in the overlap between the solidarist international society and world society conceptions of global political order. It also shows the ongoing relevance of realist thinking wherein there is a relationship between power and normative change in international society, which the English School aims to interrogate.

This is because states agree international treaties dealing with criminal law issues, they establish courts and tribunals to implement the law, and their ongoing assistance to and cooperation with the tribunals is essential to their effective functioning including in terms of providing funding and logistical support. As Simpson explains, there is somewhat of a paradox in the cosmopolitanism of international criminal law in 'it represents an attempt to transcend sovereignty while remaining largely reliant on the particular instantiations of it.'[214] This means states can shape international criminal justice and its implementation, and moreover, the most powerful states will often have the greatest influence. As Simpson argues, 'the construction of the international criminal order remains subject to the inclinations of the Great Powers.'[215] Examples of this include the manner in which the Allied States determined the structure of the Nuremberg and Tokyo Tribunals, and the law to be applied by them, and the control exercised by the Security Council over the creation of the *ad hoc* Tribunals and the continuing influence it had over their work. As Megret argues in relation to the ICTY, 'the Security Council obtained almost everything short of outright suzerainty...[f]or most of its early years, the Tribunal would be a toy in the hands of the great powers'.[216] In this respect, Simpson argues that '[l] aw is politics transformed...war crimes trials pursue political ends through jurisprudential means. They are a form of legalistic politics.'[217]

It is also seen in the highly politicised nature of the Rome Statute negotiations and the control that states continue to exercise over the Court's work, primarily as a result of its legal relationship with the Security Council. As Rudolph argues, 'power politics can influence the behavior of international criminal tribunals, even those designed to be the most insulated from them'.[218] Lastly, but perhaps most pertinently, the politicised nature of international criminal justice can be seen in the fact there has not been systematic and widespread prosecutions of crimes committed during the conflict in

[214] *Simpson,* Law, War and Crime, 46.
[215] *Simpson,* Law, War and Crime, 44.
[216] F. Megret, 'The Politics of International Criminal Justice', (2002) 13(5) *European Journal of International Law* 1261-1284, 1257
[217] *Simpson,* Law, War and Crime, 24.
[218] *Rudolph,* Power and Principle: The Politics of International Courts, 6.

Syria, despite the heinous nature of the crimes that have been perpetrated. Simpson argues the selectivity of international criminal trials means it is political and emphasises that great powers have the ability to insulate themselves from prosecutions, noting 'war crimes trials may be better understood as embodying the provisional immunity of hegemons'.[219] This again demonstrates the ongoing relevance of realist thinking in examining international politics.

The politicking of international criminal justice poses a real threat to the institution's legitimacy and thus its authority and long-term sustainability, because its legitimacy is derived from the neutral application of international criminal law by independent and impartial mechanisms which do not have a political agenda or political interests. This is seen in the labelling of the Nuremberg and Tokyo Trials as victor's justice, the accusations of political bias directed at the ICTY and the ICTR, and the controversies surrounding the ICC's interventions in Africa. The issue is a procedural one about *who* controls the implementation of international criminal justice and when/where it is deployed, as opposed to whether it is a legitimate institution. Moreover, there are also concerns that the evolution of international criminal justice poses a threat to order within international society because of the way it challenges the state-centric nature of global political order, reconceptualises sovereignty into a more limited form and prioritises prosecutions above the diplomatic settlement of conflicts. As Ralph explains, '[t]he pluralist criticism of international criminal justice...is often premised on the belief that such actions will lead to a breakdown in international society and the proliferation of 'chaos'.'[220] This is one of the bases of the BRICS states' concerns about international criminal justice, as will be apparent in the course of the thesis.

2.5. Conclusion

The story of the evolution of liberal international society from 1945 to date is characterised as an uneasy and unfinished progression from a pluralist to a solidarist conception of international society, involving cosmopolitan progress and with some developments touching upon the edge of world society. It can also be described as a transition from a Westphalian to a post-Westphalian world order. The post-World War Two settlement with the dominant position assumed by liberal powers, particularly the US, led to the creation of a new, primarily pluralist global political order based upon the institutions of classical international law, multilateralism and diplomacy, with the aim of facilitating the peaceful coexistence and interaction of sovereign states. It also, however, included some cosmopolitan elements with the importance of human rights protection being codified in the UN Charter and the International Military Tribunals established at Nuremberg and

[219] *Simpson,* Law, War and Crime, 16-18.
[220] J. Ralph, *Defending the Society of States. Why America Opposes the International Criminal Court,* (OUP, 2007), 80.

Tokyo laying the foundations of international criminal law and entrenching the principle of individual criminal responsibility that had first been articulated at the Leipzig Trials.

The cosmopolitan aspirations and consciousness of international society manifested in the evolution of the international human right law framework and international criminal justice, particularly in the post-Cold War era, and it reflected the improved status of the individual *vis-a-vis* states, the diversification of international law, and the shift to supranational global governance which included a growing role for international courts. These developments challenged and reconstituted the pluralist primary institutions on which international society had been founded, namely sovereignty, war, multilateralism, diplomacy and international law. As Ikenberry notes, 'the erosion of norms of state sovereignty - along with other deep shifts in the global system - have eroded the foundation of the old order and thrown the basic terms of order and rule of world politics into disrepute.'[221] This has faced resistance, however, due to concerns about how such developments may undermine and threaten order, peace and stability among states in international society. The evolution of global governance also gave rise to the issue of where authority and decision-making power lies, and how it is to be exercised legitimately. This issue is compounded with the ongoing influence of power politics in global governance, particularly by Western states. As Ikenberry argues, '[i]n a fundamental sense there is an authority crisis in today's liberal order...how to establish legitimate authority for concerted international action on behalf of the global community. is the great challenge liberal international order.'[222]

The result is an often uneasy and delicate compromise between cosmopolitan aspirations and pluralist pragmatism; a compromise between the pluralist value of order and the solidarist value of justice, and between states and international organisations with respect to decision-making authority in matters of global governance. Koskenniemi notes, '[t]he tension between ethics and institutions (or tradition and modernity) is visible in post-war internationalism'[223] and Hurrell notes that the 'difficulty of finding a politically and morally acceptable bridge between statism and cosmopolitanism remains a central challenge to the creation of a viable international order.'[224] This compromise position create challenges for the effective protection of human rights and implementation of international criminal justice, and so as Ikenberry explains, '[a] reformed liberal international order will need to find ways to reconcile more intrusive rules and institutions with legitimate international authority'[225] if progress is to be sustainable.

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[221] Ikenberry, *Liberal Leviathan,* 17.
[222] Ikenberry, 'Liberal Internationalism 3.0', 80, 83
[223] Koskenniemi, 'Lauterpacht: The Victoria Tradition in International Law', 250.
[224] Hurrell, 'Kant and the Kantian Paradigm in International Relations', 205.
[225] Ikenberry, 'Liberal Internationalism 3.0', 80-81.

With this broad historical context in mind and an awareness of the issues that it has raised, the next chapter will introduce the BRICS states and examine their views on international society with the purpose of establishing how they relate to the current international society and its evolutionary trajectory, identifying consistencies and tensions. This is a precursor to a detailed analysis of the BRICS states' engagement with international criminal justice as an institution of international society, which is provided in Chapter Four. This is followed by an analysis of the BRICS states' engagement with the ICC specifically which is the primary focus of this research project and forms of the content of the second half of this thesis in Chapters Five to Nine.

CHAPTER THREE

THE BRICS AND THEIR VISION OF INTERNATIONAL SOCIETY

3.1. Introduction

Following on from the analysis of the cosmopolitan-solidarist evolution of liberal international society in the previous chapter, this chapter introduces the BRICS states as the representatives of the shift in the balance of power and examines their normative vision of global political order for the purpose of understanding whether and, if so, how these states pose a threat to international society as it currently exists and its future evolutionary trajectory, particularly in response to the decline of Western influence in international affairs. As Newman argues, the rise of new powers such as the BRICS states 'has arguably resulted in a process of normative contestation and resistance in international politics'[1] and Gaskarth similarly asserts that the emergence of such states 'represents a profound challenge to both the structure of the international system and the normative foundation of international society' which 'potentially threaten to unravel the institutions of global governance'.[2] This chapter provides historical and analytical background to the remainder of the thesis which assesses the threat to liberal international society posed by the BRICS through a focused analysis of their relationship with the ICC.

The chapter is structured as follows. First, it traces the evolution of the BRICS as a political group and argues that the states coalesced around a shared desire to play a significant and meaningful role in global governance commensurate with their rising power status. It then goes on to examine the BRICS' reformist nature and their desire to make global governance more democratic. Third, the chapter examines the BRICS' view of global political order. It argues that the BRICS support a state-solidarist conception of international society which involves asserting the continuing importance of pluralist primary institutions and values in the context of progressive cosmopolitan progress. The concern of the BRICS states is about *how* cosmopolitan values are implemented, not about challenging their continued existence and relevance. It is noted, however, that this normative positioning on the part of the BRICS states is partly informed by self-interested concerns of power maximisation and the protection of national interests. Last, the chapter reflects upon the decline of the West and how this has created space for BRICS agency in global order building.

[1] E. Newman, 'What prospects for common humanity in a divided world? The scope for RtoP in a transitional international order', (2016) 53(1) *International Politics* 32-48, 36.
[2] J. Gaskarth, 'Introduction' in J. Gaskarth (ed), Rising Powers, Global Governance and Global Ethics, (Routledge, 2015), 1-2.

3.2. The Evolution of the BRICS and their Reform Ambitions

3.2.1. The Origins of the BRICS

The term 'the BRICs' was originally coined in 2001 by Jim O'Neill, the then head of global economic research at Goldman Sachs.[3] The acronym referred to the identification of the large emerging economies of Brazil, Russia, India and China,[4] whose Gross Domestic Products were outstripping those of the G7 countries and therefore provided a potential investment opportunity over the next ten years. By 2003, encouraged by another Goldman Sachs publication entitled 'Dreaming of the BRICs: The Path to 2050',[5] the BRICs was fast becoming a buzzword in international politics,[6] it having previously been confined to narrow economic circles, and this was followed by the evolution of the BRICs as a political group, which Stuenkel describes as 'one of the most important developments in international politics.'[7]

The first meeting of the BRICs states took place in 2006, an informal meeting of the countries' foreign ministers, at which they identified a shared 'growing discontent about the distribution of power in the IMF and the World Bank' and expressed a 'commitment to jointly push for further reform of global financial structures.'[8] This was followed over the subsequent years by a series of regular, more formal meetings between the countries, including their heads of state, during which their relations as a political group emerged.[9] Each of the states saw commonalities in their positions

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[3] O. Stuenkel, *The BRICS and the Future of Global Order,* (Lexington Books, 2015), 1. *See also,* J. O'Neill, 'Building Better Global Economic BRICs', *Goldman Sachs Global Economics Paper No.66,* 30 November 2001, 1-16, available online at http://www. goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf (accessed 16/07/2018).

[4] South Africa was not included in Jim O'Neill's acronym and only became a member the political grouping in 2011. As a result the acronym was changed to 'BRICS', with a big 'S' for South Africa as opposed to a small 's' pluralising BRIC.

[5] D. Wilson and R. Purushothaman, 'Dreaming with the BRICs: The Path of 2050', *Goldman Sachs Global Economics Paper No.99,* 1 October 2003, 1-24, available online at http://www. goldmansachs.com/our-thinking/archive/archive-pdfs/brics-dream.pdf (accessed 16/07/2018).

[6] Stuenkel, *The BRICS ad the Future of Global Order,* 2.

[7] O. Stuenkel, 'Emerging Powers and Status: The Case of the First BRICs Summit', (2014) 38(1) *Asian Perspective* 89-109, 89. *See also,* C. Roberts, 'Polity Forum: Challengers or Stakeholders? BRICs and the Liberal World Order', (2010) 42(1) *Polity* 1-13, 1.

[8] Stuenkel, *The BRICS ad the Future of Global Order,* 11.

[9] Joint Statement of the BRIC Countries' Leaders, *Yekaterinburg, Russia,* 16 June 2009, available online at http://www.brics.utoronto.ca/docs/090616-leaders.html (accessed 16/07/2018); Second BRIC Summit of Head of State and Government: Joint Statement, *Brasilia,* 15 April 2000, available online at http://www.brics.utoronto.ca/docs/100415-leaders.html (accessed 16/07/2018); Sanya Declaration, *Sanya, China,* 14 April 2011, available online at http://www.brics.utoronto.ca/docs/110414-leaders.html (accessed 16/07/2018); Fifth BRICS Summit - eThekwini Delcartion and Action Plan, *eThekwini, South Africa,* 27 March 2013, available online at http://www.mea.gov.in/bilateral-documents.htm?dtl/21482 (accessed 16/07/2018); Fourth BRICS Summit - Delhi Declaration, *New Delhi*, 29 March 2012, available online at http://www.brics.utoronto.ca/docs/120329-delhi-declaration.html (accessed 16/07/2018); Sixth BRICS Summit: Fortaleza Declaration, *Fortaleza, Brazil,* 15 July 2014, available online at http ://www.brics.utoronto. ca/docs/140715 -leaders.html (accessed 16/07/2018); Seventh BRICS Summit: 2015 Ufa Declaration, *Ufa, Russia*, 9 July 2015, available online at http://www.brics.utoronto.ca/docs/150709-ufa-declaration en.html (accessed 16/07/2018); Eighth BRICS Summit: Goa Declaration, *Goa, India,* 16 October 2016, available online at http://www.brics.utoronto.ca/docs/161016-goa.html (accessed 16/07/2018); BRICS Leaders Xiamen Declaration, *Xiamen, China,* 4 September 2017, available online at http://www.brics.utoronto.ca/docs/170904-xiamen.html (accessed 16/07/2018).

on global issues and the benefits of uniting to face them together.[10] At the first BRICs summit, which took place in Russia in 2009, the Russian President, Dimiti Medvedev, described the meeting as the 'epicenter of world politics'[11] and the BRICs agreed 'the financial crisis offered opportunities for emerging powers to strengthen cooperation between themselves, and their position in global affairs as a whole.'[12]

In 2011, South Africa joined the group and it became known, as it is today, as the 'BRIC S'. Its inclusion was rather controversial in the sense that South Africa's GDP does not match that of the other members of the grouping, especially India and China.[13] It is suggested that South Africa was invited to join the group, and is an appropriate member, because of its status as a well-known political actor in international society, particularly given the regional leader role it plays on the African continent.[14] South Africa said it 'enjoys recognition as a dedicated and committed global and regional player' and that it plays a 'constructive role in global governance structures' which is appreciated by BRICS'.[15] Grant and Hamilton have noted South Africa's desire to be a diplomatic 'heavyweight' in international affairs in bolstered by its membership of the BRICS.[16] Moreover, as Stuenkel argues, South Africa's inclusion gave the BRICS 'a more global structure, with a stronger capacity to speak on behalf of the emerging world'.[17] The BRICS have therefore come to represent, and are perceived as representing, rising powers and the emerging global political order more generally.[18]

The inclusion of South Africa also brings additional credibility to the group because of its transition from apartheid and its commitment to human rights; as South Africa has stated, its 'own unique historic political transformation process to become a constitutional democracy is perceived as a unique contribution to the world. The country has facilitated similar processes for peace elsewhere in the world', and it sees such an identity as a valuable addition to the BRICS.[19] Schoeman therefore

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[10] For a detailed explanation of the evolution of the BRICS states as a political grouping *see,* Stuenkel, *The BRICS ad the Future of Global* Order; O. Stuenkel, *Post Western World,* (Polity Press, 2016).
[11] Stuenkel, 'Emerging Powers and Status', 92.
[12] Stuenkel, *The BRICS ad the Future of Global Order,* 14-15.
[13] P. Harrison, 'South Africa in the BRICS', (2014) 19 *Oasis* 67-84, 68-69.
[14] *See,* N. Duggan, 'BRICS and the Evolution of a New Agenda Within Global Governance' in M. Rewizorski, *The European Union and the BRICS: Complex Relations in an Era of Global Governance,* (Springer, 2015), 16; C. Alden and M. Schoeman, 'South Africa in the company of giants: the search for leadership in a transforming global order', (2013) 89(1) *International Affairs* 111-129, 114-115
[15] 'South Africa's Role in BRICS, and its Benefits to Job Creation and the Infrastructure Drive in South Africa. Minister Maite Nkoana-Mashabane, Minister of International Relations and Cooperation, Republic of South Africa, Speech presented at the New Age Business Briefing', 11 September 2010, available online at http://www.brics.utoronto.ca/docs/120911-nkoana-mashabane.html (accessed 16/07/2018).
[16] J. A. Grant and S. Hamilton, 'Norm dynamics and international organisations: South Africa in the African Union and the International Criminal Court', (2016) 54(2) *Commonwealth and Comparative Politics* 161-185, 162.
[17] Stuenkel, *The BRICS ad the Future of Global Order,* 41.
[18] This thesis takes as a fact, consistent with the existing literature, that Brazil, Russia, India, China and South Africa are rising powers and therefore does not spend time justifying the inclusion of these states within that category.
[19] 'South Africa's Role in BRICS', *supra* note 15.

argues South Africa enjoys emerging power recognition 'largely on the basis of the 'normative legitimacy' that grew from its anti-apartheid history and its peaceful transition to democracy under the leadership of Nelson Mandela.'[20] Moreover, like the other BRICS states, South Africa aspires to be a norm-maker and to contribute to reforming global governance. This is driven by its ruling party's, the ANC, self-identification as a liberation movement. This serves to distinguish it from traditional middle powers[21] and makes it a suitable member of the grouping.

The BRICS political grouping subsequently became increasingly institutionalised with the states meeting formally on a regular basis at BRICS summits. These involve heads of state meetings as well as meetings between other senior government officials, and communiques are produced. Furthermore, the interests and ambitions of the BRICS gradually expanded beyond economic and financial issues to encompass terrorism, sustainable development, security, peacekeeping, the internet, illegal migration, the drugs trade, arms trafficking and, more recently, human rights and humanitarian intervention as well as other global issues.[22] This occurred because, as Stuenkel explains, 'close cooperation in the area of finance had created the trust that allowed ties to expand into fields such as education, science and technology, and defence.'[23] Moreover, Ferdinand argues that while '[t]he origins of the BRICS group lie in their past and expected future economic performance', 'the experience of repeated summits and iterated consultation laid the foundation for closer foreign policy cooperation as well.'[24]

3.2.2. A Desire for a Role in Global Governance

While the individual BRICS states have different political systems and foreign policies,[25] the formation of the new political grouping was driven by a shared desire among the states to assume what they perceived to be as their rightful role in global governance decision-making as leading economic powers and representatives of the non-Western world.[26] Weiss notes that they 'long

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[20] M. Schoeman, 'South Africa as an emerging power: from label to 'status consistency', (2015) 22(4) *South African Journal of International Affairs* 429-445, 432-434, 437.

[21] M. D. Stephen, 'Rising Regional Powers and International Institutions: The Foreign Policy Orientations of India, Brazil and South Africa', (2012) 26(3) *Global Society* 289-309, 293. *See also,* Schoeman, 'South Africa as an emerging power', 429, 431 and Harrison, 'South Africa in the BRICS', 74.

[22] Meeting of BRICS Ministers of Foreign Affairs New York, September 29, 2015, available online at http://www.brics.utoronto.ca/docs/150929-foreign.html (accessed on 06/08/2018).

[23] Stuenkel, *The BRICS ad the Future of Global Order,* 18. *See also,* Statements and Declarations of the BRICS, supra note 7, to see how interests gradually expanded.

[24] P. Ferdinand, 'Rising powers at the UN: an analysis of the voting behaviour of the BRICS in the General Assembly', (2014) 35(3) *Third World Quarterly* 376-391, 377.

[25] R. Thakur, 'How representative are the BRICS?', (2014) 35(10) *Third World Quarterly* 1791-1808, 1792.

[26] *See,* A. Hurrell, 'Hegemony, liberalism and global order: what space for would-be great powers', (2006) 82(1) *International Affairs* 1-19. *See also,* G. J. Ikenberry, 'The Future of Multilateralism: Governing the World in a Post-Hegemonic Era', (2015) 16(3) *Japanese Journal of Political Science* 399-413, 399; E. Newman and B. Zala, 'Rising powers and order contestation: disaggregating the normative from the representational', (2017) 39(5) *Third World Quarterly* 871-888, 871; O. Wæver, 'A Post-Western Europe: Strange Identities in a Less Liberal World Order', (2018) 32(1) *Ethics and International Affairs* 75-88, 76.

desired to expand their participation in the rule-setting processes of global governance',[27] and they share an aspiration 'to be "rule makers" instead of "rule takers".'[28] India has long held a critical aim to be a great power,[29] Brazil has a fervent belief that it 'is the country of the future'[30] and has 'established itself as an important and influential player in world politics',[31] and South Africa sees itself a regional powerhouse with global ambitions'.[32] Moreover, the BRICS states share a strong desire to change international society. For example, Xi Jinping has confirmed that under his leadership and in the context of a changing international order 'China will take an active part in reforming and developing the global governance system, and keep contributing Chinese wisdom and strength to global governance.'[33]

The creation of such a political group gave the individual states the added legitimacy and authority that they needed to be recognised and taken seriously in international society as decision-makers and rule-creators as opposed to norm-takers, and to speak on behalf of the emerging world order they claimed to represent. As Stuenkel argues, '[t]his was the true thrust behind the first summit in 2009, which turned Brazil, Russia, India and China into de facto representatives of the emerging world, and indispensable actors in the construction of tomorrow's global order.'[34] In essence, the grouping allowed the individual states to transform their growing economic power into political capital and influence, and to effect their desired reform of international society and its governance framework. On this point, the former president of South Africa, Jacob Zuma, noted that '[t] he BRICS forum offers member states the opportunity of an amplified voice for political, financial, economic and social interests around a common growth and development agenda based on our shared values.'[35] It is clear that the BRICS states sought to consolidate and enhanced their power within the global political order. This was undoubtedly both for self-interested reasons but also to allow them to shape global governance in accordance with their normative vision of international

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[27] T. G. Weiss, 'Rising Powers, Global Governance, and the United Nations', (2016) 1(1) *Rising Powers Quarterly* 7-19, 12.
[28] Duggan, 'BRICS and the Evolution of a New Agenda Within Global Governance', 17.
[29] C. Ogden, 'Great-Power Aspirations and Indian Conceptions of International Society' in J. Gaskarth (ed), *China, India and the Future of International Society,* (Rowman and Littlefield, 2015), 53. *See also,* D. M. Ollapally, 'India and the International Order: Accommodation and Adjustment', (2018) 32(1) *Ethics and International Affairs* 61-74, 62.
[30] S. W. Burges, 'Brazil as a bridge between old and new powers', (2013) 89(3) *International Affairs* 577-594, 579. *See also,* M. R. S. De Lima and M. Hirst, 'Brazil and an intermediate state and regional power: action, choice and responsibilities', (2006) 82(1) *International Affairs* 21-40, 21.
[31] A. Hurrell, 'Brazil: What Kind of Rising State in What Kind of Institutional Order' in A. S. Alexandroff and A. F. Cooper (eds), *Rising States, Rising Institutions: Challenges for Global Governance',* (Brookings Institution Press, 2010), 128.
[32] Schoeman, 'South Africa as an emerging power', 43.
[33] 'Full text of Xi Jinping's report at the 19th CPC National Congress', *China Daily,* 18 October 2017, available online at http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content 34115212.htm (accessed 03/02/2018). *See also*, Statement by China, UNGA Official Records, Sixty-seventh session, 14th plenary meeting, 27 September 2012, UN Doc. A/67/PV.14, p.28; Statement by China, UNGA Official Records, Sixty-eighth session, 15th plenary meeting, 28 September 2013, UN Doc. A/68/PV.15, p.39.
[34] Stuenkel, *The BRICS ad the Future of Global Order,* 43.
[35] 'Addressing the Summit Theme "BRICS and Africa: Partnership for Development, Integration and Industrialisation" Plenary Session Statement by the Jacob Zuma, President of the Republic of South Africa Durban, South Africa', 27th March 2013, available online at http://www.brics.utoronto.ca/docs/130327-zuma-address.html (accessed on 06/08/2018).

society.

The grouping was particularly important for Russia because, as a former and re-emerging power, it was seeking a way by which to re-establish itself as a world leader after the Cold War, and it saw the BRICS platform as a way to achieve this ambition. This is an example of the BRICS project serving both normative (a desire to shape global governance) and self-interested ends (an increase in the power of the states). This explains the leading role that Russia took in establishing the group, convening its first informal and formal meetings,[36] and its lead on efforts to transform the group of states into a formalised institutional structure.[37] After the 2011 BRICS Foreign Ministers' Meeting, Russia noted that it 'regards participation in the BRICS as one of the main thrusts of its foreign policy, and intends to actively facilitate the strengthening of this association'[38] and it was subsequently said that 'our organisation can become one of the key elements in the global governance system. Russia believes that BRICS must be positioned as a new model of relations'.[39]

3.2.3. The Reformist Ambitions of the BRICS

While the BRICS states are keen to play a more substantive role in global governance and effect change in international society, it is important to stress the BRICS are concerned with *reforming* international society and not with engineering or precipitating a *revolution*.[40] There is a widely held view that they should be considered to be 'revisionist powers', not revolutionary ones. The BRICS states have made substantial contributions to liberal international society and continue to operate within it and through its organisations.[41] An example of their willingness to participate within existing society is their contribution to peacekeeping. China, India and Brazil are major contributors

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[36] Stuenkel, *The BRICS and the Future of Global Order,* 31; Z. Laidi, 'BRICS: sovereignty power and weakness', (2012) 49(5) *International Politics* 614-632, 619.

[37] B. Lo, *Russia and the New World Disorder,* (Brookings Institution Press, 2015), 77-78.

[38] Press Release: BRICS Foreign Ministers' Meeting New York, September 24 2011, available online at http://www.brics.utoronto.ca/docs/110923-foreign.html (accessed on 06/08/2018).

[39] Russian President's Address at the BRICS Summit Dmitry Medvedev, President, Russian Federation New Delhi, March 29 2012, available online at http://www.brics.utoronto.ca/docs/120329-medvedev-statement.html (accessed on 06/08/2018).

[40] Stuenkel, *The BRICS ad the Future of Global Order,* 156. *See also,* Newman and Zala, 'Rising powers and order contestation', 881.

[41] *See,* M. A. Glosny, 'China and the BRICs: A Real (but Limited) Partnership in a Unipolar World', (2010) 42(1) *Polity* 100-129, 116; S. Breslin, 'China and the global order: signalling threat or friendship', (2013) 89(3) *International Affairs* 615-634, 629; X. Zhang, 'A Rising China and the Normative Changes in International Society', (2011) 28(2) *East Asia* 235-246, 240; I. Clark, 'China and the United States: a succession of hegemonies', (2011) 87(1) *International Affairs* 13-28, 25; B. Buzan, 'China in International Society: Is 'Peaceful Rise' Possible?', (2010) 3(2) *The Chinese Journal of International Politics* 5-36, 12-13; I. Clark, 'International Society and China: The Power of Norms and the Norms of Power', (2014) 7(3) *The Chinese Journal of International Politics* 315-340, 332; Y. Zhang, 'China and liberal hierarchies in global international society: power and negotiation for normative change, (2016) 92(4) *International Affairs* 795-816, 796; M. Kahler, 'Rising powers and global governance: negotiating change in a resilient status quo', (2013) 89(3) *International Affairs* 711-729, 718; Hurrell, 'Brazil: What Kind of Rising State in What Kind of Institutional Order', 137-138; D. Flemes, 'India-Brazil-South Africa (IBSA) in the New Global Order: Interests, Strategies and Values of the Emerging Coalition', (2009) 46(4) *International Studies* 401-421, 406-409; G. Chin and R. Thakur, 'Will China Change the Rules of Global Order?', (2010) 33(4) *The Washington Quarterly* 119-138, 120; D. M. Malone, *Does the Elephant Dance?: Contemporary Indian Foreign Policy,* (OUP, 2011), 257

to UN peacekeeping.[42] The BRICS have also benefitted from liberal international society, particularly globalisation and the liberalisation of trade, and they continue to enjoy many of its benefits.[43] As a consequence, they appear not to have any desire to see its collapse. Ikenberry argues that China and other rising powers are not seeking a 'post-liberal order',[44] Kahler notes the 'world's three largest emerging economies -China, India and Brazil- give little sign that they wish to mount radical challenges to the status quo in global governance'.[45]

The BRICS also clearly demonstrate no desire to usurp the role of the US and other liberal powers in shouldering the responsibility for global security provision and the management of other global issues, which require substantial financial and political commitments.[46] The BRICS have also not articulated any alternative vision of global political order or global governance.[47] As revisionist powers they instead prefer working to bring about reform incrementally from the inside, both in their interests and in the interests of emerging states generally.[48] Stephen argues that the BRICS 'pose a within-system challenge to global governance: they challenge its most liberal content, while becoming dependent on, and engaging with, its existing institutional structures.'[49]

The BRICS have clearly already had an impact. An early success for the states, and demonstrative of their influence in global governance, was the negotiation of revised quotas for the IMF and the World Bank,[50] which transferred greater power to emerging nations, and more recently the establishment of the New Development Bank. They have also gained representation in key economic institutions such as the G20, which replaced the more exclusive G7/G8, and they played

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[42] Kahler, 'Rising powers and global governance: negotiating change in a resilient status quo', 717-718; Chin and Thakur, 'Will China Change the Rules of Global Order?', 120; Malone, *Does the Elephant Dance?: Contemporary Indian Foreign Policy,* 257.

[43] G. J. Ikenberry, 'The Future of Liberal World Order', (2015) 16(3) *Japanese Journal of Political Science* 450-455, 453. *See also,* Gaskarth, 'Introduction' in Gaskarth (ed), *China, India and the Future of International Society',* 5 - 'China and India are clearly prospering within the current international system, and so it is doubtful that they would wish to subvert it unless it came to hamper their prosperity. '

[44] Ikenberry, 'The Future of Liberal World Order', 452.

[45] Kahler, 'Rising powers and global governance', 726. *See also*, H. Trinkunas, 'Brazil's Rise: Seeking Influence on Global Governance', (2014) *Latin America Initiative Foreign Policy at Brookings,* available online at https://www.brookings.edu/wp-content/uploads/2016/06/Trinkunas-Brazils-Rise.pdf (accessed 16/07/2018); J. Y. S. Cheng, 'China's Approach to the BRICS', (2015) 24(92) *Journal of Contemporary China* 357-375, 366.

[46] Breslin, 'China and the global order', 616, 622; Malone, *Does the Elephant Dance?,* 250; A. Acharya, 'Can Asia Lead? Power ambitions and global governance in the twenty-first century', (2011) 87(4) *International Affairs* 851-869, 859; Buzan, 'China in International Society: Is 'Peaceful Rise' Possible?', 17; Newman and Zala, 'Rising powers and order contestation', 873.

[47] Breslin, 'China and the global order', 629- 630.

[48] A. E. Abdenur, 'Rising Powers and International Security: the BRICS and the Syrian Conflict', (2016) 1(1) *Rising Powers Quarterly* 109-133, 118. *See also,* Stuenkel, *Post Western World,* 60; Breslin, 'China and the global order', 630; J. Zeng and S. Breslin, 'China's 'new type of great power relations': a G2 with Chinese characteristics', (2016) 92(4) *International Affairs* 773-794, 776; Glosny, 'China and the BRICs: A Real (but Limited) Partnership in a Unipolar World', 116.

[49] M. D. Stephen, 'Rising powers, global capitalism and liberal global governance: A historical materialist account of the BRICS challenge', (2014) 20(4) *European Journal of International Relations* 912-938, 914. *See also,* Kahler, 'Rising powers and global governance', 719; Zhang, 'China and liberal hierarchies in global international society', 797; G. Chin, 'China's Rising Institutional Influence' in A .S. Alexandroff and A. F. Cooper (eds), *Rising States, Rising Institutions: Challenges for Global Governance',* (Brookings Institution Press, 2010), 85, 100.

[50] Cheng, 'China's Approach to the BRICS', 368.

a significant role in the UN climate change negotiations, both in Copenhagen (2009) and in Paris (2015).[51] Stephen explains '[i]t is widely recognized that rising powers are beginning to have an increasing role in the governance of the globe, including the international institutions that have traditionally been dominated by established powers'[52] and Weiss notes '[b]oth individually and through new alignments such as the BRICS...emerging powers are engaging more directly in key normative debates about how major institutions could and should contribute to today's world order.'[53] Brazil has affirmed that 'developing countries have stepped into new roles in designing a multipolar world, with examples such as. the BRIC countries'.[54]

3.2.4. A More Equitable Distribution of Power within Global Governance

The basis of the BRICS' reform agenda is to limit the power and influence exercised by Western states in global governance, including in international organisations, and to establish fairer, more equitable representation, taking into account the shift to multipolarity. The BRICS have recorded that '[w]e underline our support for a more democratic and just multi-polar world order'[55] and their belief that 'the BRICS are an important force for incremental change and reform of current institution towards more representative and equitable governance'.[56] Such views have also been expressed by the individual states. For example, Russia noted '[h]egemony has no place in the future'[57] and Sergey Lavrov, the Russian foreign minister, argued 'today international relations are too sophisticated a mechanism to be controlled from one centre.'[58] Xi Jinping explained in his most recent address to the Chinese Community Party 'China stands for democracy in international relations. and supports the efforts of other developing countries to increase their representation and strengthen their voice in international affairs.'[59] Moreover, India, Brazil and South Africa

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[51] M. Lipton, 'Are the BRICS reformers, revolutionaries, or counter-revolutionaries?', (2017) 24(1) *South African Journal of International Affairs* 41-59, 44. *See also,* C. Layne, 'The US-Chinese power shift and the end of Pax Americana', (2018) 94(1) *International Affairs* 89-111, 99.

[52] Stephen, 'Rising powers, global capitalism and liberal global governance', 913.

[53] Weiss, 'Rising Powers, Global Governance, and the United Nations', 9. *See also,* A. F. Cooper and R. Thakur, 'The BRICS in the New Global Economic Geography' in T. G. Weiss and R. Wilkinson (eds), *International Organization and Global Governance,* (Routledge, 2014), 268.

[54] UNGA Official Records, Sixty-third session, 5th plenary meeting, 23 September 2008, UN Doc. A/63/PV.5, 7.

[55] Joint Statement of the BRIC Countries' Leaders, 2; Second BRIC Summit of Head of State and Government: Joint Statement, 1; BRICS, 2009 BRICS Foreign Ministers Meeting.

[56] Sixth BRICS Summit: Fortaleza Declaration, 2. *See also*, Eighth BRICS Summit: Goa Declaration, 2; BRICS Leaders Xiamen Declaration; Media Statement on the Meeting of the BRICS Foreign/International Relations Ministers Hague, Netherlands, March 24 2014, available online at http://www.brics.utoronto.ca/docs/141115-brisbane.html (accessed on 06/08/2018).

[57] UNGA Official Records, Seventy-first session, 17th plenary meeting, 23 September 2016, UN Doc. A/71/PV.17, 41. *See also,* Statement by China, UNGA Official Records, Fifty-third session, 11th plenary meeting, 23 September 1998, UN Doc. A/53/PV.11, 10.

[58] S. Lavrov, 'Russia's Foreign Policy: Historical Background', *Russia in Global Affairs,* 3 March 2016, available online at http://www.mid.ru/en/foreign policy/news/-/asset publisher/cKNonkJE02Bw/content/id/2124391 (accessed 28 June 2018).

[59] 'Full text of Xi Jinping's report at the 19th CPC National Congress'. *See also,* UNGA Official Records, Fifty-eighth session, 9th plenary meeting, 24 September 2003, UN Doc. A/58/PV.9, p.27; Breslin, 'China and the global order', 629; Glosny, 'China and the BRICs: A Real (but Limited) Partnership in a Unipolar World', 114; P. Ferdinand, 'Westward ho - the China dream and the 'one belt, one road': Chinese foreign policy under Xi Jinping', (2016) 92(4) *International Affairs* 941-957, 955-956; Chin, 'China's Rising Institutional Influence', 85.

particularly 'oppose the implicit and explicit hierarchies of international institutions and the many privileges often enjoyed by great powers in international deliberations',[60] including as a product of their colonial pasts.[61] The former president of South Africa, Jacob Zuma, explained that '[w]e share with our BRICS partners the imperative need for the reform of global decision-making structures... to make these structures more effective, efficient and representative.'[62] As Newman argues, the discourse of the BRICS, 'clearly sets out a powerful demand for the regimes of global governance to better reflect the evolving balance of power, in terms of control of the agenda and decision-making.'[63] While this position is undoubtedly informed by a normative concern for democratising international society to a greater extent and giving a greater say to a much larger number of states in global governance decision-making, we must also acknowledge that it serves well the ends of rising powers who can use their significant and growing political power to exercise greater control in a reforming international society with less influence wielded by Western states.

3.3. The BRICS Support for a State-Solidarist International Society

The BRICS approach to global political order can be summarised as a promotion of a state-solidarist conception of international society which involves accepting cooperation around common values but at the same time defending pluralist institutions, and prioritising order between states.[64] This is in response to the cosmopolitan-solidarist progress inspired by the pursuit of justice which involves the expansion of international law, the limiting of state sovereignty and the progressive evolution of powerful international organisations which, Hurrell notes, 'undoubtedly represented a substantial challenge to countries such as Brazil, Russia, India and China [and] challenged the strong, albeit varying, preference of these states for the older pluralist norms of sovereignty and non-intervention.'[65] It has previously been said of China, while it contests 'liberal cosmopolitan anti-

[60] Stuenkel, *The BRICS ad the Future of Global Order,* 166. *See also,* Stuenkel, *Post Western World,* 184; M. Bevir and J. Gaskarth, 'Global governance and the BRICs. Ideas, actors, and governance practices' in J. Gaskarth (ed), *Rising Powers, Global Governance and Global Ethics,* (Routledge, 2015), 88; Council on Foreign Relations, 'South Africa: An Emerging Power in a Changing World', 5 April 2016, available online at https://www.cfr.org/content/publications/attachments/CFR-SAIIA South Africa Workshop Report 4- 5-16.pdf (accessed 16/07/2018).

[61] K. Bajpai, 'Indian Conceptions of Order and Justice: Nehruvian, Gandhian, *Hindutva,* and Neo-Liberal' in R. Foot, J. Gaddis and A. Hurrell, *Order and Justice in International Relations,* (OUP, 2003), 240. *See also*, Ollapally, 'India and the International Order: Accommodation and Adjustment', 62-64; F. Mielniczuk, 'BRICS in the Contemporary World: changing identities, converging interests', (2013) 34(6) *Third World Quarterly* 1075-1090, 1083.

[62] Address by President J G Zuma of the Republic of South Africa at the Fourth BRICS Summit Jacob Zuma, President, South Africa, New Delhi, March 29 2012, available online at http://www.brics.utoronto.ca/docs/120329-zuma-statement.html (accessed on 06/08/2018).

[63] Newman and Zala, 'Rising powers and order contestation', 878. *See also,* Stuenkel, *The BRICS ad the Future of Global Order',* 101; Abdenur, 'Rising Powers and International Security', 110-111; Schoeman, 'South Africa as an emerging power', 431.

[64] A. Hurrell, 'Beyond the BRICS: Power, Pluralism and the Future of Global Order', (2018) 32(1) *Ethics and International Affairs* 89101, 100

[65] Hurrell, 'Hegemony, Liberalism and Global Order', 4. *See also,* Laidi, 'BRICS: sovereignty power and weakness', 615 and I. Hall, 'Normative Power India' cited in C. Ogden, 'Great-Power Aspirations and Indian Conceptions of International Society' in J. Gaskarth (ed), *China, India and the Future of International Society,* (Rowman and Littlefield, 2015), 103.

pluralism' it is willing to support 'state-centric solidarism'[66] but 'rejects firmly any coercive form of liberal solidarism'.[67] Russian similarly supports 'Charter Liberalism' but rejects 'liberal anti-pluralism', in other words liberal cosmopolitanism, a view shared by Brazil and India,[68] as well as South Africa. Furthermore, the BRICS states preference for a state solidarist conception of international society can be seen in their strong defence of the pluralist primary institutions of diplomacy, multilateralism, sovereignty in its absolute form and classical international law, each of which is addressed in greater detail below. As Ogden notes, 'the core principles shared by BRICS countries inform us of their preferred future vision...for international society'.[69]

3.3.1. A Defence of Multilateralism and Diplomacy

The BRICS commitment to a state solidarist conception of international society and their desire to mitigate the influence of the West in global governance in order to create a space for them and other emerging states to exert their influence on matters of international affairs is evident from their strong defence of multilateralism and diplomacy as the principal means of global governance and as fundamental primary institutions. This is evident in their various statements. For example, Brazil said its 'commitment to...multilateralism will not waiver',[70] China emphasised 'we should uphold multilateralism'[71] and affirmed its commitment to it,[72] Russia stated 'there is no alternative to tackling problems through multilateral diplomacy',[73] India noted '[t]he management of global interdependence requires. a rules-based multilateral system',[74] and South Africa explained that 'international problems can be resolved effectively only through multilateral cooperation.'[75] Kahler argues rising powers display a conservative preference for models of global governance 'in which

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[66] Zhang, 'China and liberal hierarchies in global international society', 798 and 815-816.

[67] Zhang, 'China and liberal hierarchies in global international society', 816. *See also,* S. Tang, 'China and the Future of International Order(s)', (2018) 32(1) *Ethics and International Affairs* 31-43, 37.

[68] A. L. Clunan, 'Russia and the Liberal World Order', (2018) 32(1) *Ethics and International Affairs* 45-59, 45-50. More specifically, Clunan describes 'Charter Liberalism' as 'a state-centered order in which the great powers have established the necessary rules of an international society—enlightened rules of coexistence that enable the states-based-system and statehood to persist. These include the great power management system of the UN Security Council that sits atop the democratic General Assembly, and the secular institutions of international law, laws of war, diplomacy, sovereignty, and non-intervention' at 46.

[69] Ogden, 'Great-Power Aspirations and Indian Conceptions of International Society' in J. Gaskarth (ed), *China, India and the Future of International Society,* 68.

[70] UNGA Official Records, Fifty-seventh session, 2nd Plenary Session, 12 September 2002, UN Doc. A/57/PV.2, 4. *See also,* UNGA Official Records, Seventy-second session, 3rd Plenary Meeting, 19 September 2017, UN Doc. A/72/PV.3, 7; Hurrell, 'Brazil: What Kind of Rising State in What Kind of Institutional Order', 145.

[71] UNGA Official Records, Sixty-ninth session, 15th plenary meeting, 27 September 2014, UN Doc. A/69/PV.15, 38.

[72] UNGA Official Records, Sixty-seventh session, 14th Plenary Meeting, 27 September 2012, UN Doc. A/67/PV.14, 26; UNGA Official Records, Seventieth session, 13th plenary meeting, 28 September 2015, UN Doc. A/70/PV. 13, 19; UNGA Official Records, Seventy-second session, 12th plenary meeting, 21 September 2017, UN Doc. A/72/PV.12, 30.

[73] UNGA Official Records, Sixty-first session, 15th Plenary Meeting, 21 September 2006, UN Doc. A/61/PV.15, 27. *See also,* UNGA Official Records, Fifty-third session, 9th Plenary Meeting, 22 September 1998, UN Doc. A/53/PV.9, 21 and UNGA Official Records, Seventy-second session, 12th plenary meeting, 21 September 2017, UN Doc. A/72/PV.12, 30.

[74] UNGA Official Records, Sixtieth session, 5th plenary meeting, 15 September 2005, UN Doc. A/60/PV.5, 29. *See also,* UNGA Official Records, Fifty-ninth session, 15th plenary meeting, 27 September 2014, UN Doc. A/59/PV.15, 16.

[75] UNGA Official Records, Sixty-fourth session, 4th plenary session, 23 September 2009, UN Doc. A/64/PV.4, 21.

national governments serve as essential gatekeepers to global institutions',[76] and Hurrell notes that rising powers 'have tended to resist the effective delegation of authority to international bodies',[77] preferring genuine multilateral approaches which allow them to retain autonomy and exercise control in decision-making processes.[78] Stephen therefore correctly argues the balance of power shift 'poses new challenges to supranational institutions',[79] such as the ICC.

The BRICS support for multilateralism and diplomacy is also evident in their strident support for the UN. The 2009 Statement of the BRICS Leaders expressed 'strong commitment to multilateral diplomacy with the United Nations playing the central role in dealing with global challenges and threats'[80] and this commitment has been articulated in subsequent statements.[81] Moreover, China has said of the UN that it is the 'only legitimate decision-making body when it comes to finding global solutions to either transnational problems or cases of domestic state failure'[82] and in his address to the 19th CPC National Congress, Xi Jinping confirmed that 'China supports the United Nations in playing an active role in international affairs'.[83] Russia also emphasises the importance of the UN as the 'center for regulation of international relations and coordination in world politics in the 21st century'[84] and Putin has described 'attempts to undermine the authority and legitimacy of the UN as extremely dangerous.'[85] In addition, the BRICS states have stressed the importance of regional organisations in global governance.[86]

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[76] Kahler, 'Rising powers and global governance', 719.

[77] A. Hurrell, *On Global Order: Power, Values, and the Constitution of International Society,* (OUP, 2007), 292.

[78] Kahler, 'Rising powers and global governance', 718. *See also,* Mielniczuk, 'BRICS in the Contemporary World', 1081; L. E. Armijo and S. W. Burges, 'Brazil, the Entrepreneurial and Democratic BRIC', (2010) 42(1) *Polity* 14-37, 28; De Lima and Hirst, 'Brazil and an intermediate state and regional power', 25; Buzan, 'China in International Society: Is 'Peaceful Rise' Possible?', 31; Malone, *Does the Elephant Dance?,* 270; Lo, *Russia and the New World Disorder,* 97.

[79] Stephen, 'Rising Regional Powers and International Institutions', 291.

[80] Joint Statement of the BRIC Countries' Leaders, 2.

[81] Second BRIC Summit of Head of State and Government: Joint Statement, 1; Sanya Declaration', 1; Fourth BRICS Summit - Delhi Declaration, 4; Fifth BRICS Summit - eThekwini Declaration and Action Plan', paras.1 and 20; Sixth BRICS Summit: Fortaleza Declaration, 4; Press release on the Meeting of BRICS Foreign Ministers New York, September 25 2014, available online at http://www.brics.utoronto.ca/docs/140925-foreign.html (accessed on 06/08/2018); Seventh BRICS Summit: 2015 Ufa Declaration, 1; Eighth BRICS Summit: Goa Declaration, 2; BRICS Leaders Xiamen Declaration, 2; Meeting of BRICS Ministers of Foreign Affairs /International Relations in New York New York, September 21 2017, available online at http://www.brics.utoronto.ca/docs/170921 - foreign.html (accessed on 06/08/2018).

[82] Breslin, 'China and the global order', 631.

[83] 'Full text of Xi Jinping's report at the 19th CPC National Congress'. See also, 'Full text of President Xi's New Year address', *CGTN,* 31 December 2017, available online at https://news.cgtn.com/news/3063444d35637a6333566d54/share p.html (accessed 03/02/2018) - 'China will staunchly safeguard the authority and status of the United Nations'.

[84] Concept of the Foreign Policy of the Russian Federation, 12 February 2013, available online at http://www.mid.ru/en/foreign policy/official documents/-/asset publisher/CptICkB6BZ29/content/id/122186 (accessed 28/06/2018). *See also,* Statement by the Russian Federation, UNGA Official Records, Fifty-fourth session, 6th Plenary Session, 21 September 1999, UN Doc. A/54/PV.6, 13; Statement by the Russian Federation, UNGA Official Records, Fifty-eighth session, 11th Plenary Meeting, 25 September 2003, UN Doc. A/58/PV.11, 6; Lo, *Russia and the New World Disorder,* (Brookings Institution Press, 2015), 73; S. N. Macfarlane, 'The 'R' in BRICs: is Russia an emerging power?', (2006) 82(1) *International Affairs* 41-57, 48; E. Chebankova, 'Russia's idea of the multipolar world order: origins and dimensions', (2017) 33(3) *Post Soviet Affairs* 217-234, 244.

[85] Macfarlane, 'The 'R' in BRICs: is Russia an emerging power?', 56. *See also,* for example, Statements by Brazil: UNGA Official Records, Fifty-seventh session, 2nd Plenary Session, 12 September 2002, UN Doc. A/57/PV.2, 4 and UNGA Official Records, Sixty-first session, 10th Plenary Meeting, 19 September 2006, UN Doc. A/61/PV.10, 7; Statement by South Africa, UNGA Official Records, Sixty-seventh session, 7th plenary meeting, 25 September 2012, UN Doc. A/67/PV.7, 12-13.

[86] Statement by the Russian Federation, UNGA Official Records, Sixty-forth session, 4th Plenary Meeting, 23 September 2009, UN Doc. A/64/PV.4, 16; Statement by South Africa, UNGA Official Records, Sixty-sixth session, 12 th plenary meeting, 21 September 2011, UN

While Russia and China's support for the UN is based on the collective nature of its decision-making, their ability to control decision-making on matters of international peace and security through the Security Council, and thereby restrain US unilateralism, is key to their support. Lo notes that Russia's permanent seat on Security Council 'mitigated the consequences of [its] post-cold war decline' and she further explained that, '[f]or Putin, the best kind of multilateralism is encapsulated by the UN Security Council'.[87] While Brazil, India and South Africa share China and Russia's strong support for the UN on the basis it facilitates all states involvement in matters of global governance, they have also long advocated for reform of the organisation in order to ensure that it is truly representative of the current distribution of power and afford greater status to new powers, particularly within the Security Council.[88] More specifically, Brazil, India and South Africa have long-lobbied for permanent seats on the Security Council on the basis of their global power status.[89] The emphasis they place on the need for such reform reflects not only their personal ambitions but the importance they attach to input-legitimacy in global governance.[90] This again demonstrates how the BRICS states' support for a state-solidarist international society is informed by both normative and material concerns.

Various declarations have been issued by the BRICS reiterating the importance that China and Russia attach to the status of India, Brazil and South Africa in international affairs, and which states that they 'understand and support their aspiration to play a greater role in the UN'.[91] They have also reaffirmed 'the need for a comprehensive reform of the UN, including the Security Council, with a view to making it more effective, efficient and representative'[92] and 'to increase the representation

Doc. A/66/PV.12, 22-23; Statement by China, UNGA Official Records, Fifty-third session, 11th Plenary Meeting, 23 September 1998, UN Doc. A/53/PV.11, 10

[87] Lo, *Russia and the New World Disorder,* 73-74. *See also,* Macfarlane, 'The 'R' in BRICs: is Russia an emerging power?', 56.

[88] For example, *see* Statements by Brazil: UNGA Official Records, Fifty-third session, 7th plenary meeting, 21 September 1998, UN Doc. A/53/PV.7, 8, UNGA Official Records, Fifty-sixth session, 44th plenary meeting, 10 November 2001, UN Doc. A/56/PV.44, 6, UNGA Official Records, Sixtieth session, 9th plenary meeting, 17 September 2005, UN Doc. A/60/PV.9, 6; UNGA Official Records, Seventieth session, 13th plenary meeting, 28 September 2015, UN Doc. A/70/PV.13, 7. Statements by India: UNGA Official Records, Fifty-third session, 13th plenary meeting, 24 September 1998, UN Doc. A/53/PV.13, 17, UNGA Official Records, Fifty-eighth, 11th plenary meeting, 25 September 2003, UN Doc. A/58/PV. 11, 14, UNGA Official Records, Seventy-first session, 22nd plenary meeting, 24 September 2016, UN Doc. A/71/PV.22. Statements by South Africa: UNGA Official Records, Sixty-first session, 10th plenary meeting, 19 September 2006, UN Doc. A/61/PV.10, 14, UNGA Official Records, Seventieth session, 14th plenary meeting, 28 September 2015, UN Doc. A/70/PV.14, 7-8.

[89] De Lima and Hirst, 'Brazil and an intermediate state and regional power', 28; A. Sinha and J. P. Dorschner, 'Rising Power or a Mere Revolution of Rising Expectations', (2010) 42(1) *Polity* 74-99, 77; Schoeman, 'South Africa as an emerging power', 436.

[90] W. W. Burke-White, 'Power Shifts in International Law: Structural Realignment and Substantive Pluralism', (2015) 56(1) *Harvard International Law Journal* 1-79, 61.

[91] Sanya Declaration, 1-2. *See also,* Joint Statement of the BRIC Countries' Leaders, *2;* 2009 BRICS Foreign Ministers Meeting; Second BRIC Summit of Head of State and Government: Joint Statement, 1; Fourth BRICS Summit - Delhi Declaration, 4; Fifth BRICS Summit - eThekwini Delcartion and Action Plan, para.20; Sixth BRICS Summit: Fortaleza Declaration, 4; Seventh BRICS Summit: 2015 Ufa Declaration, 2; Eighth BRICS Summit: Goa Declaration, 2; BRICS Leaders Xiamen Declaration, 6; Meeting of BRICS Ministers of Foreign Affairs/International Relations in New York.

[92] Sanya Declaration, 1-2; Fourth BRICS Summit - Delhi Declaration, 4; Sixth BRICS Summit: Fortaleza Declaration, 4; Press release on the Meeting of BRICS Foreign Ministers New York, September 25 2014; Seventh BRICS Summit: 2015 Ufa Declaration, 4; Meeting of BRICS Ministers of Foreign Affairs New York, September 29 2015.

of the developing countries so that it can adequately respond to global challenges.'[93] Such statements have not, however, expressed explicit support for India, Brazil and South Africa's ambitions for permanent Security Council seats, and both China and Russia have been unwilling to support these ambitions in a material way.[94]

3.3.2. A Defence of a Classical Conception of International Law

The BRICS have all expressed their belief in and support for the role of international law within international society. The joint statements have confirmed a shared 'commitment to international law',[95] their support for a world order 'based on the rule of international law',[96] and that they stand ready to deal with the challenges and opportunities in the world today 'on the basis of universally recognized norms of international law'.[97] Furthermore, Russia has stated 'it believes that the principle of the rule of law is an imperative for the entire system of international relations',[98] China has said '[t]he rule of law in international relations should be strengthened'[99] and that 'it is necessary to strictly abide by the norms of international law',[100] India has stated that 'the rule of law at the international level is a sine qua non for ensuring peace and justice among States',[101] and Brazil has emphasised that '[t]he ideal of an international order based on the rule of law should always be a source of inspiration for all of us.'[102]

What is clear, however, is that the BRICS states see international law principally as a means of regulating the interactions between sovereign states and, as Stuenkel notes, they 'tend to be critical of the growing scope and intrusiveness of international rules and norms, which, they fear, erode the respect for state sovereignty or the inviolability of borders'.[103] As the former Russian President,

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[93] Eighth BRICS Summit: Goa Declaration, 2; BRICS Leaders Xiamen Declaration, 6; 2009 BRICS Foreign Ministers Meeting. *See also*, for example, Statements by the Russian Federation: UNGA Official Records, Fifty-fourth session, 6th plenary session, 21 September 1999, UN Doc. A/54/PV, 14 and UNGA Official Records, Sixty-forth session, 4th plenary meeting, 23 September 2009, UN Doc. A/64/PV.4, 17. Statements by China, UNGA Official Records, Fifty-fourth session, 8th plenary meeting, 22 September 1999, UN Doc. A/54/PV.8, 17; UNGA Official Records, Fifty-fifth session, 12th plenary session, 13 September 2000, UN Doc. A/55/PV.12, 5; UNGA Official Records, Fifty-ninth session, 11th plenary meeting, 27 September 2004, A/59/PV.11, 10; Meeting of BRICS Ministers of Foreign Affairs/International Relations in New York New York.

[94] Ferdinand, 'Rising powers at the UN', 378 and Y. H. Ferguson, 'Rising powers and global governance' in J. Gaskarth (ed), Rising Powers, Global Governance and Global Ethics, (Routledge, 2015), 32.

[95] Sixth BRICS Summit: Fortaleza Declaration, 1.

[96] Joint Statement of the BRIC Countries' Leaders, 1; Second BRIC Summit of Head of State and Government: Joint Statement, 1; 2009 BRICS Foreign Ministers Meeting.

[97] Fourth BRICS Summit - Delhi Declaration, 1. *See also,* Seventh BRICS Summit: 2015 Ufa Declaration, 2.

[98] UNSC Verbatim Record, 4833rd meeting, 24 September 2003, UN Doc. S/PV.4888, 5. *See also,* Statement by the Russian Federation, UNSC Verbatim Record, 5474th meeting, 22 June 2006, UN Doc. S/PV.5474, 16.

[99] UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 14.

[100] UNSC Verbatim Record, 7113rd meeting, 19 February 2014, UN Doc. S/PV.7113, 16 - 17.

[101] UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc. S/PV.6849, 10. *See also,* Statement by India, UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 4.

[102] UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 23. *See also,* Statement by Brazil, UNSC Verbatim Record, 7113rd meeting, 19 February 2014, UN Doc. S/PV.7113, 25.

[103] Stuenkel, *The ERICS ad the Future of Global Order,* 156. *See also,* Burke-White, 'Power Shifts in International Law', 5.

Dmitry Medvedev, explained, the BRICS are 'committed to the classical interpretation of international law principles.'[104] This can also be seen in the deference paid to the UN Charter which is characterised by rules concerning state sovereignty, political independence, territorial integrity and the many others regulating the actions of states within international society. The BRICS have confirmed they are committed to an 'international order based on the UN Charter'[105] and have emphasised 'the paramount importance of the principles of international law enshrined in the Charter of the United Nations, particularly state sovereignty, political independence, territorial integrity and sovereign equality of states, non-interference in internal affairs of other states'.[106] These views have also been expressed by the individual states. For example, Brazil has stated 'all Member States have an unquestionable and overriding duty to abide by the United Nations Charter'[107] and China emphasised '[t]he Charter and the principles of international law enshrined therein constitute the core of the rule of law in international relations' and 'adherence to the Charter... represents the essence of the promotion of the international rule of law.[108]

Additionally, the BRICS are wary of international law being enforced at the international law and by international courts - the judicialisation of international society - on the basis it curtails the autonomy and authority of states, and usurps the state-based nature of international society and global governance. Russia in particular has expressed the view that the UN and international society should not replace, only supplement the implementation and promotion of the rule of law within states,[109] and China has said '[s]tates bear the primary responsibility to punish international crimes, eliminate impunity and achieve justice'.[110] The BRICS are also clear in their view that the application of the law should be universal and free from double standards.[111] The thrust behind this position is a both normative – to preserve order the society of states – but also material in that they want to guard against interference and intervention in their own internal affairs, and supporting a classical conception of international law advances that objective.

The BRICS have demonstrated a limited acceptance of the cosmopolitan developments within

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[104] Russian President's Address at the BRICS Summit Dmitry Medvedev, President, Russian Federation New Delhi. *See also,* Newman and Zala, 'Rising powers and order contestation', 879.
[105] Sixth BRICS Summit: Fortaleza Declaration, 4. *See also,* Sanya Declaration, 2; Sixth BRICS Summit: Fortaleza Declaration, 4; Seventh BRICS Summit: 2015 Ufa Declaration, 1-2; Eighth BRICS Summit: Goa Declaration, 1-2.
[106] BRICS Leaders Xiamen Declaration, 8.
[107] UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052, 13.
[108] UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 14. *See also,* Statements by China: UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052, 22; UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc. S/PV.6849, 12; UNSC Verbatim Record, 7113rd meeting, 19 February 2014, UN Doc. S/PV.7113, 17.
[109] Statements by the Russian Federation: UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052, 7, UNSC Verbatim Record, 5474th meeting, 22 June 2006, UN Doc. S/PV.5474, 16, UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 15.
[110] UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc. S/PV.6849, 12.
[111] G. W. Ziero, 'Looking for a BRICS perspective on international law', (2015) 12(2) *Teoria Do Direito Internacional* 304-324, 318.

international law, such as those concerning human rights and criminal justice,[112] but only to the extent that it does not significantly interfere with the states' authority over internal matters and matters of foreign policy or, in other words, so long as it respects sovereignty, as will be shown in due course in relation to their interaction with the ICTY, the ICTR and the ICC.[113]

3.3.3. A Defence of State Sovereignty

The BRICS states preference for a state-solidarist conception of international society is also evident in their strident defence of a substantially absolutist understanding of sovereignty and the corollary norms of non-intervention, political independence and territorial integrity in the context of a progressive cosmopolitan shift to a more limited, conditional and permeable understanding of sovereignty as advanced within liberal international society.[114] Roberts has therefore described the BRICS states as 'sovereignty hawks'.[115] Moreover, Newman and Zala argue '[t]he principle of state sovereignty is the bedrock of a number of collective aspirations of rising powers. It implies a resistance to the liberal evolution of sovereignty, which attaches conditions upon territorial integrity related to human rights and governance.'[116]

One of the principal reasons for the BRICS defence of state sovereignty is to protect domestic political autonomy and moral pluralism in the face the evolution of a cosmopolitan-solidarist liberal international society. Newman argues that 'there is a real reluctance amongst rising powers to open the door to a transformation of the norm of sovereignty' as, '[a]ccording to the pluralist view, states are the legitimate agents to resolve problems within their borders, and to undermine this principle - even when terrible abuses are occurring - would be to set a very dangerous precedent.'[117] Xi Jinping has recently emphasised in a keynote address to the fifth BRICS annual summit 'we must

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[112] *See*, for example, Statement by Brazil: UNGA Official Records, Sixtieth session, 9th plenary meeting, 17 September 2005, UN Doc. A/60/PV.9, 5; Statements by the Russian Federation: UNGA Official Records, Fifty-fifth session, 20th plenary meeting, 18 September 2000, UN Doc. A/55/PV.20, 8, UNGA Official Records, Sixty-seventh session, 16th plenary meeting, 28 September 2012, UN Doc. A/67/PV.16, 23; Statements by India: UNGA Official Records, Fifty-third session, 13th plenary meeting, 24 September 1998, UN Doc. A/53/PV.13, 17, UNGA Official Records, Sixty-second session, 13th plenary meeting, 1 October 2007, UN Doc. A/62/PV.13, 22; Statements by South Africa: UNGA Official Records, Fifty-fourth session, 4th plenary session, 20 September 1999, UN Doc. A/54/PV.4, 8, UNGA Official Records, Sixty-third session, 16th plenary meeting, 29 September 2008, UN Doc. A/63/PV.16, 13.

[113] *See*, for example, Statement by China: UNGA Official Records, Fifty-fourth session, 8th plenary meeting, 22 September 1999, UN Doc. A/54/PV.8, 16. *See also,* Ziero, 'Looking for a BRICS perspective on international law', 319-20.

[114] *See*, for example, Statement by the Russian Federation: UNGA Official Records, Seventy-first session, 17th plenary meeting, 23 September 2016, UN Doc. A/71/PV.17, 41; Statements by China: UNGA Official Records, Sixty-sixth session, 25th plenary meeting, 26 September 2011, UN Doc. A/66/PV.25,.42 and UNGA Official Records, Sixty-seventh session, 14th plenary meeting, 27 September 2012, UN Doc. A/67/PV. 14, 26. *See also,* Abdenur, 'Rising Powers and International Security', 112; Bevir and Gaskarth, 'Global governance and the BRICs. Ideas, actors, and governance practices', 91.

[115] C. Roberts, 'Building the New World Order BRIC by BRIC', (2011) 4 *The European Financial Review* 5; C. Roberts, 'Polity Forum: Challengers or Stakeholders?, 10.

[116] Newman and Zala, 'Rising powers and order contestation', 879. *See also,* Clunan, 'Russia and the Liberal World Order', 51 - 'Russia and China much prefer an absolutist or "hard" sovereignty, rather than a sovereignty contingent on good governance and a government's responsibility to protect the human rights of its population. '

[117] Newman, 'What prospects for common humanity in a divided world?, 39. *See also,* Cooper and Thakur, 'The BRICS in the New Global Economic Geography', 272.

always adhere to equality, democracy and inclusiveness, respect the right of all countries to independently choose their social system and development path'.[118] In addition, BRICS states defend sovereignty as a barrier to Western interference in states' internal affairs. As Xi Jinping also stated, '[w]e oppose acts that impose one's will on others or interfere in the internal affairs of others as well as the practice of the strong bullying the weak.'[119] Moreover, Roberts and Armijo argue, '[t]he BRICS do share a common stake in defending international norms of state sovereignty, independence, and territorial integrity from what they see as excessive use of force and coercion by the USA and Europeans to achieve their strategic and humanitarian goals.'[120] Therefore again we see that the support of the BRICS states for an absolutist conception of state sovereignty is informed by both self-interested and normative concerns.

3.4. The Decline of the West as Space for Rising Power Agency

The rise of the BRICS states and their ability to shape the future of international society has been facilitated by the paralleled decline of the West. As Roberts notes, 'what makes the BRICs story politically salient is that the rise of such non-Western emerging giants appears to be coinciding with the waning of American primacy and a relative decline in U.S. power'.[121] This decline in western influence and control was precipitated by the global fallout from the military interventions in Afghanistan and Iraq, and the US's global 'war on terror',[122] which included a disregard for the rules prohibiting the use of torture.[123] As Ikenberry argues, US foreign policy since 2001 'thrust American power into the light of day - and, in doing so, deeply unsettled much of the world'.[124] More recently, Donald Trump's 'America First' policy ' signals both a stepping away from the global leadership role the US has played since 1945, and an abandoning of the precepts that uphold the liberal world order',[125] leading to a 'vast outpouring of anxiety over' its future.[126]

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118 'Work together for common development - keynote address at the fifth BRIC summit Statement by Chinese President Xi Jinping at the BRICS Durban Summit Durban, South Africa', March 27 2013, available online at http://www.brics.utoronto.ca/docs/130327-xi-statement.html (accessed on 06/08/2018).

119 'Full text of Xi Jinping's report at the 19th CPC National Congress'.

120 L. E. Armijo and C. Roberts, 'The Emerging Powers and Global Governance: Why the BRICS Matter' in Robert Looney (ed), *Handbook of Emerging Economies,* (Routledge, 2014), 513.

121 Roberts, 'Polity Forum: Challengers or Stakeholders?', 4.

122 A. Phillips, 'Global Terrorism' in M. Beeson and N. Bisley, *Issues in 21st Century World Politics,* (Palgrave Macmillan, 2010), 66. *See also,* A. Achraya, *The End of American World Order,* (Polity Press, 2014), 107; Buzan, 'China in International Society: Is 'Peaceful Rise' Possible?', 20.

123 C. Duncombe and T. Dunne, 'After liberal world order', (2018) 94(1) *International Affairs* 25-42, 27. *See also,* B. Jahn, 'Liberal internationalism: historical trajectory and current prospects', (2018) 94(1) *International Affairs* 43-61, 46.

124 G. J. Ikenberry, 'Power and liberal order: America's postwar world order in transition', (2005) 5 (2) *International Relations of the Asia-Pacific* 133-152, 134.

125 C. Duncombe and T. Dunne, 'Humanitarianism and the crisis of the liberal world order', *International Affairs Blog*, 17 January 2018, available at https://medium.com/international-affairs-blog/humanitarianism-and-the-crisis-of-the-liberal-world-order-98bc86a861c (accessed 17/07/2018). *See also,* A. Gyngell, 'The Rise and Fall of the Liberal International Order', *Australian Institute of International Affairs,* 13 July 2018, available online at http ://www. internationalaffairs. org.au/australianoutlook/the-rise-and-fall-of- the-liberal-international-order/ (accessed 24/08/2018).

126 A. Acharya, 'After Liberal Hegemony: The Advent of a Multiplex World Order', (2017) 31(3) *Ethics and International Affairs* 271285, 271.

Across the Atlantic, Europe's role in international affairs and its authority on the international stage has also gradually abated with the continent continuing to suffer from the effects of the 2009 global financial crisis. More specifically, the UK's refusal to intervene in Syria in 2014, which was driven by a concern it would be another Iraq or Libya,[127] represented a disengagement from traditional liberal interventionism and created space for the substantial expansion of Russian involvement in the country in support for Bashar Al Assad. Such a disengagement has also been driven by a rise in nationalism and popularism in Europe and the US. As Ikenberry argues, [the] unipolar moment has now passed. Today, the United States and the Western industrial democracies, roiled by nationalist and populist upheavals, have turned inward and appear less committed to their own post-war liberal international project.[128]

What Acharya describes as the 'end of the American world order'[129] and for others the 'crisis of liberal international society'[130] has created space for emerging powers, and particularly the BRICS, to establish themselves as leading and alternative powers in international society, and to pursue their foreign policy objectives and desired reforms of global political order,[131] including challenging 'the legitimacy of the existing power system and [to] press not for revolution but for greater decisionmaking power in global institutions.'[132] The resulting issue is whether, in the absence of strong liberal powers and the ascendance of states defending pluralist values and institutions, the cosmopolitan-solidarist institutions, such as international human rights and criminal justice, and secondary institutions such as the ICC, can continue to progress or even exist in their current form post-hegemony. This thesis examines the issue and makes a contribution to understanding how shifting power balances may influence the evolution of liberal international society, particularly its governance frameworks, with a focus on the ICC and its relationship with the BRICS states.

3.5. Conclusion

The global political order is in a period of profound change with power and influence shifting away from Western states to the Global South and East. This has created rising powers, as exemplified by the BRICS political grouping, which emerged onto the world stage in 2009, not coincidentally in the aftermath of the global financial crisis which plunged much of the West into economic

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[127] J. Ralph, J. Holland and K. Zhekova, 'Before the vote: UK foreign policy discourse on Syria 2011-13', (2017) 43(5) *Review of International Studies* 875-897.

[128] G. J. Ikenberry, 'Why the Liberal Order Will Survive', (2018) 32(1) *Ethics and International Affairs* 17-29, 17. *See also,* Hurrell, 'Beyond the BRICS', 91

[129] Achraya, *The End of American World Order*. *See also,* I. Clark, *Hegemony in International Society,* (OUP, 2011), 3; F. Zakaria, *The Post-American World*, (Norton, 2008).

[130] G. J. Ikenberry, I. Parmar and D. Stokes, 'Introduction: Ordering the world? Liberal internationalism in theory and practice', (2018) 94(1) *International Affairs* 1-5.

[131] Ikenberry, 'Why the Liberal Order Will Survive', 17. *See also*, Stuenkel, *The BRICS ad the Future of Global Order,* 3.

[132] C. Roberts, 'Russia's BRICS Diplomacy: Rising Outsider with Dreams of an Insider', (2010) 42(1) *Polity* 38-73, 42.

turmoil. Since then, it has evolved into a coherent political force with defined objectives spanning the breadth of international affairs and it holds annuals summits at which the heads of state gather to agree the group's foreign policy objectives. The BRICS states coalesced around a shared desire to reform international society and, more specifically, to reform the global governance framework to make it more representative of the shifting distribution of power or, in other words, to give themselves and developing nations a greater role in decision-making and norm-setting. The BRICS states' ambitions can therefore be said to be informed by self-interested and normative concerns.

The BRICS also share a particular vision of international society which they seek to defend in shaping the global governance architecture. This is described as a state-solidarist conception of international society. This means that they defend pluralist values and primary institutions in the context of advancing cosmopolitan solidarism. More specifically, they emphasise the importance and the centrality of multilateralism and diplomacy in the management of international affairs. As a result, they are wary of the shift away from horizontal, state-based governance towards more vertical, supranationalised governance implemented through increasingly powerful international organisations, including international courts, on the basis that it curtails the autonomy of the state and results in inflexible responses to international issues. This is seen in the BRICS support for the role of the UN and the Security Council. They also promote a rules-based international society and defend the international rule of law, but they see it principally as applying between states for the purpose of maintaining international peace and security or, in English School terms, order among sovereign nations. They are, however, willing to support cosmopolitan moral progress, such as the protection of human rights and the implementation of criminal justice, the latter of which is explored in the next chapter, but only to the extent they do not undermine pluralist values and institutions of international society, or threaten order. Finally, the BRICS pluralist leaning is seen in their defence of an substantially absolutist understanding of sovereignty and the rejection of interference in states' internal affairs in the context of increasingly dominant understanding in liberal international society that sovereignty in limited and conditional upon a state complying with international norms and rules, particularly concerning the protection of human rights.

The vision of international society that the BRICS states promote can be said to be informed by both normative and material concerns, as has been identified throughout this chapter. The BRICS states clearly want to advance a model of global governance which they consider to be appropriate, principally because in their view it guarantees peace and order within a society of states which have different political, historical, social, cultural and economic identities, and because it allows each state to develop in its own way and in accordance with domestic political will. However, this position also allows the BRICS states to exercise greater control and influence in the global political

order as rising powers, particularly with the decline of the West, and serves to protect them from external interference in their domestic affairs.

This shift in the balance of power and the rise of the BRICS states, combined with their defence of state-solidarism, has potential implications for cosmopolitan progress in international society, the trajectory along which, it is argued, liberal international society has been evolving since 1945, particularly in light of the declining influence of liberal Western states. This includes concerns about the sustainability of both primary and secondary cosmopolitan-solidarist institutions of international society. The remainder of this thesis is dedicated to examining that issue through a study of the relationship between the BRICS states and the ICC. Before addressing that, however, the next chapter provides some further, more specific background in the form of an analysis of the BRICS states engagement with international criminal justice since the end of World War Two.

CHAPTER FOUR

THE BRICS AND INTERNATIONAL CRIMINAL JUSTICE

4.1. Introduction

Building on the examination of the BRICS vision of global political order in the previous chapter, this chapter examines their engagement with a specific aspect of liberal international society, the institution of international criminal justice. The purpose of this is to provide further background to the examination of the BRICS states' relationship with the ICC, which will be the focus of the remainder of this thesis. More specifically, this chapter examines, in the following order: the USSR's and China's contributions to the creation and functioning of the Nuremberg and Tokyo Trials; the BRICS states involvement in the Genocide Convention negotiations; Brazil, Russia and China's involvement in establishing the *ad hoc* tribunals for Yugoslavia and Rwanda; and the BRICS states subsequent involvement with the ICTY and the ICTR from their creation to date. It also identifies the contributions of the BRICS states to the creation of other criminal tribunals after the ICC as well as providing a brief explanation of South Africa's alternative approach to transitional justice in the post-apartheid era.[1]

It is argued in the course of the chapter that the BRICS states have been supportive of international criminal justice and have contributed to its progressive development. However, they have also challenged and contested it where it challenges pluralist primary institutions and pluralist values. It is therefore argued, consistent with position adopted in Chapter Three, that the BRICS states support cosmopolitan progress, in this case criminal justice, to the extent that it is implemented with sufficient deference to pluralist values and primary institutions or, in other words, within a state- solidarist conception of international society. It is also noted, however, where support or opposition to international criminal justice was potentially informed by material concerns because, as has been acknowledged throughout the thesis, a state's or group of states' foreign policy views and positions are informed by both normative and material, self-interested concerns.

4.2. China and the USSR's Support for the Post-World War Two Military Tribunals

Both the USSR and China were extensively involved in World War Two and bore a significant

[1] It is understood and accepted that the BRICS states were very different in their constitution and domestic political situations in the period of time examined in the majority of this chapter and, more importantly, were not in the political grouping that was created in 2001. Nevertheless, it is relevant and important to understand how those states engaged with international criminal justice prior to the establishment and operation of the ICC in order to later identify continuities and divergences in their views and practices.

brunt of the war crimes and atrocities that were perpetrated by the Nazis and the Japanese Empire. As a result, both states supported the establishment of criminal tribunals to prosecute those guilty of crimes that had been committed during the conflicts, and they both contributed substantially to the setting up and the operation of the Nuremberg Military Tribunal and the Far East Tribunal (IMTFE or Tokyo Trials). The support of these states for the post-war tribunals was also informed, however, by a desire to demonstrate their status in the new global political order and to contribute to the shaping of the post-war global governance architecture. Their experiences of the military tribunals were far from resoundingly positive, however, and this arguably conditioned their views and positions on international criminal justice going forward. This section of the chapter begins with an analysis of the USSR's involvement in the Nuremberg Tribunal and then moves on to look at China's participation in the Tokyo Trials.

4.2.1. The USSR's Contribution to the Nuremberg Military Tribunal

The USSR contributed substantially to establishing the International Military Tribunal and its operation. Malksoo describes the Soviet understanding of its contribution as a 'seminal role'[2] and Hirsch argues the 'Soviet Union made significant contributions to the legal framework of the IMT and to a new postwar vision of international law.'[3] Individuals from the USSR played a prominent role in the negotiations which shaped the charter of the Tribunal. Most notably, a Soviet scholar and foreign policy adviser, Aron Trainin, had been developing the concept of the crime of aggression and his work was circulated amongst the parties negotiating the crimes to be prosecuted. His work 'would later serve as a basis for the Nuremberg Charter.'[4] In addition to the USSR's contribution to the Nuremberg Tribunal, the Soviets also sent a delegation to the IMTFE to support the prosecutions taking place there[5] and they also conducted a large number of domestic war crimes trials which included both perpetrators from Europe and the Far East. These domestic trials began in the mid-1940s and continued well into the 1950s.[6]

Despite these important contributions, Moscow sort to stage manage the Trials as much as possible.[7] For Stalin, the guilt of the defendants had already been determined by the world and the Trials were

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[2] L. Malksoo, *Russian Approaches to International Law,* (OUP, 2015), 136.

[3] F. Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order', (2008) 113(3) *American Historical Review* 701-730, 703.

[4] Hirsch, 'The Soviets at Nuremberg', 707-708. *See also,* K. Sellars, *'Crimes against Peace' and International Law,* (CUP, 2013), 4952, 55-58; G. Esakov, 'International Criminal Law and Russia: From 'Nuremberg' Passion to 'The Hague' Prejudice', (2017) 69(8) *Europe-Asia Studies* 1184-1200, 1188.

[5] Z. Dan, 'From Tokyo to Rome: A Chinese Perspective' in L. Daquin and Z. Binxin (eds), *Historical War Crimes Trials in Asia,* (Torkel Opshal Academic EPublisher, 2016), 38.

[6] V. B. Ikova, 'Post-Second World War Trials in Central and Eastern Europe' in M. Bergsmo, C. W. Ling and Y. Ping (eds), *Historical Origins of International Criminal Law: Volume 2,* (Torkel Opshal Academic EPublisher, 2014), 714-721. *See also,* Sellars, *'Crimes against Peace ' and International Law,* 53-55.

[7] G. J. Bass, *Stay the Hand of Vengeance. The Politics of War Crimes Tribunals,* (Princeton University Press, 2000), 196.

simply a means of determining the relative guilt of the defendants and meting out punishment.[8] He also wanted to ensure that the Trials ultimately projected a 'good versus evil' narrative, with the USSR being confirmed as on the right side of history, along with the other allied states, and Germany and the axis powers rendered as villains.[9] This was because the Nuremberg Trials were much more than just a criminal procedure, they became the site of a battle between the USSR and other allied powers.[10] As a precursor to the Cold War they were 'an intense political and ideological struggle... about the meaning of World War II and the shape of the new international order '[11] and, like the other allied states, the Soviets saw Nuremberg as a forum through which to establish the USSR as a major international actor at a time when the postwar order was still emerging.'[12]

In furtherance of this objective, the USSR sort to ensure the ability of the German defendants to highlight Soviet crimes through their defence was prevented, an objective that was shared by the other allied states. However, as Hirsch notes, despite an inter-state agreement for that purpose, Western powers permitted the Nazi defendants to give evidence of Soviet crimes, whilst keeping their crimes out of the courtroom, as a means of validating their claim to be the righteous leaders of the post-war global political order. This sense of being duped by the liberal powers influenced the subsequent negotiations about the creation of UN and other organisations including a permanent international criminal court[13] and Esakov notes that the Soviet's 'failure' at Nuremberg together with the evolution of the Cold War resulted in a shift in the Russian approach to international criminal law from cooperation to condemnation,[14] which can be seen in Russia's approach to the International Criminal Tribunal for the Former Yugoslavia.

We see here that the USSR's approach to international criminal justice at the end of World War Two was driven by material and self-interested concerns, namely a desire to consolidate its image as a leading post-war power and to exact control over the process. However, the USSR's commitment to the development of the Nuremberg model also demonstrates its normative support for the project. As was explained in the theoretical framework for this thesis, the motivations behind states foreign policy decision-making can be complex and multifaceted, and encompass both material and normative concerns.

[8] Hirsch, 'The Soviets at Nuremberg', 703.
[9] Hirsch, 'The Soviets at Nuremberg', 717.
[10] Hirsch, 'The Soviets at Nuremberg', 722.
[11] Hirsch, 'The Soviets at Nuremberg', 703.
[12] Hirsch, 'The Soviets at Nuremberg', 727.
[13] Hirsch, 'The Soviets at Nuremberg:', 725-727.
[14] Esakov, 'International Criminal Law and Russia', 1188.

4.2.2. China's Contribution to the International Military Tribunal of the Far East

China played a similarly prominent role in bringing to justice individuals who had committed crimes in the Far East, both through domestic war crimes proceedings and through a contribution to the IMTFE.[15] Firstly, the Kuomintang government of China established a national office to investigate cases of war crimes alleged to have been committed by Japanese soldiers on Chinese territory and it contributed to establishing the UN War Crimes Commission (UNWCC) 'for reasons of international solidarity' which 'aptly reflected China's newly developing self-understanding as a major power'.[16] Furthermore, China strongly advocated for, and was instrumental in, establishing the Chungking Sub-Commission of the UNWCC which focused on Japanese crimes committed in the Far East.[17] Military tribunals were established throughout China, called the 'Nationalist Trials', and included the Nanjing War Crimes Tribunal, in which, from 1945 to 1947, 2435 Japanese defendants were tried before these courts with 149 individuals sentenced to death.[18] This, as Judge Liu Daquin argues, 'was the first time that China, as a victorious nation, conducted public criminal trials instead of summarily executing war criminals' and he argues 'the trials greatly raised the moral and legal consciousness in the Chinese people and became a central milestone for the rule of law.'[19] The trials were widely recognised for their adherence to judicial guarantees, despite the highly sensitive political circumstances in which they were conducted,[20] and they were guided by an overarching philosophy of forgiveness as opposed to retribution on the basis of Chiang's view 'that the "real victory" was not winning the war, but to make sure that "this war is the last war of civilised nations of the world".'[21] Furthermore, in 1956 trials were conducted by the People's Republic of China in which 45 defendants pleaded guilty and were then returned to Japan.[22] It is argued that one reason for the trials being held and conducted in the manner that they were, employing international law, was to demonstrate China's commitment to this new international

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[15] *See,* Z. Binxin, 'Criminal Justice for World War II Atrocities in China', (2014) *FICHL Policy Brief Serious* No.29, available online at https://www.legal-tools.org/doc/24e3bc/pdf/ (accessed 17/07/2018).

[16] A. Bihler, 'Late Republican China and the Development of International Criminal Law: China's Role in the United Nations War Crimes Commission in London and Chungking' in M. Bergsmo, C. W. Ling and Y. Ping, *Historical Origins of International Criminal Law: Volume 1,* (Torkel Opshal Academic EPublisher, 2014), 513 and Z. Binxin, 'Criminal Justice for World War II Atrocities in China', 1.

[17] Bihler, 'Late Republican China and the Development of International Criminal Law', 517-518. For a more detailed explanation and analysis of the work of the UNWCC and the Chungking Sub-Commission, *see* M. L. Houle, 'China and the War Crimes Far Eastern and Pacific Sub-Commission' in M. Bergsmo, C. W. Ling, S. Tianying, and Y. Ping, *Historical Origins of International Criminal Law: Volume 4,* (Torkel Opshal Academic EPublisher, 2015), 661-701 and Bihler, 'Late Republican China and the Development of International Criminal Law', 507-538.

[18] Binxin, 'Criminal Justice for World War II Atrocities in China', 1-2.

[19] Forward by Judge Liu Daquin in L. Daquin and Z. Binxin (eds), *Historical War Crimes Trials in Asia,* (Torkel Opshal Academic EPublisher, 2016), v.

[20] Z. Binxin, 'War Crimes Trials in China after the Second World War: Justice and Politics' in L. Daquin and Z. Binxin (eds), *Historical War Crimes Trials in Asia,* (Torkel Opshal Academic EPublisher, 2016), 231-232.

[21] Binxin, 'War Crimes Trials in China after the Second World War', 238.

[22] Z. Binxin, 'Criminal Justice for World War II Atrocities in China', (2014) *FICHL Policy Brief Serious,* No.29, 2. For a more detailed examination of the 1956 Trials, *see* L. Yan, 'The 1956 Japanese War Crimes Trials in China' in M. Bergsmo, C. W. Ling and Y. Ping, *Historical Origins of International Criminal Law: Volume 2,* (Torkel Opshal Academic EPublisher, 2014), 215-241.

order to secure a place within it.[23]

China's Nationalist Government also made a constructive contribution to the Tokyo Trials. It supported the prosecution and punishment of Japanese war criminals from the beginning; 'the Chinese delegate to the signing of the St James's Declaration, which called for the punishment of German war leaders, stated that it was China's "intention to apply the same principles to the Japanese occupying authorities in China when the time comes"[24], which was one of the first major statements on the punishment of offences in the Far East.[25] The USSR also supported such a judicial process from an early stage, Stalin having stated on 6 November 1943 that 'we shall have to take ...measures to ensure that all the fascist criminals who are responsible for this war and the suffering the people have endured shall meet with stern punishment and retribution for all the crimes they have committed'.[26] China also signed the Cairo Declaration on 1 December 1943, together with the leaders of the US and Great Britain, which made it clear that they were 'fighting this war to restrain and punish the aggression of Japan'[27] and it later adopted the Potsdam Declaration, again with the US and Great Britain, which provided 'stern justice shall be meted out to all war criminals'.[28] Finally, it contributed to the formal establishing of the International Military Tribunal of the Far East.[29]

Subsequently, China sent a delegation of 10 people to the Tribunal to assist with prosecuting the Japanese defendants as well as one judge, Ju-ao Mei. However, unlike the Soviets at Nuremberg, the Chinese were unable to contributively substantially to the drafting of the Tribunal's Charter because this had already been largely decided by the US, which exerted much greater control over the IMTFE than the Nuremberg Trials. Unlike at Nuremberg where there were four chief prosecutors, one for each of the Allied states, at the IMTFE there was one chief prosecutor from the US, Joseph B. Keenan, and ten associate prosecutors from various countries including China and 'British India'.[30]

Similar to the Soviets at Nuremberg, the Chinese believed that the trials at the IMTFE were going to be a mere formality and expected them to simply be about punishing the vanquished and, as a result, were underprepared and under-resourced. The Chinese were also taken aback by the highly

[23] Binxin, 'War Crimes Trials in China after the Second World War', 246.
[24] Dan, 'From Tokyo to Rome: A Chinese Perspective', 33.
[25] N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal,* (OUP, 2008), 17.
[26] Boister and Cryer, *The Tokyo International Military Tribunal: A Reappraisal,* 17 citing B. V. A. Roling, 'The Tokyo Trial and the Quest for Peace' in Hosoya et al (eds), *The Toko Trial: An International Symposium,* (Kodansha, 1986), 125-126.
[27] The Cairo Declaration (adopted on 1 December 1943).
[28] The Potsdam Declaration (adopted on 26 July 1945).
[29] Boister and Cryer, *The Tokyo International Military Tribunal: A Reappraisal,* 22-27.
[30] Dan, 'From Tokyo to Rome: A Chinese Perspective', 34-35.

politicised nature of the Tribunal and the influence wielded by the US within it, particularly its decision not to prosecute Emperor Hirohito. Moreover, China was uncomfortable with the application of common law rules by Western judges.[31] The Chinese were also left with the feeling that its peoples' desire for justice had not been satisfied on account of the failure of the Tribunal to address the guilt and responsibility of the Japanese state, it having focused solely on individual criminal responsibility. Dan argues these criticisms and concerns have coloured China's view of international justice and that this influenced its approach to the ICTY and the ICTR, and more recently, the ICC, regarding the latter with a degree of suspicion, as will be explored in the remainder of this thesis.[32]

It can be seen from this analysis that both the Soviet Union and China supported and contributed to the establishment of the foundations of international criminal justice in the form of the Nuremberg and Tokyo Tribunals, as well as the extensive domestic war crimes prosecutions that they both conducted. Whilst both states contributions were partly motivated by selfish reasons, namely the desire to establish themselves as new powers in the evolving post-war international order, they also clearly supported the cosmopolitan development of the principle of individual criminal responsibility and the creation of international criminal law given the extensive and constructive role that they played during the evolutionary process. This evidences the role that both material and normative interests play in societal progress, and an acknowledgement of the continuing relevance of realist thinking. The USSR and China were, however, left disappointed by the way in which they were marginalised in the operation of the Tribunals and the control that Western powers influenced within them. This experience has clearly informed the way in which they approached international criminal justice in the subsequent period.

4.3. The BRICS and the Evolution of the Genocide Convention

In the wake of the Nuremberg and Tokyo Trials, the international community decided that what was needed to prevent the horrors of the Holocaust reoccurring was an international convention prohibiting and supressing genocide. General Assembly Resolution 96(I), adopted on 11 December 1946, recorded the view of the international community that the 'denial of the right of existence shocks the conscience of mankind...and is contrary to moral law and to the spirit and aims of the United Nations'. It noted that '[t]he punishment of genocide is a matter of international concern', affirmed 'genocide is a crime under international law' and invited 'Member States to enact the necessary legislation for the prevention and punishment of this crime'. The General Assembly also

[31] Dan, 'From Tokyo to Rome: A Chinese Perspective', 54.
[32] Dan, 'From Tokyo to Rome: A Chinese Perspective', 57.

requested the drawing up of a convention on the crime of genocide.[33] India co-sponsored the Resolution and the USSR, China, Brazil and the Union of South Africa all voted in favour of its adoption, demonstrating a commitment to the further development of international criminal justice and the international criminal law framework. Again, their contribution was also arguably informed by a desire to be seen to be contributing, particularly in the case of the USSR and China, to the development of the post-war international society in order to consolidate their position as leading powers in the new global political order.

4.3.1. Contributions to the Genocide Convention Negotiations

The BRICS states subsequently contributed to the development of the Convention, the USSR extensively so, which demonstrates their commitment to the evolution of the institution of international criminal justice. After the UN Secretariat developed a draft convention, an *Ad Hoc* Committee was convened to scrutinise and develop the draft. Both China and the USSR sat on the Committee, and the USSR, holding the Vice Chairmanship, made extensive contributions to the debates.[34] After the *Ad Hoc* Committee had prepared its draft of the convention, the matter was passed on to the Sixth Committee of the General Assembly for further scrutiny and finalising. The USSR, China, Brazil, India and the Union of South Africa all sat on the Sixth Committee[35] and contributed to the debates, and again, the USSR was particularly vocal in expressing its views. China, it was said, 'ardently desired the adoption of the convention on genocide'.[36]

One of the most controversial aspects of the negotiations and an issue which divided the BRICS states was whether an international court should be established to prosecute instances of genocide prohibited by the Convention. This reflected an uncertainty about the extent of cosmopolitan progress that should be endorsed. Russia vigorously maintained the position throughout the negotiations the convention should not provide a role for an international tribunal to punish acts of genocide and that instead this should be undertaken only by domestic courts in the territory in which the genocide had occurred.[37] The state-solidarist nature of the USSR's position can be seen in its expressed view that 'the establishment of an international court would constitute an intervention in the internal affairs of States and a violation of their sovereignty an important element of which was the right to try all crimes without exception, committed in the territory of the State concerned'[38] and

[33] UNGA Res. 96(I), 11 December 1946, UN Doc. A/RES/96(I).
[34] A. Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention,* (University of Wisconsin Press, 2017), 55-57.
[35] H. Abtahi and P. Webb, *The Genocide Convention: The Traveaux Pr6paratoires,* Vol. Two, (Martinus Nijhoff, 2008), 1272-1282.
[36] UNGA Sixth Committee, Official Records, 65th meeting, 2 October 1948, UN Doc. A/C.6/SR.65, 24.
[37] ECOSOC Ad Hoc Committee on Genocide, Official Records, 8th meeting, 13 April 1948, UN Doc. E/AC.25/SR.8, 2.
[38] ECOSOC Ad Hoc Committee on Genocide, Official Records, 24th meeting, 28 April 1948, UN Doc. E/AC.25/SR.24, 10-11.
See also, UNGA Sixth Committee, Official Records, 64th meeting, UN Doc. A/C.6/SR.64, 14.

its statement that ' no exception should be made in the case of genocide to the principle of the territorial jurisdiction of states'.[39]

In rejecting the creation of an international tribunal, the USSR considered that 'international law could not take precedence over the national legislation of states'[40] and, on a more practical note, it considered an international tribunal would also be ineffective. It stated those 'who favoured an international court proposed no practical methods of combating the crime of genocide; they confined themselves to enunciating principles.'[41] The USSR instead strongly advocated for the convention to provide that states must adopt within their national legal systems laws prohibiting and criminalising genocide in order to facilitate prosecutions at the domestic level.[42] It considered this to be the most effective means of suppressing genocide. Its memorandum provided that 'national tribunals would be competent to judge genocide in accordance with the internal legislation of the country concerned'.[43] Brazil initially shared the USSR's anti-international court stance, although it did so on more pragmatic than ideological grounds. Its delegate explained that:

> [t]he time had not yet come to establish an international criminal court for, notwithstanding the contrary opinion of eminent jurists, there did not exist any international criminal law properly speaking; there existed, in each State, provisions of domestic law and it was by extension that it had become possible to speak of international criminal law...The last words of article VII expressed merely a wish, an aspiration, and the delegation of Brazil thought they should be deleted in order that the convention might remain within the confines of reality.'[44]

However, it later came to support a role for an international criminal court to punish the crime of genocide, after initially voting alongside the USSR in favour of an amendment to remove reference to an international court from the convention,[45] 'on the basis that it would mean that the ILC would take up the issue and begin considering it' and because 'if the convention contained no reference to the possibility of the establishment of an international criminal tribunal, it might have to be revised at a later date, when an international tribunal was eventually established.'[46] Brazil also expressly approved of France's position which is reflected in its delegate's statement on the inclusion o f a provision for an international court within the convention: '[w]ithout that principle, there would

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[39] ECOSOC Ad Hoc Committee on Genocide, Official Records, 7th meeting, 12 April 1948, UN Doc. E/AC.25/SR.7, 9. *See also,* UNGA Sixth Committee, Official Records, 98th meeting, 10 November 1948, UN Doc. A/C.6/SR.98, 379.
[40] ECOSOC Ad Hoc Committee on Genocide, Official Records, 7th meeting, 12 April 1948, UN Doc. E/AC.25/SR.7, 16.
[41] ECOSOC Ad Hoc Committee on Genocide, Official Records, 7th meeting, 12 April 1948, UN Doc. E/AC.25/SR.7, 16.
[42] ECOSOC Ad Hoc Committee on Genocide, Official Records, 6th meeting, 9 April 1948, UN Doc. E/AC.25/SR.6, 14. *See also,* ECOSOC Ad Hoc Committee on Genocide, Official Records, 7th meeting, 12 April 1948, UN Doc. E/AC.25/SR.7, 5 and 16.
[43] ECOSOC Ad Hoc Committee on Genocide, Official Records, 3rd meeting, 6 April 1948, UN Doc. E/AC.25/SR.3, 3.
[44] UNGA Sixth Committee, Official Records, 97th meeting, 9 November 1948, UN Doc. A/C.6/SR.97, 371.
[45] *See,* Abtahi and Webb, *The Genocide Convention,* p.1698.
[46] UNGA Sixth Committee, Official Records, 130th meeting, 30 November 1948, UN Doc. A/C.6/SR.130, 678.

have been no real provision for the punishment of Governments.'[47]

In contrast, China tentatively supported the provision of an international court in the convention from the beginning, later noting it 'had always been in favour of the principle of the establishment of an international criminal tribunal.'[48] It shared the French delegation's view, adopted more latterly by Brazil, that in the circumstances where a government has perpetrated a genocide, effective prosecutions could not be undertaken through the national system and therefore an international court would be required. [49] It however questioned the Ad Hoc Committee's competence to establish such a court.[50] China voted against the proposed amendment to remove any and all reference to an international court from the draft convention[51] and its delegate explained that 'his delegation saw the need for the punishment of genocide on a national as well as on an international level. Since that crime was often committed with the connivance or the permission of the State, it was unlikely that, national courts would punish it effectively.'[52] India was hesitant to proceed with establishing an international court to punish genocide 'without fuller knowledge of the implications involved in the establishment of such a body'[53] and particularly, 'without being in possession of the details, in particular as to the composition of the court, the procedure to be followed before it, and the law to be applied',[54] on the basis it may lead 'to international interference in the domestic jurisdiction of States and thus to action contrary to the Charter.'[55] The Indian delegate also stressed that:

> his delegation did not reject *a priori* the jurisdiction of an international court in cases an act of genocide was committed or tolerated by Governments; he observed, however, that, if two kinds of courts for the repression of the crime of genocide were envisaged, the cases when over which national courts would have jurisdiction and the cases which would have to be submitted to the international court must be clearly determined in advance.[56]

There was also disagreement among the states as to whether the Convention should prescribe alternative mechanisms for prosecuting genocide at the international level, including through universal jurisdiction and the ICJ. The USSR, continuing to defend pluralist institutions, rejected the suggestion of universal jurisdiction being used to punish genocide on the basis it 'was even more incompatible with the sovereignty of States than international punishment.'[57] It also rejected

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[47] UNGA Sixth Committee, Official Records, 133rd meeting, 2 December 1948, UN Doc. A/C.6/SR.133, 707.
[48] UNGA Sixth Committee, Official Records, 130th meeting, 30 November 1948, UN Doc. A/C.6/SR.130, 678.
[49] ECOSOC Ad Hoc Committee on Genocide, Official Records, 7th meeting, 12 April 1948, UN Doc. E/AC.25/SR.7, 10.
[50] ECOSOC Ad Hoc Committee on Genocide, Official Records, 7th meeting, 12 April 1948, UN Doc. E/AC.25/SR.7, 10.
[51] *See,* Abtahi and Webb, *The Genocide Convention,* 1698.
[52] UNGA Sixth Committee, Official Records, 100th meeting, 11 November 1948, UN Doc. A/C.6/SR.100, 402.
[53] UNGA Sixth Committee, Official Records, 64th meeting, 1 October 1948, UN Doc. A/C.6/SR.64, 15.
[54] UNGA Sixth Committee, Official Records, 97th meeting, 9 November 1948, UN Doc. A/C.6/SR.97, 372.
[55] UNGA Sixth Committee, Official Records, 64th meeting, 1 October 1948, UN Doc. A/C.6/SR.64, 15.
[56] UNGA Sixth Committee, Official Records, 97th meeting, 9 November 1948, UN Doc. A/C.6/SR.97, 372.
[57] UNGA Sixth Committee, Official Records, 100th meeting, 11 November 1948, UN Doc. A/C.6/SR. 100, 403.

a role for the ICJ and considered that instead any instances of genocide should be reported to the Security Council so it could take action. It said granting jurisdiction to the ICJ over cases of genocide would amount to an 'interference in the internal affairs of States and violation of their sovereignty'.[58] Its representative also explained that it 'would not prevent acts of genocide or violations of the convention' and disputed the legality of such an approach, stating:

> [t]he mass extermination of a human group could not be called a dispute between the parties to the convention and therefore could not be within the province of the International Court of Justice. Moreover, the Court was not the competent body to consider situations endangering the maintenance of international peace and security, since it did not have the means to prevent acts of genocide.[59]

The USSR 'could not see any organ of the United Nations better qualified to arbitrate cases of genocide than the Security Council. It was therefore desirable to designate that organ in the convention'[60] and it believed that any acts of genocide should be reported 'to the Security Council, which was the only body competent to take immediate steps against the crime, so that action could be taken under Article 6 of the Charter.'[61] Furthermore, its representative explained '[a]ny act of the genocide was a threat to international peace and security and as such it should be dealt with under Chapters VI and VII of the Charter'[62] and the USSR delegate was highly critical of the refusal of states to support its proposal on the Security Council, stating that 'they had prevented the inclusion in the draft convention of a provision that recourse should be had to the Security Council. No action was in fact being taken to secure effective prevention of genocide'.[63] This reflects a normative view about the primacy of the state and the need for political control of global governance in international society. The USSR's emphasis on a role for the Security Council also reflects, however, its jealous protection of its new great power states and its ability to exercise political control. It addition to its state-solidarist vision for international society, the USSR's position can be explained, Weiss-Wendt argues, on the basis that '[h]aving just recently emerged from an extensive period of international isolation, it would be inconceivable for the Soviet Union to water down its hard-won status of a superpower by accepting the principle of universal adjudication'[64] and because, in its view, 'the concept of universal jurisdiction was nothing but a violation of state sovereignty and an unholy attempt to circumvent the Security Council's authority.'[65] Therefore, it is evident that the USSR's position was informed by both material and

[58] ECOSOC Ad Hoc Committee on Genocide, Official Records, 26th meeting, 30 April 1948, UN Doc. E/AC.25/SR.26, 7.
[59] UNGA Sixth Committee, Official Records, 104th meeting, 13 November 1948, UN Doc. A/C.6/SR.104, 440.
[60] ECOSOC Ad Hoc Committee on Genocide, Official Records, 8th meeting, 13 April 1948, UN Doc. E/AC.25/SR.8, 25.
[61] UNGA Sixth Committee, Official Records, 64th meeting, 1 October 1948, UN Doc. A/C.6/SR.64, 14.
[62] UNGA Sixth Committee, Official Records, 101st meeting, 11 November 1948, UN Doc. A/C.6/SR. 101, 409.
[63] UNGA Sixth Committee, Official Records, 98th meeting, 10 November 1948, UN Doc. A/C.6/SR.98, 379.
[64] Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention,* 71.
[65] Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention,* 95.

normative concerns. Although it must be noted that the normative concerns appeared to weigh heavily in the formulation of the USSR's position given the extensive and detailed justifications that it gave for opposing the creation of an international court to prosecute genocide or the ICJ.

In contrast to the USSR's position, Brazil was prepared to accept the compulsory jurisdiction of the ICJ in matters of genocide. China abstained on the vote to exclude reference to the ICJ from the convention and its representative explained that this was on the basis that 'although he approved of the idea of submitting disputes to the International Court of Justice, he did not think that the concept of the responsibility of the State should be included in the convention.'[66] It ostensibly supported an individualised approach to the criminalisation of genocide based on the Nuremberg and Tokyo precedent.[67] This perhaps represented a development in its thinking given that it lamented the failure of the IMTFE to address the guilt of the state of Japan but more likely it was concerned about granting authority to an established international court over which it could not exercise control.

4.3.2. Support for the Adoption of the Genocide Convention

Despite the concerns expressed by the BRICS states on different issues and the rejection of the USSR's last minute proposed amendments to the convention to exclude any reference to an international court with jurisdiction over the crime of genocide,[68] all of the BRICS stated voted in favour of adopting the convention and it was adopted unanimously.[69] This reflected a strong and meaningful committed to the development of international criminal justice. After the vote on the USSR's amendments, but in advance of the main vote, the USSR delegate reiterated his country's strong belief in the importance of its proposed amendments but he explained that '[t]he draft convention did however provide for the condemnation of genocide and rendered it punishable' and so it would vote in favour of it. He also insisted, however, that any cases referred to the ICJ must have the consent of the parties or, in other words, that there be no compulsory jurisdiction for that court.[70] This is an example of it defending a pluralist, consent-based approach to international adjudication, but at the same time endorsing and supporting cosmopolitan progress, which is evidence of state-solidarist positioning. It also demonstrates the strength of the states' support for the criminalisation and prosecution of genocide over and above the pluralist concerns that had been identified by some states. All of the BRICS nations subsequently either ratified or acceded to the Convention on the Prevention and Punishment of the Crime of Genocide.[71] India and China also

[66] UNGA Sixth Committee, Official Records, 104th meeting, 13 November 1948, UN Doc. A/C.6/SR. 104, 447.
[67] UNGA Sixth Committee, Official Records, 104th meeting, 13 November 1948, UN Doc. A/C.6/SR.104, 447.
[68] UNGA Official Records, 170th plenary meeting, 9 December 1948, UN Doc. A/PV.179, 849.
[69] UNGA Official Records, 170th plenary meeting, 9 December 1948, UN Doc. A/PV. 179, 851.
[70] UNGA Official Records, 170th plenary meeting, 9 December 1948, UN Doc. A/PV.179, 850-851.
[71] Brazil Signed: 11 December 1948, Ratified: 15 April 1952; Russia Signed: 16 December 1949, Ratified: 3 May 1954; India Signed:

made reservations to the treaty. China recorded that it did not consider itself bound by article IX of the Convention which required disputed matters to be referred to the ICJ[72] and India recorded its understanding that disputed matters relating to the Convention could only be referred to the ICJ with the consent of all parties to the dispute.[73] Russia adopted both of these reservations.[74] This use of reservations addresses the pluralist concerns that some states held. We cannot know, however, whether if reservations were not available at the time, states would still have voted in favour of the adoption of the Genocide Convention thereby accepting a move away from their pluralist position for the benefit of the advancement of international criminal justice or whether they would have sacrificed justice in favour of order. The pragmatism of the reservations system allowed for the advancement of international criminal justice, albeit its efficacy was somewhat potentially limited by the use of reservations. This pragmatic balancing is something we see again in the Rome Statute negotiations and the negotiations concerning the crime of aggression at the ICC, which are looked at in Chapters Five and Six of this thesis respectively.

4.4. The BRICS States' Role in the Creation of the *Ad Hoc* Tribunals

The BRICS states relationship with international criminal justice would become more complex with the establishment of the *ad hoc* tribunals for the Former Yugoslavia and Rwanda. As will be shown in this section of the chapter, the BRICS states generally supported a role for retributive justice in the Former Yugoslavia and Rwanda but there were differences of opinion as to how this should be achieved and, more specifically, how the *ad hoc* tribunals that would be charged with delivering justice should be created. The concerns expressed by states reflects their state-solidarist vision of international society including a defence of pluralist values and institutions, and a concern that the Tribunals would erode respect for state sovereignty and UN Charter-based rules.

The Russian Federation was the most supportive of the creation of the *ad hoc* tribunals for the Former Yugoslavia and Rwanda, co-sponsoring and voting in favour of the UN Security Council Resolutions establishing them.[75] This support can also been seen in the statements made by Russian

29 November 1949, Ratified: 27 August 1959; China Signed: 20 July 1949, Ratified; 18 April 1983.

[72] United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1961), Declarations and Reservations, available online at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg no=IV-1&chapter=4&clang= en#EndDec (accessed 27/11/2017) (See website for China's reservation).

[73] United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1961), Declarations and Reservations, available online at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg no=IV-1&chapter=4&clang= en#EndDec (accessed 27/11/2017) (See website for India's reservation).

[74] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1961) 78 UNTS 277, 310.

[75] UNSC Res.827 (25 May 1993), UN Doc. S/RES/827; UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 2 (ICTY) and USC Res. 955 (8 November 1994), UN Doc. S/RES/955; UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 3 (ICTR).

representatives. For example, in relation to the creation of the ICTY, Mr Vorontsov said that 'Russia has pursued an unwavering course of putting an end to war crimes and cannot remain indifferent to the flagrant mass violations of international humanitarian law in the territory of the former Yugoslavia'.[76] He also emphasised that those guilty of international crimes and grossly violating our human concepts of morality and humanity must be punished and that the ICTY is 'an instrument of justice which is called upon to restore international legality and the faith of the world community in the triumph of justice and reason.'[77] Similarly, Mr Lavrov said the ICTR 'will give yet another clear and unequivocal signal to the effect that the international community will not tolerate serious violations of norms of international humanitarian law and disregard for the rights of the individual.'[78]

Russia did however emphasise, demonstrating its defence of pluralist values as part of its state-solidarist vision of international society, that the Tribunals were not solely about delivering retributive justice. It emphasised the function of the ICTY in promoting 'the restoration of peace in the region'[79] and that the ICTR 'must promote the process of national reconciliation, the return of refugees, and the restoration and maintenance of peace in Rwanda'.[80] It was also said of the ICTY that it should not abolish or seek to replace national justice mechanisms.[81] Nevertheless, Russia was keen to point out that the creation of both the *ad hoc* tribunals reinforces Russia's 'conviction that a permanent international criminal court must be established in the near future.'[82]

In contrast to the very positive approach adopted by Russia, China and Brazil were more cautious in their support for the Tribunals. While they noted the need for justice in the respective regions, they were concerned about the tribunals being created by the Security Council. While Brazil voted in favour of the Security Council Resolutions establishing the ICTY and the ICTR,[83] noting that it is a matter of 'high moral duty' that perpetrators from the Former Yugoslavia are prosecuted and punished[84] and highlighting the 'exceptionally serious circumstances of the situation' in Rwanda,[85] its representative emphasised Brazil's scepticism that the Security Council has the power to establish a tribunal to fulfil that important function and expressed his country's concern about the

[76] UNSC Verbatim Record, 3175th meeting, 22 February 1993, UN Doc. S/PV.3175, 16.
[77] UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 44
[78] UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 2-3
[79] UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 46. *See also,* UNSC Verbatim Record, 3175th meeting, 22 February 1993, UN Doc. S/PV.3175, 16.
[80] UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 2-3.
[81] UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 46.
[82] UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 2-3.
[83] UNSC Res.827 (25 May 1993), UN Doc. S/RES/827; UNSC, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, p.2 (ICTY) and UNSC Res. 955 (8 November 1994), UN Doc. S/RES/955; UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 3 (ICTR).
[84] UNSC Verbatim Record, 3175th meeting, 22 February 1993, UN Doc. S/PV.3175, 7.
[85] UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 9-10.

Security Council interpreting its powers in such an expansionist manner, stating:

> [t]he Security Council can and should play a strong and positive role in promoting the implementation of the various elements that would contribute to the peace efforts developed by the Conference on the Former Yugoslavia, that role, however, can and should remain within the scope of the powers expressly granted to the Security Council in accordance with the United Nations Charter. In this rapidly changing world, we consider it increasingly important to promote the rule of law, in international relations by acting to ensure strict respect for the provisions of our Charter and other norms of international law.[86]

Furthermore, in respect of the creation of the ICTY, the Brazilian representative lamented the fact that, in its view, difficult political and legal issues relating to the Tribunal had not be adequately considered and satisfactorily resolved by the Security Council, and he regretted that an initiative with such far reaching implications had not been examined 'in a context that allowed a broader participation by all States Members of the United Nations' such as through the UN General Assembly.[87] In relation to the creation of the ICTR, Brazil expressed similar doubt as to whether 'the option of resorting to a resolution of the Security Council is the most appropriate method for such a purpose' and that its preferred means for 'establishing an international criminal tribunal has been and remains the conclusion of a convention by the international community' on the basis that 'the assertion and the exercise of criminal jurisdiction are essential attributes of national statehood. Therefore, such jurisdiction cannot normally be presumed to exist at the international level without the participation and consent of the competent parties.'[88] The Brazilian representative further highlighted a specific concern that the sensitive question of the relationship between the ICTR and local courts had not been properly considered and addressed.[89]

China adopted a position similar to that of Brazil. While its representative emphasised China's staunch commitment to justice processes for international crimes, as shown by its involvement in prosecuting crimes committed by the Japanese during World War Two, it was critical of the consensus among the Security Council members to establish the Tribunal by way of a Chapter VII resolution, preferring it was underpinned by a treaty 'so as to provide a solid legal foundation for it and ensure its effective functioning.'[90] The representative also explained that the ICTY 'ought to become effective only after having been negotiated and concluded by sovereign States and ratified by their national legislative organs' otherwise its creation is 'not in compliance with the principle

[86] UNSC Verbatim Record, 3175th meeting, 22 February 1993, UN Doc. S/PV.3175, 7. In relation to the creation of the ICTR, *see* Statement by Brazil, UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 9-10.
[87] UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 34-37.
[88] UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 9-10.
[89] UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 9-10.
[90] UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 33-34.

of State judicial sovereignty.'[91] It nevertheless voted for the resolution '[b]earing in mind the particular circumstances in the Former Yugoslavia and the urgency of restoring and maintaining world peace'[92] but stressed, like Brazil, that it 'shall not constitute any precedent.'[93] China decided to abstain on the resolution establishing the ICTR.[94] While its representative condemned the commission of war crimes and acts of genocide, and emphasised China's preference for bringing perpetrators to justice, he conveyed China's continued discomfort with tribunals being established by the Security Council, and it was critical of the Council's decision to establish the Tribunal so hurriedly and in circumstances where the Rwandan government had not provided its acceptance of the mechanism.[95]

Although India was not a member of the Security Council at the time the Tribunals were established and therefore did not contribute to the debate or vote, it later expressed its concern, one shared by Brazil and China, that the Security Council did not have the power to create such judicial mechanisms under Chapter VII, stating that:'[t]he Security Council has not been assigned any judicial functions under the Charter; therefore, under Article 29, or under the concept of implied powers, it cannot set up a subsidiary body, entrusting to it functions which the Council itself does not possess.'[96] It expressed its view that the Tribunals should have been established by the General Assembly.[97] This reflects India's concern about the power of the Security Council and its support for a restrictive interpretation of international law.

While Russia, China and Brazil all supported a role for international criminal justice in responding to the conflicts in the Former Yugoslavia and Rwanda through the establishment of *ad hoc* tribunals, China and Brazil were critical of the fact they were established by the Security Council, a view that was also later expressed by India. Their preference for an alternative legal basis, such as through the UN General Assembly which allowed for more diverse contributions by a larger number of states, demonstrates a shared commitment to multilateralism as a means of global governance. This compares to Russia's resolute support for the role of the UN Security Council in creating the Tribunals, which is consistent with its general view of global governance, as identified in Chapter Three, with Russia expressing greater support for mulitpolarity as opposed to genuine multilateralism, protecting the privileged place of the Security Council within the global

[91] UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 33-34.
[92] UNSC Res.827 (25 May 1993), UN Doc. S/RES/827; UNSC, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 2.
[93] UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 33-34. *See also*, Statement by Brazil, UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 9-10 and, in relation to the ICTY, *see* Statement by Brazil, UNSC Verbatim Record, 3217th meeting, 25 May 1993, UN Doc. S/PV.3217, 34-37.
[94] UNSC Res. 955 (8 November 1994), UN Doc. S/RES/955; UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 3.
[95] UNSC Verbatim Record, 3453rd meeting, 8 November 1994, UN Doc. S/PV.3453, 11.
[96] UNGA Official Records, Sixty-first session, 26th plenary meeting, 9 October 2006, UN Doc. A/61/PV.26, 15.
[97] UNGA Official Records, Sixty-first session, 26th plenary meeting, 9 October 2006, UN Doc. A/61/PV.26, 15.

governance framework. Nevertheless, both positions are state-solidarist in their demand for political control over international criminal justice. In addition, the BRICS state-solidarism is evidenced in their defence of state sovereignty. Russia emphasised that the Tribunals should not replace national jurisdictions, Brazil criticised the lack of involvement of the states of the Former Yugoslavia is establishing the courts and China noted that the process did not comply with national judicial sovereignty. Finally, despite Russia's strong support for the tribunals, its pluralist concern for order is demonstrated in its emphasis on the role of the Tribunals is promoting peace, not merely delivering justice.

4.5. The BRICS States and the *Ad Hoc* Tribunals: Support and Contestation

The BRICS states' relationship with the *ad hoc* tribunals increasingly began to deteriorate over the course their life with concerns about the politicisation of their work and bias, and delays in them completing their mandates. What can be seen clearly in analysing the BRICS states' engagement with the Tribunals is their tempering of the cosmopolitan aspirations of international society which underpinned their creation, with their emphasis on the pluralist principles of global governance, especially on the part of the Russian Federation. We can particularly see a continually evolving frustration and weariness with internationally delivered justice - tribunal fatigue - both on practical and ideological grounds, and a developing emphasis on the importance and primacy of domestic prosecutions for international crimes, which is consistent with the BRICS states' emphasis on the state-solidarist conception of international society.

4.5.1. Criticisms of Politicisation and Bias

While Russia initially expressed strong support for the *ad hoc* tribunals, both in the process of their creation and after,[98] including in a statement to the General Assembly in 2010 in which the Russian representative explained '[t]he Russian Federation is inalterably committed to the idea of the dispensation of international criminal justice...and recognizes the significant contribution of the Tribunals to establishing a system of international criminal justice',[99] Russia's relationship with the *ad hoc* Tribunals, but particularly the ICTY, can be characterised as one of deterioration from the end of the 1990s onwards and growing hostility. More specifically, Russia became increasingly concerned and critical of what it perceived to be the continued politicisation of the ICTY and its lack of strict adherence to the fundamental principle of independence. It noted 'in the recent work of the Tribunal there have been serious instances in which this principle has been allowed to slide'[100]

[98] UNSC Verbatim Record, 4063rd meeting, 10 November 1999, UN Doc. S/PV.4063, 8.
[99] UNGA Official Records, Sixty-fifth session, 27th plenary meeting, 8 October 2010, UN Doc. A/65/PV.27, 13.
[100] UNSC Verbatim Record, 4063rd meeting, 10 November 1999, UN Doc. S/PV.4063, 9. *See also,* Statement by the Russian Federation,

and it also stated that 'from the very beginning of its activities, the ICTY did not avoid politicization, bias and partisanship in its activities, particularly with respect to Yugoslavia.'[101] The Russian Federation was particularly critical of what it thought was an anti-Serb bias adopted by the ICTY at the behest of the West. Its comments on the Tribunal are littered with instances propagating this narrative.[102] This included the defending of Serbia or Serbian defendants appearing before the Tribunal[103] and criticising the Tribunal for failing to prosecute individuals of other parties to the Yugoslav conflict.[104] Moreover, the Russian Federation continued to raise issues with specific ICTY cases before the Security Council, particularly those involving Serb nationals, and it criticised the Tribunal's handling of them.[105] Sergey Lavrov criticised the ICTY's decision to indict Slobodan Milosevic and other Yugoslav leaders while at the same time not investigating NATO's bombing of Kosovo.[106] It should be noted no other BRICS states made such specific references and criticisms of the ICTY's or the ICTR's work in respect of particular cases.

While there is undoubtedly some legitimacy to the concerns expressed by the Russian Federation in respect of the ICTY's focus on the Serbs and the impact that this had on the integrity of the Tribunal,[107] the support for Serbian nationals prosecuted by the ICTY can also be explained, at least partly, by Russia's growing political relationship with the Serbian state at that time which was initially underpinned by their shared opposition to the secession of Kosovo as an independent state, Russia fearing that this could encourage secessionist movements in the Russian Federation, as well as their growing economic relations, Russian oil and gas companies having invested heavily in the country.[108] Therefore, its position is likely to have been informed by both normative and material concerns.

UNSC Verbatim Record, 4150th meeting, 2 June 2000, UN Doc. S/PV.4150, 15 - 'because of all the violations of its mandates that have occurred, we have unfortunately come to consider less and less as an impartial judicial body.'

[101] UNGA Official Records, Fifty-fifth session, 68th plenary meeting, 20 November 2000, UN Doc. A/55/PV.68, 29. *See also,* Statement by the Russian Federation, UNGA Official Records, Sixty-first session, 26th plenary meeting, 9 October 2006, UN Doc. A/61/PV.26, 17.

[102] *See,* for example, UNSC Verbatim Record, 4150th meeting, 2 June 2000, UN Doc. S/PV.4150, 15; UNGA Official Records, Fifty-fifth session, 68th plenary meeting, 20 November 2000, UN Doc. A/55/PV.68, 29; UNSC Verbatim Record, 4161st meeting, 20 June 2000, UN Doc. S/PV.4161, 7-8.

[103] UNSC Verbatim Record, 6678th meeting, 7 December 2011, UN Doc. S/PV.6678, 23-24.

[104] UNSC Verbatim Record, 4150th meeting, 2 June 2000, UN Doc. S/PV.4150, 15. *See also,* Statements by the Russian Federation: UNGA Official Records, Fifty-fifth session, 68th plenary meeting, 20 November 2000, UN Doc. A/55/PV.68, 29; UNSC Verbatim Record, 4161st meeting, 20 June 2000, UN Doc. S/PV.4161, 7-8.

[105] UNSC Verbatim Record, 5594th meeting, 15 December 2006, UN Doc. S/PV.5594, 23; UNSC Verbatim Record, 6342nd meeting, 18 June 2010, UN Doc. S/PV.6342, 25; UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 14-15. *See also,* VC. Bilkova, 'Divided we Stand? The Ad Hoc Tribunals and the CEE region', *Symposium on the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Broadening the Debate,* (2016) Vol. 110 *AJIL Unbound* 240-244, 243.

[106] S. Lavrov, 'The Russian Approach: The Fight Against Genocide, War Crimes and Crimes Against Humanity', (1999) 23(2) *Fordham Journal of International Law* 415-428, 425.

[107] 'The Serbs haven't fared much better at the ICTY than Africans have at the ICC. As of December 2012, Serbs had received, in terms of years, seventy-eight percent of the total sentences doled out' – G. N. Bardos, 'Trials and Tribulations: Politics as Justice at the ICTY', *World Affairs,* September/October 2013, available online at http://www.worldaffairsjournal.org/article/trials-and-tribulations-politics-justice-icty (accessed on 06/01/2019)

[108] L-P, Jacob, 'Keys to Understanding Russia's Relationship with Serbia', *Nato Association of Canada,* 1 December 2017, available online at http://natoassociation.ca/keys-to-understanding-russias-relationship-with-serbia/ (accessed on 06/01/2019).

China also emphasised the importance of independence and impartiality in the work of the ICTY 'as an organ of international criminal justice' in order to establish its authority and withstand the test of history, and in noting '[t]he Tribunal should not be affected by international politics and other factors' expressed concern that 'it has become a political tool' and 'is affected too much by politics'.[109] In furtherance of this, the Chinese representative explained to the UN Security Council that China shared the view of the Russian Federation that the ICTY should conduct investigations into whether crimes were committed by NATO in the context of its bombing campaign against the Federal Republic of Yugoslavia.[110] It was however far less critical of the Tribunal than Russia and did not repeatedly raise the issue of perceived bias and politicisation of the *ad hoc* tribunals within the Security Council or otherwise.

Whilst India refrained from criticising the Tribunals directly, it expressed the view that '[i]n order to ensure the credibility of the system, selective and discriminatory approaches should be shunned and the role of political organizations minimized for consistent application of the law.'[111] It has also communicated its 'firm belief that we need to strengthen the rule of law at the international level by avoiding selectivity, partiality, and double standards' and, specifically, by 'freeing the international criminal justice institutions from the clutches of political considerations',[112] and it warned that a failure to do so 'will ruin the credibility of the international criminal justice system and force people to view it as an instrument to meet the political objectives of the powerful states.'[113] The position adopted by India, China and Russia is consistent with their reformist ambitions, particularly to remove Western influence and control of global governance.

4.5.2. The Prioritisation of Peace over Justice

The BRICS states share a view about the inter-related nature of peace and justice, and more particularly, an instrumental position that the pursuit of retributive justice should contribute to achieving the peaceful resolution of conflicts. This is consistent with the pluralist priority which the BRICS states' afford to the value of order in international society. Some of the BRICS became increasingly critical of the *ad hoc* Tribunals' failure to deliver upon such expectations and some also argued that criminal trials alone are not a sufficient mechanism to deliver transitional justice and post-conflict reconciliation.

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[109] UNSC Verbatim Record, 4161st meeting, 20 June 2000, UN Doc. S/PV.4161, 15.
[110] UNSC Verbatim Record, 4150th meeting, 2 June 2000, UN Doc. S/PV.4150, 15.
[111] UNGA Official Records, Sixty-eighth session, 33rd plenary meeting, 14 October 2013, UN Doc. A/68/PV.33, 10.
[112] UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc. S/PV.6849, 11.
[113] India's contribution to the thematic debate on International Criminal Justice at the Sixty-seventh UNGA, UN Meetings Coverage, 'Robust International Criminal Justice System Gives 'Much-Needed Voice to Victims' of Serious Crimes, Secretary-General Tells General Assembly', 10 April 2013, UN Doc. GA/11355, available online at https://www.un.org/press/en/2013/ga11355.doc.htm (accessed 16/11/2017).

Russia highlighted the relationship between justice and peace, and argued the potential effect of criminal prosecutions on peace processes should always be considered.[114] This serves as evidence of Russia's view that order in and between states is the ultimate objective and primary function of global governance, and justice is only beneficial and legitimate to the extent that it serves this overriding objective. In in other words, justice is subservient to order. China also emphasised the role of criminal justice, and specifically of the *ad hoc* Tribunals, in contributing to the peaceful resolution of conflicts.[115] Its representative stated that 'the ICTY and the ICTR were created with two objectives. On the one hand, they are to conduct fair trials of those responsible for serious violations of international humanitarian law. On the other hand, the Tribunals are to promote peace and reconciliation in the regions concerned.'[116] It emphasised 'the relationship between the maintenance of peace and the pursuit of justice must be addressed in an appropriate manner',[117] noting that 'if handled improperly the two may clash',[118] and stating '[b]oth Tribunals should bear in mind this dual function in carrying out their work'.[119] Furthermore, China also warned criminal justice should not interfere with ongoing peace processes or efforts to achieve reconciliation, and confirmed that justice should not be obtained at the expense of peace.[120] South Africa also highlighted the complementary nature of peace and justice, explaining that there 'can be no peace without justice'[121] and '[p]eace and justice are inextricably connected. One without the other is, at best, short term and, at worst, futile',[122] and India similarly explained that '[p]eace and justice are intertwined. There is no peace without justice and there is no justice without peace'.[123]

Russia was highly critical of the Tribunals in respect of their impact on peace. It emphasised the work of the ICTY should only further the Balkans peace process and expressed concern that the Tribunal's demonstrable lack of impartiality threatened this important objective, specifically stating that 'the ICTY is not helping, as it should, to normalize the political process in the former Yugoslavia' and, moreover, 'the Tribunal's activities have had a destructive impact on the process

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[114] UNSC Verbatim Record, 4063rd meeting, 10 November 1999, UN Doc. S/PV.4063, 9.

[115] UNSC Verbatim Record, 5594th meeting, 15 December 2006, UN Doc. S/PV.5594, 18 and UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052, 21 - 'the restoration of the rule of law and justice is both a prerequisite for the restoration of peace in conflict-ridden societies and also a basic safeguard for ensuring long-term peace. Without the rule of law there can be no genuine peace.'

[116] UNSC Verbatim Record, 4429th meeting, 27 November 2001, UN Doc. S/PV.4429, 23. *See also,* Statements by China: UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc. S/PV.6849, 12; UNSC Verbatim Record, 7113rd meeting, 19 February 2014, UN Doc. S/PV.7113, 17.

[117] UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc.S/PV.6705,14.

[118] UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc.S/PV.6849,12.

[119] UNSC Verbatim Record, 4429th meeting, 27 November 2001, UN Doc. S/PV.4429, 23.

[120] *See,* for example, Statements by China: UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 14 - 'We believe also that peace and justice should facilitate and complement each other...The pursuit of justice should promote rather than interfere with peace processes and facilitate rather than hinder national reconciliation'; UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc. S/PV.6849, 12; UNSC Verbatim Record, 7113rd meeting, 19 February 2014, UN Doc. S/PV.7113, 17.

[121] UNGA Official Records, Sixty-second session, 25th plenary meeting, 15 October 2007, UN Doc. A/62/PV.25 and UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 20.

[122] UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc.S/PV.6849,16.

[123] UNSC Verbatim Record, 6849th meeting, 17 October 2012, UN Doc.S/PV.6849,10.

of reaching a settlement in the Balkans.'[124] Russia was also critical of the ICTR's failure to live up to what it considered to be the Security Council's expectations that the Tribunal would become 'an important factor in restoring peace and tranquillity in Rwanda and in the region.'[125] India was also quite critical of the Tribunals, noting the *ad hoc* Tribunals have a mixed record 'establishing accountability for perpetrators and in instilling greater public confidence in post-conflict societies that have enabled those societies to move forward.'[126] China, unlike Russia and India, was not overly critical of the Tribunals' failure to resolve the peace and security issues in the respective regions, seemingly adopting a more realistic evaluation consistent with the view put forward by Thakur and Popovski that the language used in the Security Council resolutions creating the *ad hoc* tribunals 'raised unnecessarily expectations' and that '[t]he tribunals can play only a limited and very specific part in the long and difficult process of peacebuilding.'[127] In contrast, South Africa commended the work of the Tribunals in achieving the dual objectives. Its representative noted that the tribunals:

> have brought to justice persons responsible for serious violations of international humanitarian law, rendered justice to the victims of international crimes and are an important factor in the restoration of peace and stability in their respective jurisdictions. The significant achievements of the Tribunals have clearly proven that peace and justice are complementary and mutually reinforcing.[128]

It also commented that 'it is certain that the establishment of the ICTR will assist the valiant efforts of the people of Rwanda to reconstruct their beloved country, to rebuild their communities and to help the healing process of the souls of all Rwandans', noting that justice goes beyond mere retribution and is an important component of post-conflict peace-building.[129] It also explained that 'the Tribunals have made an immense contribution to stability and peace, both in Rwanda and in the former Yugoslavia.'[130] Similarly, Brazil emphasised that 'the Tribunals had and will have an important impact on peace and reconciliation in the Balkans and the Great Lakes region by promoting the rule of law and judicial accountability and by helping those countries to achieve a more equal and just future.'[131]

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[124] UNSC Verbatim Record, 4161st meeting, 20 June 2000, UN Doc. S/PV.4161, 8.
[125] UNSC Verbatim Record, 4150th meeting, 2 June 2000, UN Doc. S/PV.4150, 14.
[126] UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052 (Resumption 1), 23.
[127] R. Thakur and V. Popovski, 'The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity', (2007) 1 *The Global Community Yearbook of International Law and Jurisprudence* 39-61, 60.
[128] UNSC Verbatim Record, 6041st meeting, 12 December 2008, UN Doc. S/PV.6041, 23. *See also,* Statements by South Africa: UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 29-30 and UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052, 13.
[129] UNGA Official Records, Fifty-fifth session, 68th plenary meeting, 20 November 2000, UN Doc. A/55/PV.68, 11.
[130] UNGA Official Records, Sixty-third session, 24th plenary meeting, 13 October 2008, UN Doc. A/63/PV.24, 19. *See also,* Statement by South Africa, UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 20.
[131] UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 25. *See also,* Statement by Brazil, UNSC Verbatim Record, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 23.

Some of the states also expressed the view that criminal trials alone could not deliver transitional justice and post-conflict reconciliation, and that in fact adopting such a narrow view was dangerous. As Russia noted generally, while it believes the international community, particularly the UN, has a role to play in providing justice in post-conflict societies, 'excessive zeal becomes a hindrance to peace, complicating the attainment or implementation of peace agreements' and in such situations 'one should make more active use of alternative mechanisms — truth and reconciliation commissions'.[132] China was also clear in its view that justice alone cannot create peace and that post-conflict reconstruction should be a holistic process.[133] It has explained 'the rule of law and justice must not be built on fragile foundations... promoting the rule of law and justice is not merely a legal matter, it is also closely bound up with political, economic and social issues.'[134] Brazil recognised that 'the Tribunals alone cannot bring peace and reconciliation to the region through judicial decisions. It takes time for true peace and reconciliation to lay their roots'.[135] Moreover, Brazil also said in relation to the implementation of international criminal justice, that national unity and progress' in post-conflict states 'cannot be attained from Arusha or The Hague alone' and that it is 'is particularly important to bring the Tribunals closer to the communities involved in the events they are mandated to investigate.'[136] In this vein, it has explained its view that '[w]e need carefully to consider the particular rule of law and justice needs in each country. Local consultation and ownership are very important elements'.[137] India noted that international justice mechanisms are often not equipped to deliver on that objective[138] and 'do not always have the desired impact on the affected communities in terms of healing and reconciliation.'[139] It thus emphasises that in order to have its desired effect, criminal justice is often best delivered at the national level through domestic institutions, and the international community should focus on building local judicial capacity.[140] This is consistent with the BRICS states' emphasis on state-based international society, prioritising state-led solutions over ones delivered at the international level.

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[132] UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052, 6.

[133] *See,* China's contribution to the thematic debate on International Criminal Justice at the Sixty-seventh UNGA, UN Meetings Coverage, 'Robust International Criminal Justice System Gives 'Much-Needed Voice to Victims' of Serious Crimes, Secretary- General Tells General Assembly', 10 April 2013, UN Doc. GA/11355, available online at https://www.un.org/press/en/2013/ga11355.doc.htm (accessed 16/11/2017).

[134] UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052, 21. See also, Statements by China: UNSC Verbatim Record, 5474th meeting, 22 June 2005, UN Doc. S/PV.5474, 26; UNSC Verbatim Record, 7113th meeting, 19 February 2014, UN Doc. S/PV.7113, 17.

[135] UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 25. *See also,* Statement by Brazil, 6705th meeting, 19 January 2012, UN Doc. S/PV.6705, 23.

[136]UNSC Verbatim Record, 6678th meeting, 7 December 2011, UN Doc. S/PV.6678, 17.

[137] UNSC Verbatim Record, 5052nd meeting, 6 October 2004, UN Doc. S/PV.5052, 13.

[138] UNGA Official Records, Sixty-first session, 26th plenary meeting, 9 October 2006, UN Doc. A/61/PV.26, 16.

[139] UNGA Official Records, Sixty-eighth session, 33rd plenary meeting, 14 October 2013, UN Doc. A/68/PV.33, 10.

[140] *See*, for example, statements by India: UNGA Official Records, Sixty-first session, 26th plenary meeting, 9 October 2006, UN Doc. A/61/PV.26, 16; UNGA Official Records, Sixty-eighth session, 33rd plenary meeting, 14 October 2013, UN Doc. A/68/PV.33, 10

4.5.3. Concerns about Tribunal Autonomy

Another main issue that was raised by states in relation to the *ad hoc* tribunals was the exercise of their powers and contribution to the development of international law. Russia was critical of the Tribunals in this respect. Its representative repeatedly stated the ICTY must strictly comply 'with the mandate given it by the Security Council and with the Statute of the Tribunal, the Peace Agreement for Bosnia and the relevant decisions of the Security Council' and he was particularly critical of what Russia perceived to be an abuse of its power in, for example, the use sealed arrest warrants to secure the detention of suspects on the territory of states without their consent and the use of coercion.[141] Russia pledged its continued support for the activities of the ICTY in 2000 but only 'on the condition that these are strictly in keeping with the mandate adopted by the Security Council'.[142]

Russia also denied the right of the Tribunals to create any new law that was not included in their Statutes and it was critical of what it saw as the ICTY repeatedly tinkering with 'the norms and rules of international humanitarian law to suit its own purposes and interpreted them at its own convenience...exploiting the lack of any real control by the international community over the elaboration of the rules of procedure and evidence'.[143] It was of the view that such an approach to the development of law has 'begun to constitute a threat to the integrity of international law'[144] and it took the position that any such amendments to the law and the Tribunals' statutes should be approved by the Security Council.[145] It was particularly strident in its position that the Tribunals should generally pay great deference to the Security Council and that the Council should monitor closely and exercise substantial control over the Tribunals' activities.[146] Its representative said 'the activities of the Tribunal should be brought into conformity with the resolutions of the Security Council' and that '[i]f we do not do this in the near future, the Tribunal will no longer be viewed as an impartial organ handing down fair international justice', a rather oxymoronic position to adopt given the independent nature of courts and the political nature of the Security Council.[147] Russia emphasised a conservative, positivist approach to international law in which law is created by states

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[141] UNSC Verbatim Record, 4063rd meeting, 10 November 1999, UN Doc. S/PV.4063, 9. *See also,* Statements by the Russian Federation: UNSC Verbatim Record, 4429th meeting, 27 November 2001, UN Doc. S/PV.4429, 22 - 'I would like to say that the ICTY and the ICTR should not go beyond the sphere of their competence'; UNSC Verbatim Records, 5453rd meeting, 7 June 2006, UN Doc. S/PV.5453, 24 - 'We must not adopt policies of legal fantasy, such as the Tribunal's cloak and-dagger operations to seek the arrest of persons in the territories of individual States'; UNGA Official Records, Fifty-fifth session, 68th plenary meeting, 20 November 2000, UN Doc. A/55/PV.68, 29.

[142] UNSC Verbatim Record, 4161st meeting, 20 June 2000, UN Doc. S/PV.4161, 9.

[143] UNSC Verbatim Record, 4161st meeting, 20 June 2000, UN Doc. S/PV.4161, 8.

[144] UNSC Verbatim Record, 4150th meeting, 2 June 2000, UN Doc. S/PV.4150, 29.

[145] UNSC Verbatim Record, 4161st meeting, 20 June 2000, UN Doc. S/PV.4161, 8.

[146] UNSC Verbatim Record, 4150th meeting, 2 June 2000, UN Doc. S/PV.4150, 15.

[147] UNSC Verbatim Record, 4161st meeting, 20 June 2000, UN Doc. S/PV.4161, 9.

only and criticised the judicial construction of law, which is consistent with its pluralist defence of state-based international society, where authority rests with states.

Russia's position differed from that of the other BRICS states, however. Whereas Russia sort to limit the ability of the Tribunals to develop law, China encouraged it. Its representative explained that his country 'would like to see the work of the two Tribunals prove positive for the development of international law'.[148] But China was also clear that the Tribunals should respect the national laws of states otherwise 'they will continue to face daunting tasks in the future.'[149] Brazil also recognised 'the importance of their contributions to international law',[150] emphasising that their creation reflected a 'commitment by the international community to ensure that those responsible for the most heinous crimes that offend the very essence of human dignity answer for those crimes in public trials'[151] and it described them as a 'remarkable achievement in the fight against impunity' which 'will contribute to strengthening the activity of the [ICC].'[152]

4.5.4. Tribunal Fatigue and Support for National Prosecutions

From the early to mid-2000s onwards, only some six or seven years after the Tribunals had been created, the discussions within the Security Council about the Tribunals, and the criticisms of them, principally by Russia, focused primarily on the delay in them completing their work. Consistent with its approach to other issues, Russia was particularly critical of the Tribunals, especially the ICTY, for their failure to complete their work on schedule and for the ongoing, and in its view unjustified, delays. It described the pace of their completion as 'unimpressive',[153] 'dismal'[154] and 'a disservice, both to the international community and to the Tribunals themselves',[155] and it also stated that the recurring delays in ongoing cases 'fail to meet any conceivable standard of civilized international justice.'[156] On numerous occasions, Russia emphasised 'the need for strict compliance by both Tribunals with their completion strategies within the time frames set out by the Security Council'[157] and suggested the Security Council play an active role in assisting the Tribunals to do

[148] UNSC Verbatim Record, 4838th meeting, 9 October 2003, UN Doc. S/PV.4838, 20.
[149] UNSC Verbatim Record, 4063rd meeting, 10 November 1999, UN Doc. S/PV.4063, 8.
[150] UNSC Verbatim Record, 5199th meeting, 13 June 2005, UN Doc. S/PV.5199, 18. *See also,* Statement by Brazil, UNSC Verbatim Record, 5086th meeting, 23 November 2003, UN Doc. S/PV.5086, 19.
[151] UNSC Verbatim Record, 4999th meeting, 29 June 2004, UN Doc. S/PV.4999, 25. *See also,* Statements by Brazil: UNSC Verbatim Record, 5086th meeting, 23 November 2003, UN Doc. S/PV.5086, 19; UNSC Verbatim Record, 5199th meeting, 13 June 2005, UN Doc. S/PV.5199, 18; UNSC Verbatim Record, 5328th meeting, 15 December 2005, UN Doc. S/PV.5328, 19.
[152] UNSC Verbatim Record, 5199th meeting, 13 June 2005, UN Doc. S/PV.5199, 19.
[153] UNSC Verbatim Record, 6134th meeting, 4 June 2009, UN Doc. S/PV.6134, 19.
[154] UNSC Verbatim Record, 6134th meeting, 18 June 2010, UN Doc. S/PV.6134, 25.
[155] UNGA Official Records, Sixty-fifth session, 27th plenary meeting, 8 October 2010, UN Doc. A/65/PV.27, 14.
[156] UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 16. *See also,* statement by the Russian Federation, UNGA Official Records, Sixty-third session, 24th plenary meeting, 13 October 2008, UN Doc. A/63/PV.24, 18.
[157] UNSC Verbatim Record, 5328th meeting, 15 December 2005, UN Doc. S/PV.5328, 18. *See also,* Statements by the Russian Federation: UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 23; UNSC Verbatim Record, 5796th meeting,

that, including by mandating that they 'can begin no judicial proceedings in the first instance after 1 January 2009.'[158] It also noted that the failure to arrest particular suspects, specifically Karadzic, could not justify extending the mandates.[159]

China also recognised that the Tribunals 'could not exist indefinitely.[160] It regularly emphasised the need for the Tribunals to work towards completing their mandates as soon as possible, as required by the Security Council.[161] It did so, however, in a less hostile and more supportive manner than Russia. While it expressed concern and disappointment as deadlines were extended, it also commended the efforts of the Tribunals to implement the completion strategies[162] and expressed understanding that the Tribunals could not have anticipated many of the challenges that have hindered their efficiency.[163] In stark contrast, while accepting the need for the Tribunals to work towards completing their work and commending the Tribunals' efforts to do so,[164] Brazil insisted that rigid deadlines should not be enforced where they 'frustrate justice, rather than assist the international community to end impunity' and its representative conceded that '[t]he Council may eventually need to adjust those timetables in order to allow the Tribunals to fulfil their mandates.'[165] South Africa commended the efforts of the Tribunals towards implementing their completion strategies.[166] It also stressed the 'importance of the Tribunals taking all possible measures to carry out their functions as quickly as possible' but emphasised that 'this should not prejudice the rights of the accused or fair trial standards.'[167] India also expressed its support for the completion

10 December 2007, UN Doc. S/PV.5796, 23; UNSC Verbatim Record, 6134th meeting, 4 June 2009, UN Doc. S/PV.6134, 19; UNGA Official Records, Sixty-second session, 25th plenary meeting, 15 October 2007, UN Doc. A/62/PV.25, 17; UNGA Official Records, Sixty-fourth session, 16th plenary meeting, 8 October 2009, UN Doc. A/64/PV. 16, 16.

[158] UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 14. *See also,* Statement by the Russian Federation, UNSC Verbatim Record, 6041st meeting, 12 December 2008, S/PV.6041, 23.

[159] *See,* for example, statements by the Russian Federation: UNSC Verbatim Record, 5594th meeting, 15 December 2006, UN Doc. S/PV.5594, 23; UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 23; UNSC Verbatim Record, 6134th meeting, 4 June 2009, UN Doc. S/PV.6134, 19; UNSC Verbatim Record, 6434th meeting, 6 December 2010, UN Doc. S/PV.6434, 23; UNGA Official Records, Sixty-first session, 26th plenary meeting, 9 October 2006, UN Doc. A/61/PV.26, 17; UNGA Official Records, Sixty-second session, 25th plenary meeting, 15 October 2007, UN Doc. A/62/PV.25, 17; UNGA Official Records, Sixty-fourth session, 16th plenary meeting, 8 October 2009, UN Doc. A/64/PV.16, 16.

[160] UNSC Verbatim Record, 4429th meeting, 27 November 2001, UN Doc. S/PV.4429, 23.

[161] *See,* for example, statements by China: UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 13-14; UNSC Verbatim Record, 6134th meeting, 4 June 2009, UN Doc. S/PV.6134, 17; UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 20.

[162] *See,* for example, statements by China: UNSC Verbatim Record, 5086th meeting, 23 November 2004, UN Doc. S/PV.5086, 19; UNSC Verbatim Record, 5328th meeting, 15 December 2005, UN Doc. S/PV.5328, 29; UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 13; UNSC Verbatim Record, 6228th meeting, 3 December 2009, UN Doc. S/PV.6228, 21; UNSC Verbatim Record, 6342nd meeting, 18 June 2010, UN Doc. S/PV.6342, 24.

[163] *See,* for example, statements by China: UNSC Verbatim Record, 6228th meeting, 3 December 2009, UN Doc. S/PV.6228, 21; UNSC Verbatim Record, 6434th meeting, 6 December 2010, UN Doc. S/PV.6434, 22.

[164] UNSC Verbatim Record, 6434th meeting, 6 December 2010, UN Doc. S/PV.6434, 15.

[165] UNSC Verbatim Record, 4999th meeting, 29 June 2004, UN Doc. S/PV.4999, 25. *See also,* Statements by Brazil: UNSC Verbatim Record, 5086th meeting, 23 November 2004, UN Doc. S/PV.5086, 19; UNSC Verbatim Record, 5199th meeting, 13 June 2005, UN Doc. S/PV.5199, 18; UNSC Verbatim Record, 5328th meeting, 15 December 2005, UN Doc. S/PV.5328, 19.

[166] *See,* for example, statements by South Africa: UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 29; UNSC Verbatim Record, 6041st meeting, 12 December 2008, UN Doc. S/PV.6041, 23; UNGA Official Records, Sixty-third session, 24th plenary meeting, 13 October 2008, UN Doc. A/63/PV.24, 19.

[167] UNSC Verbatim Record, UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 23.

strategies.[168]

Notably, the BRICS were united in their positions that the Tribunals should focus on transferring cases to national jurisdictions to support their completion strategies.[169] This is evidence of tribunal fatigue and also their state-solidarist commitment to state-driven solutions, perhaps enhanced by an increasingly negative view of the Tribunals. For example, Russia noted that '[international criminal courts have only a supplementary role to play...they cannot replace national judicial systems'[170] and that '[w]e see no basis for denying the sovereign right of those States to conduct national judicial proceedings, especially since those countries have stated their readiness independently to try those accused' currently held before the ICTY and ICTR.[171] China explained that one of the 'priorities in the work of the Tribunals are to transfer cases to the domestic courts of the countries concerned as soon as possible'[172] and South Africa also emphasised it too was 'particularly keen to see the situation countries, where the crimes were committed, take up for themselves the responsibility of accepting more referrals from the Tribunals'.[173] India concurred with these sentiments.[174] Brazil supported transferring cases to national jurisdictions in principle but it emphasised that it should be for 'non-senior suspects' and only 'whenever the country's judiciary structure so allows'[175] and independent judgments are possible.[176] The state-solidarist emphasis on domestic solutions is also evident in the BRICS' support for capacity building efforts at the national level to facilitate the transfer of cases to domestic courts.[177] South emphasised the importance that 'justice is meted out

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[168] *See,* for example, statements by India: UNSC Verbatim Record, 6678th meeting, 7 December 2011, UN Doc. S/PV.6678, 18-19; UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 26; UNGA Official Records, Sixty-seventh session, 24th plenary meeting, 15 October 2012, UN Doc. A/67/PV.24, 8-9.

[169] *See,* for example, Statements by the Russian Federation: UNSC Verbatim Record, 4429th meeting, 27 November 2001, UN Doc. S/PV.4429, 22; UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 22; UNSC Verbatim Record, 6041* meeting, 12 December 2008, UN Doc. S/PV.6041, 21-22; UNGA Official Records, Sixty-second session, 25th plenary meeting, 15 October 2007, UN Doc. A/62/PV.25. Statements by China: UNSC Verbatim Record, 6134th meeting, 4 June 2009, UN Doc. S/PV.6134, 17; UNSC Verbatim Record, 6434th meeting, 6 December 2010, UN Doc. S/PV.6434, 22; UNSC Verbatim Record, 6678th meeting, 7 December 2011, UN Doc. S/PV.6678, 18. Statements by South Africa: UNSC Verbatim Record, 6678th meeting, 7 December 2011, UN Doc. S/PV.6678, 12; UNGA Official Records, Sixty-second session, 25th plenary meeting, 15 October 2007, UN Doc. A/62/PV.25, 16. Statements by Brazil: UNSC Verbatim Record, 5199th meeting, 13 June 2005, UN Doc. S/PV.5199, 18; UNSC Verbatim Record, 5328th meeting, 15 December 2005, UN Doc. S/PV.5328, 20. Statement by India, UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 26.

[170] UNGA Official Records, Sixty-third session, 24th plenary meeting, 13 October 2008, UN Doc. A/63/PV.24, 18. *See also,* Statements of the Russian Federation: UNGA Official Records, Sixty-fourth session, 16th plenary meeting, 8 October 2009, UN Doc. A/64/PV.16, 16; UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 14; UNSC Verbatim Record, 6228th meeting, 3 December 2009, UN Doc. S/PV.6228, 16; UNSC Verbatim Record, 4429th meeting, 27 November 2001, UN Doc. S/PV.4429, 22.

[171] UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 14. *See also,* Statement by the Russian Federation, UNSC Verbatim Record, 6228th meeting, 3 December 2009, UN Doc. S/PV.6228, 16.

[172] UNSC Verbatim Record, 4999th meeting, 29 June 2004, UN Doc. S/PV.4999, 4.

[173] UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 29. *See also,* Statements by South Africa: UNSC Verbatim Record, 5796th meeting, 10 December 2007, UN Doc. S/PV.5796, 22; UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 16; 6678th meeting, 7 December 2011, UN Doc. S/PV.6678, 12; UNGA Official Records, Sixty-third session, 24th plenary meeting, 13 October 2008, UN Doc. A/63/PV.24, 19.

[174] UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 26.

[175] UNSC Verbatim Record, 5199th meeting, 13 June 2005, UN Doc. S/PV.5199, 18. *See also,* Statement by Brazil, UNSC Verbatim Record, 5328th meeting, 15 December 2005, UN Doc. S/PV.5328, 20.

[176], UNSC Verbatim Record, 5086th meeting, 23 November 2004, UN Doc. S/PV.5086, 19.

[177] *See,* for example, statements by the Russian Federation: UNSC Verbatim Record, 5796th meeting, 10 December 2007, UN Doc. S/PV.5796, 23; UNSC Verbatim Record, 6041st meeting, 12 December 2008, UN Doc. S/PV.6041, 21-22; UNGA Official Records,

close to the people affected by the atrocities'[178] and in furtherance of a belief 'justice sector reform is a critical element of post conflict reconstruction.'[179]

4.6. The BRICS States' Support for Other Tribunals

The BRICS states' commitment to international criminal justice is further demonstrated by their support for tribunals that were established after the ICTY and the ICTR. For example, China and Russia voted in favour of the Security Council resolution establishing the Special Court for Sierra Leone[180] and Brazil, China and Russia all contributed to the creation of the Special Tribunal for Lebanon. More specifically, in respect of the Lebanon situation, Brazil, China and Russia voted in favour of the Security Council resolution which established an investigative mechanism as a precursor to criminal proceedings[181] and they also voted in favour of a resolution requesting the UN Secretary General to negotiate an agreement with the Government of Lebanon aimed at establishing a criminal tribunal.[182] When it came to the resolution that would establish the court, however, the states all abstained due to concerns about the process that was adopted. In explaining its position, South Africa said that it supported the establishment of the tribunal but not by way of a Security Council resolution because this overlooks the importance of the 'principle of national consensus in establishing international tribunals' which, it believed, is key to peacebuilding and reconciliation.[183]

China abstained on the same basis. Its representative expressed China's desire to 'hold the perpetrators accountable and ensure justice for the victims' but he also noted that establishing the Tribunal by way of a Security Council resolution would create a precedent of Council interference in the domestic affairs and legislative independence of a sovereign State.[184] Russia said the 'perpetrators of that crime must be brought to justice' but that '[w]e do not believe that the

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Sixty-second session, 25th plenary meeting, 15 October 2007, UN Doc. A/62/PV.25, 17. Statements by China: UNSC Verbatim Record, 5086th meeting, 23 November 2004, UN Doc. S/PV.5086, 19; UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 28-29; UNSC Verbatim Record, 5796th meeting, 10 December 2007, UN Doc. S/PV.5796, 18; UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 13; UNSC Verbatim Record, 7113rd meeting, 19 February 2014, UN Doc. S/PV.7113, 17. Statements by South Africa: UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 29; UNSC Verbatim Record, 5796th meeting, 10 December 2007, UN Doc. S/PV.5796, 22; UNSC Verbatim Record, 5904th meeting, 4 June 2008, UN Doc. S/PV.5904, 16; 6678th meeting, 7 December 2011, UN Doc. S/PV.6678, 12; UNGA Official Records, Sixty-third session, 24th plenary meeting, 13 October 2008, UN Doc. A/63/PV.24, 19.

[178] UNSC Verbatim Record, 6545th meeting, 6 June 2011, UN Doc. S/PV.6545, 23.

[179] UNSC Verbatim Record, 5697th meeting, 18 June 2007, UN Doc. S/PV.5697, 29. *See also,* Statement by South Africa, UNGA Official Records, Sixty-second session, 25th plenary meeting, 15 October 2007, UN Doc. A/62/PV.25, 16.

[180] See, UNSC Verbatim Record, 4186th meeting, 14 August 2000, UN Doc. S/PV.4186, 2.

[181] *See,* UNSC Verbatim Record, 5160th meeting, 7 April 2005, UN Doc. S/PV.5160, 2. The mandate of the investigative mechanism was extended by the Security Council in December 2005 with unanimous support from its members including Brazil, China and Russia, *see* UNSC Res.1644 (15 December 2005), UN Doc. S/RES/1644 and UNSC Verbatim Record, 5329th meeting, 15 December 2005, UN Doc. S/PV.5329 2.

[182] UNSC Res.1664 (29 March 2006), UN Doc. S/RES/1664 and UNSC Verbatim Record, 5401st meeting, 29 March 2006, UN Doc. S/PV.5401.

[183] UNSC Verbatim Record, 5695th meeting, 30 May 2007, UN Doc. S/PV.5695, 3-4.

[184] UNSC Verbatim Record, 5695th meeting, 30 May 2007, UN Doc. S/PV.5695, 4-5.

establishment of a special tribunal by a decision of the Council under Chapter VII of the Charter is warranted.' This demonstrates a state-solidarist commitment to state-led criminal justice processes and a caution about imposed solutions by international society, including because of the risk that they pose to the institution of state sovereignty.

In addition, India's commitment to international criminal justice is demonstrated by its decision to fund the Extraordinary Chambers in the Courts of Cambodia (ECCC), which was created to try those accused of crimes committed during the Khmer Rouge era, to the value of just over one million dollars.[185] The mechanism has both an international and domestic element which are funded separately and it is perhaps significant that India chose to fund the domestic rather than the international aspect of its work given the BRICS states' commitment to state-led criminal justice processes where appropriate.

4.7. South Africa's Alternative Approach to Transitional Justice

Following the end of apartheid, the South African government established a truth and reconciliation commission (TRC) as a means of confronting the past and promoting national healing. This restorative approach to justice was used as an alternative to purely criminal prosecutions, as had been adopted by the ICTY and the ICTR only a year earlier. In order to make the TRC function effectively in constructing a historical record of apartheid and the crimes committed during the period, amnesties were granted in exchange for full confessions and disclosure by participants, which reflects the emphasis that was placed on creating future peace rather than criminal accountability and punishment.[186] As Mamdani argues, the South African approach was 'guided by the dictum that perpetrators are forgiven past crimes in return for acknowledging the past (truth)' and that 'the TRC created a new precedent: immunity from prosecution...in return for acknowledging the truth: forgiveness in return for an honest confession.'[187] However, Mamdani further argues that the TRC was only one part of the process of post-apartheid transition and that the real basis for reconciliation was political reform through the Convention for a Democratic South Africa (CODESA). This, he said, saw justice as a political issue rather than a criminal one and argues it was necessary in South Africa because there was no overall 'winner', like at the conclusion of World War II; as such everyone needed to contribute to the future of South Africa if peace was to prevail rather than particular factions being de-legitimised and marginalised through criminal

[185] ECCC, Financial Outlook as at 31 October 2017, available online at https://www.eccc.gov.kh/sites/default/files/ECCC%20Contribution%20Data%20as%20at%2031%20Qctober%202017.pdf (accessed on 7/5/2018).
[186] *See,* Promotion of National Unity and Reconciliation Act 34 of 1995.
[187] M. Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa' in K. Engle, Z. Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda*' (CUP, 2016), 335.

prosecutions.[188] Mamdani argues that 'CODESA presents us with a radical new way of thinking about justice .it prioritized political justice, the reform of the political system over the other two [social and criminal justice]'.[189]

The emphasis placed on 'inclusive political settlement' as a means of conflict resolution and transitional justice, as opposed to individualised accountability, continues to inform South Africa's foreign policy and its approach to the implementation of criminal justice, as will become evident in the subsequent chapters examining the work of the ICC in Sudan and Libya. More specifically, it is argued that South Africa's transition from apartheid has led it to adopt a pragmatic approach to transitional justice which aims to combine criminal prosecutions with an emphasis on political settlements of ongoing conflicts, and not allowing the former to disrupt the latter. This position is broadly shared by the other BRICS states.

4.8. Conclusion

This chapter provided an overview of the BRICS states historic engagement with international criminal justice, as a new cosmopolitan primary institution of international society, since 1945 as a precursor to the examination of the BRICS states' relationship with the ICC, which is the focus of this thesis. It has been shown that the BRICS states strongly supported the evolution of criminal justice as a primary institution through their substantial involvement in the establishing of various international courts and tribunals, and the Genocide Convention. However, it was also established that, for the most part, the BRICS states supported these developments only to the extent that they were constructed in accordance with a state-solidarist vision of international society; that is, they did not undermine pluralist primary institutions, such as a substantially absolutist understanding of state sovereignty, inter-state diplomacy and a classical conception of international law, and did not threaten the overriding pluralist value of order. It is therefore also argued in this chapter that the BRICS states' support for the evolution of criminal justice was the product of both a normative endorsement of the institution but also a material desire to play a role, and be seen to play a role, in international affairs and to shape global governance.

More specifically, we saw an overriding pluralist concern, particularly in the context of the ICTY and the ICTR, for peace and order, and the expression of the view that such values and objectives should not be compromised or undermined in the pursuit of cosmopolitan criminal justice or, in other words, order takes primacy over justice. As was highlighted in the chapter, the states became

[188] Mamdani, 'Beyond Nuremberg', 335-336.
[189] Mamdani, 'Beyond Nuremberg', 336.

increasingly concerned about the Tribunals' failure to promote the settlement of the conflicts. The BRICS expressed additional concerns about the functioning of the Tribunals, including their perceived politicisation and their failure to conclude their mandates quickly. While such criticisms were primarily led by Russia, they also found support to different degrees among the other BRICS states. We also see such a pluralist approach in South Africa's decision to pursue restorative rather than retributive justice at the end of apartheid with the creation of an inclusive political settlement in the form of CODESA and the use of a truth and reconciliation commission which made use of conditional amnesties. This alternative to the cosmopolitan criminal justice pursued at the end of World War II and during the 1990s, represented the prioritisation of peace over retributive justice.

This thesis now goes to assess the relationship between the BRICS states and the ICC. It first begins in the next chapter with an examination of the contribution of the BRICS states and the positions they took during the negotiations that established the ICC in 1998 and this is followed in the subsequent chapters by an analysis of the BRICS states' engagement with discreet aspects of the Court's work and its structure.

CHAPTER FIVE

THE ESTABLISHMENT OF THE ICC: THE CONTRIBUTION OF THE BRICS STATES AND THE COMRPOMISE NATURE OF THE ROME STATUTE

5.1. Introduction

The thesis has so far focused on understanding the views of the BRICS states on global political order and their engagement with a specific aspect of liberal international society, the institution of international criminal justice, as a precursor to the focus of this thesis which is an examination of the relationship between the BRICS states and the ICC as a means of understanding whether and, if so how, the new rising powers pose a threat to liberal international society as it is presently conceived. It has been argued the BRICS advance a state-solidarist conception of international society and that as a result they have supported the institution of international criminal justice to the extent its implementation pays sufficient deference to pluralist primary institutions and the value of order in international society.

This chapter is the beginning of the core of the thesis. It first examines the contributions and the approach of the BRICS states to the Rome Conference negotiations which established the ICC. It argues that the BRICS states contributed extensively and constructively to the negotiations which is demonstrative of their previously expressed commitment to international criminal justice but that they also generally attempted to ensure that the Court was constructed in accordance with a state-solidarist vision of international society. The extensive contributions by the BRICS states were also likely motivated by a desire to play and being seen to play a meaningful role in international affairs. Moreover, it is also identified how the positions adopted by the BRICS states in relation to specific aspects of the Rome Statute legal regime were at least in part informed by self-interested, material concerns. This again demonstrates the combination of material and normative concerns that inform states' foreign policies, as explained in the theoretical framework of the thesis. This is established through an examination of the views of the BRICS states in relation to particular aspects of the Court's legal architecture.

The second part of the chapter takes a closer look at the Rome Statute from an English School perspective and argues that it reflects a compromise between the cosmopolitan aspirations that drove the project and a deference to pluralist primary institutions, as advocated by the BRICS states. It is therefore an *evolutionary* as opposed to a *revolutionary* institution, as is argued by Ralph. The chapter concludes with some reflections on the implications of the compromise nature of the Court

for its legitimacy, effectiveness and long-term sustainability.

5.2. The BRICS States' Contributions to the Rome Negotiations

Following the aborted attempts to establish a permanent international criminal court in the wake of the Nuremberg and Tokyo Trials, the project was revived in 1989. At the request of the General Assembly,[1] the International Law Commission (ILC) prepared a draft statute for the proposed court.[2] There was widespread support for the court on the basis that 'neither the principle of universal jurisdiction...nor the mechanism of international judicial cooperation was sufficient'.[3] The BRICS states supported the creation of such an institution from the very beginning. This was on the basis of their normative support for international criminal justice, as identified in the previous chapter, but also due to their desire to play a meaningful role in international affairs commensurate with their growing economic and political development. There was however scepticism on the part of some states as to whether it could be achieved and caution was expressed about the proposed court's institutional structure, particularly how it would assimilate into the existing architecture of international society.

The General Assembly resolution restarting the work on creating the court was adopted by consensus and no opposition was indicted by any of the BRICS states, demonstrating an initial commitment to the project.[4] Moreover, in advance of the vote, China 'welcomed the proposal of Trinidad and Tobago concerning the establishment of a competent international criminal tribunal' and further noted that 'if it was possible to set up an international judicial organ to exercise jurisdiction...over international criminal activity, the efficiency of the current international system [of prosecute or extradite] would no doubt in increased.'[5] This did, however, demonstrate continued emphasis on the primacy of state-led prosecutions and the implementation of criminal justice. Russia also said that it 'was in favour of initiating work on the text of a convention to establish the court and on the convening of a conference for the adoption of the convention.'[6] Furthermore, the BRICS states participated in the preparatory negotiations during the 1990s, including in the Ad

[1] UNGA Res. 44/39 (4 December 1989), UN Doc. A/RES/44/39.
[2] Report of the International Law Commission on the work of its 46th session' (2 May - 22 July 1994), UN Doc. A/49/10, 18-88.
[3] Report of the International Law Commission on the work of its 46th session (1994) 2 May - 22 July 1994). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the secretariat'. Addendum. UN Doc. A/CN.4/464/Add. 1, paras.1 and 3.
[4] UNGA Res. 44/39 (4 December 1989), UN Doc. A/RES/44/39. *See also*, UNGA Voting Record, available online at http://unbisnet.un.org:8080/ipac20/ipac.isp?profile=voting&index=.VM&term=ares4439 (accessed on 06/08/2018).
[5] UNGA Sixth Committee, Official Records, Forty-forth session, 39th meeting, 13 November 1989, UN Doc. A/C.6/44/SR.39, 4-5.
[6] UNGA Sixth Committee, Official Records, Fiftieth session, 28th meeting, 2 November 1995, UN Doc. A/C.6/50/SR.28, 13.

Hoc[7] and Preparatory Committees,[8] and they did so constructively with a view bringing the court into existence.[9]

The BRICS states participated extensively during the diplomatic conference that was convened to finalise the treaty which would bring the court into existence (the Rome Conference). This took place in Rome over a period of five weeks from 15 June to 17 July 1998 and took place in an atmosphere of great excitement and trepidation, given both the potential of the court and the mammoth task that faced attendees; the draft statute included some 1300 brackets of un-agreed text from the preparatory negotiations.[10] As Kirsch and Robinson noted, the 'project was daunting both in magnitude and complexity'.[11] The Conference was attended by 160 states, represented by ambassadors, ministers, high- level diplomats, and legal advisers,[12] as well as UN bodies and other inter-governmental organisations,[13] and a coalition of 250 non-governmental organisations who would come to play an invaluable role during the negotiations.[14] This led Gerry Simpson to describe it as a 'cosmopolitan performance'.[15] All of the BRICS states sent strong delegations to the conference. China's delegation consisted of 16 delegates, Brazil had 13, Russia sent 11, South Africa's numbered 8, and India, with the smallest delegation of the BRICS states, included 7 people.[16] These were however, with the exception of India, larger than the average delegation size at Rome which was 8 delegates. This shows a desire on the part of the BRICS states to play a meaningful role in the negotiations commensurate with their emerging rising power status. These

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[7] The Ad Hoc Committee was asked to 'review the major substantive and administrative issues arising out of the draft statute' and provide comments, *see* UNGA Res. 49/53 (9 December 1994), UN Doc. A/RES/49/53. The sessions of the Ad Hoc Committee on the Establishment of an International Criminal Court took place between 3-13 April 1995 and then between 14-25 April 1995.

[8] The Preparatory Committee tasked with picking up where the Ad Hoc Committee left off and facilitating more detailed discussion of the issues that had been raised. It was primarily to settle technical issues with political matters to be reserved to the diplomatic conference. The Preparatory Committee was also mandated to 'draft texts, with a view to preparing a widely acceptable consolidated text o f a convention for an international criminal court as a next steps towards consideration by a conference of plenipotentiaries, *see* UNGA Res.50/46 (11 December 1995), UN Doc. A/RES/50/49, para.2. The six Preparatory Committee meetings took place between 25 March and 12 April 1996 (First Session), 12 - 30 August 1996 (Second Session), 11 - 21 February 1997 (Third Session), 11 - 15 August 1997 (Fourth Session), 1 - 12 December 1997 (Fifth Session), and 16 March - 3 April 1998 (Sixth Session).

[9] F. Benedetti, K. Bonneau and J. L. Washburn, *Negotiating the International Criminal Court. New York to Rome, 1994-1998,* (Brill, 2014), 27-30; C. K. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', (1997) 91(1) *American Journal of International Law* 177-187; C. K. Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', (1998) 92(1) *American Journal of International Law* 124-133; C. K. Hall, 'The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court', (1998) 92(2) *American Journal of International Law* 331-339; C. K. Hall, 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court', (1998) 92(3) *American Journal of International Law* 548-556.

[10] M. C. Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of the International Criminal Court', (1999) 32(3) *Cornell International Law Journal* 443-469, 445.

[11] P. Kirsch and D. Robinson, 'Reaching Agreement at the Rome Conference' in A. Cassese, P. Gaeta and J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary. Volume* 1, (OUP, 2002), 68.

[12] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Vol. II, 5-41 ('Rome Conference Official Records, Vol. II').

[13] Rome Conference Official Records, Vol. II, 41-44.

[14] A detailed account of the role played by NGOs at the Rome Conference is beyond the scope of this thesis. For such a detailed account *see*, M. Glasius, *The International Criminal Court. A global civil society achievement*, (Routledge, 2006) and W. R. Pace and J. Schense, 'The Role of Non-Governmental Organizations' in A. Cassese, P. Gaeta and J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary. Volume* 1, (OUP, 2002), 105-143.

[15] G. Simpson, *Law, War and Crime. War Crimes Trials and the Reinvention of International Law,* (Polity Press, 2007), 35.

[16] This is according to the official records. *See*, Rome Conference Official Records, Vol. II, 5-45.

numbers can however be compared to the delegations of Italy, the US, and France who sent 63, 52 and 45 delegates respectively.

In addition, some of the delegates of the BRICS states held prominent roles within the conference. China, India, Russia and South Africa all had delegates on the drafting committee, both China and Russia were represented on the credentials committee, and delegates from India, China and Russia were appointed as vice presidents of the Conference.[17] Members of both the Indian and South African delegations were also appointed as conference 'coordinators' who were responsible for encouraging and facilitating informal discussions and consultations on their allocated parts of the draft statute.[18] Furthermore, the BRICS all played an active role throughout the negotiations, they spoke regularly on different aspects of the draft statute and produced working papers and article proposals which attempted to shape the negotiations and drive them forward.[19]

While realists may argue that the BRICS states participation in the Rome Conference and, particularly, the prominent roles that they assumed within it, was merely a way of demonstrating and projecting their claims to be newly emerging powers in international society, the reality is rather more nuanced. Whilst the BRICS states participation was undoubtedly in part driven by a desire to participate meaningfully in international affairs and also being seen to participate by other states, their engagement was also informed by a desire to support the evolution of international criminal justice and the creation of an international criminal court. This is evident in the constructive role that they played and also in their diplomatic statements. For example, South Africa explained that 'the establishment of an international criminal court had been one of the most important items on the United Nations agenda for almost 50 years' and 'the court should be established without delay'.[20] Its representative further warned that 'future generations would not look kindly on those involved if they missed the window of opportunity to bring an international criminal court into being before the turn of the century.'[21] He subsequently remarked, speaking as the representative of the Southern African Development Community negotiating bloc, of which South Africa was a member, that a court 'should send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished' and that the members of the bloc 'had affirmed their commitment to its early establishment as an independent and impartial body.'[22] Similarly, the Russian Federation explained that '[i]t had become clear that a permanent court was necessary, established on the basis of a universal international treaty' and

[17] Rome Conference Official Records, Vol. II, 45.
[18] Benedetti, Bonneau and Washburn, *Negotiating the International Criminal Court. New York to Rome,* 99.
[19] Number of working papers produced: China 3, South Africa 3, Brazil 1, and India 15.
[20] UNGA Sixth Committee,Official Records, Fifty-second session, 11th meeting, 21 October 1997, UNDoc.A/C.6/52/SR.11, 3.
[21] UNGA Sixth Committee,Official Records, Fifty-second session, 11th meeting, 21 October 1997, UNDoc.A/C.6/52/SR.11, 4.
[22] Rome Conference Official Records, Vol. II, 65.

that it 'was in favour of initiating work on the text of a convention to establish the court and on the convening of a conference for the adoption of the convention.'[23] It later explained '[i]t was time to put into effect the principle of individual responsibility for the most serious crimes affecting the international community and to take steps to deter such crimes' through a permanent enforcement mechanism and that the new court 'must be perceived as an effective, independent, authoritative body, a guarantor for the proper exercise of justice.'[24] Brazil also emphasised that as 'States decided to create a court, they should give it the power and the means to play a significant role in international life'[25] and China said it must be 'independent and fair'.[26] Finally, the Indian representative 'stressed India's constructive participation in efforts for the progressive development and codification of international criminal law'[27] and that 'India took a constructive approach to the establishment of the court and would continue to cooperate in that spirit at forthcoming meetings.'[28]

India's hesitancy to express support for the court was the result of the many concerns that it had raised about how the court would be operationalised and assimilate within the existing architecture of international society. It noted that 'the statute of the International Criminal Court should clearly reflect certain fundamental principles of international law and the situation of international society in order to attract the widest possible support and membership'[29] and, moreover, it adopted the view that the 'only durable basis for the development of such international cooperation was scrupulous regard for the fundamental principles of the Charter of the United Nations'.[30] It also highlighted [t]here were several outstanding issues of substance awaiting consideration' for which '[a] great sense of understanding and accommodation of different viewpoints would be needed.'[31]

Such concerns were also expressed by the other BRICS states. For example, China explained that 'the establishment of a judicial organ involved a series of complex issues, such as its composition, applicable laws and procedures, evidence and investigation'[32] and said 'that despite the consensus reached on certain points by the Ad Hoc Committee during its deliberations, major differences remained on questions such as the nature of the future court'.[33] This resulted in China initially suggesting that the Rome Conference be delayed until such time as further agreement could be reached on substantive aspects of the proposed court's institutional structure and in order to achieve

[23] UNGA Sixth Committee, Official Records, Fiftieth session, 28th meeting, 2 November 1995, UN Doc. A/C.6/50/SR.28, 11-12.
[24] Rome Conference Official Records, Vol. II, 115.
[25] Rome Conference Official Records, Vol. II, 75.
[26] Rome Conference Official Records, Vol. II, 75.
[27] Rome Conference Official Records, Vol. II, 86.
[28] UNGA Sixth Committee,Official Records, Fifty-second session, 11th meeting, 21 October 1997, UNDoc. A/C.6/52/SR.11,8.
[29] UNGA Sixth Committee,Official Records, Fifty-second session, 11th meeting, 21 October 1997, UNDoc. A/C.6/52/SR.11,8.
[30] Rome Conference Official Records, Vol. II, 86.
[31] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 8. *See also,* Rome Conference Official Records, Vol. II, 86-87.
[32] UNGA Sixth Committee, Official Records, Forty-forth session, 39th meeting, 13 November 1989, UN Doc. A/C.6/44/SR.39, 5.
[33] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C/.6/50/SR.25, 13.

that it advocated for the 'participation by the greatest possible number of countries (especially developing countries, which did not always have the necessary human and financial resources) in the work of the Ad Hoc Committee'.[34] During the Rome Conference China continued to express its firm belief ' that universal participation was essential for the authority and effectiveness of the Court' and, furthermore, that 'the Statute should be based on the principles of democracy and equality and should give expression to the positions and views of all countries',[35] which is evidence of its commitment to genuine multilateralism. Brazil similarly said it 'was necessary to encourage universal participation, and the aim should be to achieve a proper balance between different national positions with respect to certain key provisions of the Statute.'[36] China did, however, note that despite the challenges to be faced, it 'was ready to work towards that end in the collective interest of the international community.'[37] Russia also noted, despite its support for the court, although the ILC 'made satisfactory progress in its work...serious problems remained to be solved.'[38]

5.3. A State-Solidarist Vision of the Rome Statute

During the preparatory and substantive negotiations the BRICS states took strong positions on various aspects of the court's institutional structure including its jurisdiction, its relationship with member states and with the UN Security Council, and the powers of the Prosecutor, as will be examined shortly. Whilst it is clear that some of the positions adopted by the BRICS states were informed by national interests, as will be identified, their positions are largely driven by a desire to shape the court in accordance with their normative vision of international society; as David Wippman explains, the arguments deployed by states at Rome were 'shaped by competing general conceptions of what legal institutions and rules *should look like* and what role international law and institutions *should play* in international affairs' (emphasis added).[39] Moreover, Simpson notes that rather than just being technical negotiations, '[t]he debates at Rome were debates about the proper role of law or politics'.[40] It is argued here that while there are divergences in the positions adopted by the BRICS states, which are identified in this chapter, they generally sought to advance a state-solidarist vision of international society, albeit to different degrees, whereby the cosmopolitan aspirations of delivering universal retributive criminal justice would be implemented within a state-based conception of international society with sufficient deference being paid to pluralist values and primary institutions, such as multilateralism and state sovereignty. The BRICS states believed

[34] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C/.6/50/SR.25, 13.
[35] Rome Conference Official Records, Vol. II, 5.
[36] Rome Conference Official Records, Vol. II, 75.
[37] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C/.6/50/SR.25, 15. *See also,* Rome Conference Official Records, Vol. II, 65 (for South Africa); 115 (for Russia); 75-76 (for Brazil).
[38] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C.6/50/SR.25, 3.
[39] D. Wippman, 'The International Criminal Court' in C. Reus-Smit (ed), *The Politics of International Law,* (CUP, 2004), 154.
[40] Simpson, *Law, War and Crime,* 28.

such an institution should not attempt to revolutionise international society and should assimilate into the existing structure and acknowledge within its institutional design the primacy of states. However, it should be noted South Africa and, to a lesser extent, Brazil advanced the most cosmopolitan vision of the court.

5.3.1. Attempts to Limit the Court's Jurisdiction

The court's jurisdiction was one of the most complex and sensitive topics in the negotiations, primarily because it concerned the relationship between states and an international organisation, and it engaged competing normative visions of global political order. In this respect, we see the BRICS states mainly adopting conservative positions consistent with their state-solidarist visions of international society.

One such issue was how the court would come to have jurisdiction over the crimes in the statute. China, India and Russia supported the most restrictive 'opt-in/opt-out' approach whereby states would have to expressly consent to the court's jurisdiction in respect of specific crimes in addition to voluntarily becoming States Parties to the statute.[41] This approach was well supported during the preparatory negotiations because it reflected 'the consensual basis of the court's jurisdiction'[42] and was 'consistent with the principle of sovereignty',[43] although such support waned at Rome. Russia indicated that it would accept automatic jurisdiction over the crime of genocide,[44] which is consistent with its previous support for the robust criminalisation of it. While the Brazilian delegation supported inherent jurisdiction for genocide,[45] it adopted a more ambivalent position with regard to the other crimes, stating that 'there might be a case for some kind of opt in regime' but it that 'would be flexible with regard to automatic jurisdiction...if the provisions on complementarity provide adequate safeguards.'[46] It expressing its support for opt-in, Brazil noted '[o]bservance of the distinction between acceptance of the Statute of the Court and its jurisdiction would help signatories to expedite ratification procedures and promote universal acceptance.'[47]

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[41] Rome Conference Official Records, Vol. II, 114 (Russia); 86 and 322; p.322 (India); 75 and.299 (China). *See also,* B. B. Jia, 'China and the International Criminal Court: Current Situation', (2006) 10 *Singapore Yearbook of International Law* 1-11, 3 and U. Ramanathan, 'India and the ICC', (2005) 3(3) *Journal of International Criminal Justice* 627-634, 628.

[42] Report of the International Law Commission on the work of its 45th session (1993). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session prepared by the secretariat, 15 February 1994, UN Doc. A/CN.4/457, para.93.

[43] Preparatory Committee on the Establishment of an International Criminal Court, 'Summary of the Proceedings of the Preparatory Committee During the Period 25 March - 12 April 1996', 7 May 1996, UN Doc. A/AC.249/1, para.136.

[44] Rome Conference Official Records, Vol. II, 301 and 112.

[45] Rome Conference Official Records, Vol. II, 76.

[46] Rome Conference Official Records, Vol. II, 310.

[47] Rome Conference Official Records, Vol. II, 76.

The South African delegation expressed its strong opposition to an 'opt-in' regime[48] and preferred an inherent jurisdiction for the court, meaning that state consent was not necessary for the court to act, which was the most cosmopolitan position.[49] It however accepted automatic jurisdiction was a more politically viable option that it was prepared to accept.[50] In contrast, India argued strongly against the court having either inherent or automatic jurisdiction on the basis that the court's jurisdiction must be derived from the consent of states only, as the Indian delegate stated, '[s]tate consent should be the foundation and fulcrum of the jurisdiction of the Court'.[51] He also argued that automatic jurisdiction was not the way to achieve universal acceptance of the statute.[52] In a similar vein, China argued that, in their view, 'inherent jurisdiction would exclude many countries otherwise wiling to become parties to the Statute' which would mean that '[t]he Court would then take a long time to achieve universality' whereas the 'opt-in' regime 'would allow the Court to acquire universality in a very short period of time.'[53] This is consistent with China's general desire to have a court with universal jurisdiction achieved not forcibly but by way of the voluntary consent of all states, which respects state sovereignty. As it previously explained, the ' acceptance of the court's jurisdiction would be based on the voluntary consent of the States parties and could not be mandatory'[54] and it further noted that inherent jurisdiction would 'accord precedence to the court over national courts; that was clearly at variance with the principle of complementarity and could adversely affect the cooperation between States and the court and the effective functioning of the court.'[55] In addition, it also said that as 'the effectiveness of the Court would depend entirely on the cooperation of States...the consent of interested parties was essential.'[56]

Another controversial issue was whether the court should be able to prosecute nationals of non--States Parties where they had committed crimes under the court's jurisdiction on the territory of a State Party. This was unacceptable to the US, Indian, Chinese and Russian delegations,[57] which demonstrates their more pluralist leaning. The US took the view, shared by China, that it was a flagrant breach of the fundamental principle of treaty law that a state can only be bound by an obligation to which it has expressed consented.[58] The head of the US delegation at Rome, David

[48] Rome Conference Official Records, Vol. II, 301 and 204.
[49] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 4; Rome Conference Official Records, Vol. II, 65.
[50] Rome Conference Official Records, Vol. II, 301 and 204.
[51] Rome Conference Official Records, Vol. II, 187. *See also,* Rome Conference Official Records, Vol. II, 86 and UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 8.
[52] Rome Conference Official Records, Vol. II, 300.
[53] Rome Conference Official Records, Vol. II, 189.
[54] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C/.6/50/SR.25, 14.
[55] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 12.
[56] Rome Conference Official Records, Vol. II, 299.
[57] Z. Dan, 'China, the Crime of Aggression and the International Criminal Court', (2015) 5(1) *Asian Journal of International Law* 94122, 117.
[58] Article 35, Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331.

Scheffer, said the provision could 'render nonsensical the actual functioning of the ICC'[59] and the Russian representative, Mr Panin, said that the 'approach was not consistent with international law' and that his delegation was 'unable to agree that an international treaty could create obligations for third parties' except where a referral was made by the Security Council.[60] On 15 July 1998 the Russian delegation convened a meeting of the P-5 in an attempt to find a common position on how to limit the court's jurisdiction over citizens of non-States Parties. It proposed that a citizen of a non-party state could not come before the court unless that state acknowledged that it had authorised the act that was alleged to be a crime. This would have severely restricted the court's jurisdiction and so it was swiftly rejected by the other states.[61] The opposition to this provision by China, Russia and India, particularly in light of the opinion of commentators that it is a non-issue,[62] reflects an evangelical desire to preserve the existing, classical framework of international law and to defend it against its cosmopolitan evolution which gives primacy to the protection of the individual and justice at the expense of state control. In addition to this normative position, these states' objections to the court exercising jurisdiction over nationals of non-State Parties was also likely informed by a desire to prevent their own nationals from appearing before the court.

There was also disagreement, which continued from the preparatory negotiations, as to whether the court's jurisdiction should extend to non-international armed conflicts (NIACs).[63] India and China opposed the court having such jurisdiction. India did so 'on the grounds that this would constitute an infringement of state sovereignty'.[64] China said it was beyond existing customary international law and suggested it should therefore be subject to an 'opt-in' clause.[65] Its opposition is also consistent with its view that it did not want the court to be 'a tool for political struggle or a means of interfering in other countries' internal affairs'.[66] This is despite the fact that the ICTY confirmed that war crimes can be committed in internal armed conflicts.[67] Indian and Chinese opposition to

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[59] D. J. Scheffer, 'The United States and the International Criminal Court', (1999) 93(1) *American Journal of International Law* 12-22, 18. *See also,* D. F. Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court', (1999) 32(3) *Cornell International Law Journal* 489-497, 490.

[60] Rome Conference Official Records, Vol. II, 196.

[61] Benedetti, Bonneau and Washburn, *Negotiating the International Criminal Court. New York to Rome,* 135-136.

[62] *See,* A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10(1) *European Journal of International Law* 144-171, 160; F. Megret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', (2001) 12(2) *European Journal of International Law* 247-268, 249; M. P. Scharf, 'The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the US Position', (2001) 64(1) *Law and Contemporary Problems* 67-177, 98.

[63] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UNGA Official Records, Fiftieth session (1995), UN Doc. Supp. No. 22 (A/50/22), para.74; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), UNGA Official Records, Fifty-first session (1996), UN Doc. Supp. No. 22 (A/51/22), 20.

[64] Rome Conference Official Records, Vol. II, 323.

[65] *See,* J. Guan, 'The ICC's Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China's Accession?', (2010) 28(4) *Penn State International Law Review* 703-753, 707.

[66] Rome Conference Official Records, Vol. II, 75.

[67] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadic* (IT-94-1), Appeals Chamber, 2 October 1995, paras.97-137.

the provision can also be understood in light of their involvement in ongoing internal struggles including Kashmir and Tibet respectively. As Ogden notes, New Delhi fears that the actions of the Indian army (in Kashmir and other areas of unrest in India) will be unfairly scrutinized and referred to the ICC, with concerns that alleged human rights abuses may be used as a pretext for intervention in Indian internal affairs.'[68] Here we see both material national interest and normative considerations informing the states' positions on this issue. The majority of states supported this position, however, including the US. It emphasised internal conflicts are the most frequent and the cruellest.[69] Russia also argued '[i]t would be a major achievement to extend the Court's jurisdiction to serious violations of the Geneva Conventions of 1949 committed during non-international conflicts.'[70] As the negotiations progressed a number of the states opposing the provision indicated in private that they would accept the court having jurisdiction over internal armed conflicts with appropriate safeguards,[71] and this was eventually included in the statute.

5.2.2. Disagreements about the Prosecutor's Powers

After much disagreement during the preparatory negotiations about allowing the chief prosecutor to initiate investigations of their own volition,[72] a consensus emerged that they should be granted *proprio motu* powers subject to the condition they obtain the consent of the court before starting such an investigation.[73] As a result, at the Rome Conference '[g]iving the prosecutor this power generated very little discussion, as it was generally seen that the battle against an independent prosecutor had been lost, and the issue began to pale into comparison with other jurisdictional issues'.[74] Some of the BRICS states did, however, object to the proposals and raised numerous concerns, which demonstrates a willingness to strongly defend their state-solidarist vision of international society. China said that the *proprio motu* powers were exercisable 'without checks and balances against frivolous prosecution' and amounted to giving the prosecutor 'the right to

[68] C. Ogden, 'Great-Power Aspirations and Indian Conceptions of International Society' in J. Gaskarth (ed), *China, India and the Future of International Society,* (Rowman and Littlefield, 2015), 62-63

[69] Rome Conference Official Records, Vol. II, 176. *See also,* Rome Conference Official Records, Vol. II, 95.

[70] Rome Conference Official Records, Vol. II, 115.

[71] P. Kirsch and J. T. Holmes, 'The Birth of the International Criminal Court', (1998) 36 *Canadian Yearbook of International Law* 339, 23-24

[72] *See,* for example: Report of the International Law Commission on the work of its 46th session (2 May - 22 July 1994), UN Doc. A/49/10, p.46; Report of the International Law Commission on the Work of its Forty-Sixth session (1994). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the secretariat. Addendum, 22 February 1995, UN Doc. A/CN.4/464/Add.1, para.128; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UNGA Official Records, Fiftieth session (1995), UN Doc. Supp. No. 22 (A/50/22), para.113; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), UNGA Official Records, Fifty-first session (1996), UN Doc. Supp. No. 22 (A/51/22), 35, paras.149-151.

[73] Hall, 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court', 552.

[74] Kirsch and Holmes, 'The Birth of the International Criminal Court', 8 and W. Schabas, *The International Criminal Court. A Commentary on the Rome Statute,* (OUP, 2014), 296.

judge and rule on State conduct'.[75] Russia opposed the proposal given the risk of politicisation[76] and its representative explained that Russia believed 'action should be triggered by a complaint from a State or the Security Council' only and that the 'Prosecutor should be fully independent'.[77]

India continued to raise its objection to the proposal, as it had done during the preparatory negotiations,[78] and its representative explained that India 'attached great importance to the impartiality and objectivity of the Prosecutor in conducting his functions of investigation and prosecution' and was concerned these virtues would be compromised by the prosecutor having such extensive powers.[79] India also cited other reasons for its objection, demonstrating the strength of its feeling on this issue. It was of the view that state consent should be the only basis of initiating investigations and prosecutions, and it believed *proprio motu* powers would undermine this.[80] In addition, the Indian representative explained that the success of the court would depend in great measure on state cooperation and warned that this 'would not be promoted by allowing the Prosecutor to act on his own, on the basis of sources of information, regardless of their reliability.'[81] He also stated '[s]uch an *ex officio* role for the Prosecutor would jeopardize the principle of complementarity which was generally accepted as the basic foundation for the establishment of the Court.'[82] The main thrust behind the objections raised by India, China and Russia was a state-solidarist defence of state sovereignty and state control in the face of it being challenged by robust powers being granted to the Court in initiating legal proceedings. It was also perhaps partially informed, however, by a concern that one day those states may be targeted by the court and they would better be able to control or prevent that if the prosecutor did not have such extensive powers.

In contrast, Brazil and South Africa supported such an interventionist role for the prosecutor, reflecting their more cosmopolitan visions for the court.[83] South Africa said that 'the Prosecutor should be independent and have authority to initiate investigations and prosecutions on his or her own initiative without interference from States or the Security Council'[84] and Brazil argued 'such a power would fill a potential void if, because of political or strategic considerations, both the

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[75] Rome Conference Official Records, Vol. II, 124.
[76] Rome Conference Official Records, Vol. II, 203 and 301. *See also,* Guan, 'The ICC's Jurisdiction over War Crimes in Internal Armed Conflicts', 738.
[77] Rome Conference Official Records, Vol. II, 115.
[78] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 8. *See also,* F. Benedetti and J. L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference', (1999) 5(1) *Global Governance* 1-37, 19.
[79] Rome Conference Official Records, Vol. II, 200.
[80] Rome Conference Official Records, Vol. II, 187. *See also,* Rome Conference Official Records, Vol. II, 86 and 300; Ramanathan, 'India and the ICC', 632.
[81] Rome Conference Official Records, Vol. II, 200.
[82] Rome Conference Official Records, Vol. II, 200.
[83] Rome Conference Official Records, Vol. II, 204 and 301.
[84] Rome Conference Official Records, Vol. II, 65. *See also,* UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 4.

Security Council and States felt unable to refer a situation involving crimes covered by the Statute.'[85] Both states endorsed the use of robust safeguards 'to provide a guarantee against unsubstantiated or frivolous complaints'.[86] Despite the objections raised by China, Russia and India, as well as the US,[87] *proprio motu* powers were included within the statute and are a key part of it.

5.2.3. Support for the Complementarity Principle

During the preparatory negotiations there was widespread support for the idea the permanent criminal court should be a court of last resort and the primary responsibility for prosecuting international crimes should fall upon national jurisdictions. A provision to this effect was inserted into the draft statute.[88] There were, however, disagreements between states over the content of the complementarity provision.[89] Some delegations suggested the jurisdiction of the court should be framed as 'having an exceptional character' to reinforce the idea that states had the primary responsibility to investigate and prosecute crimes.[90] It was suggested that the court should only act where there had been bad faith on the part of a state or where there was unconscionable delay in bringing proceedings. It was further emphasised that it should be for states to decide who prosecutes, not for the court.[91] This was an attempt to ensure that power and control remained with states relative to the court. Others however argued that too restrictive an approach put at risk the court's status and independence,[92] and that it should be for the court to decide when it exercises its jurisdiction in order to prevent states shielding individuals from prosecution through ineffective trials.[93] The latter issue was disputed by a number of states who were concerned it would in effect grant the court a supervisory jurisdiction over national judicial proceedings, greatly undermining sovereignty.[94] After much negotiating, a text was agreed which provided that the court shall determine whether a case before it is admissible and has jurisdiction where there was an 'unwillingness or genuine inability' of a state to investigate or to prosecute a crime over which it has jurisdiction.[95]

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[85] Rome Conference Official Records, Vol. II, 310. *See also*, Rome Conference Official Records, Vol. II, 75.
[86] Rome Conference Official Records, Vol. II, 65 and 204 (South Africa) and 75 and 204 (Brazil).
[87] Rome Conference Official Records, Vol. II, 202. *See also,* Scheffer, 'The United States and the International Criminal Court', 15.
[88] Report of the International Law Commission on the work of its 46 th session (2 May - 22 July 1994), UN Doc. A/49/10, 52.
[89] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UNGA Official Records, Fiftieth session (1995), UN Doc. Supp. No. 22 (A/50/22), para.113.
[90] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), UNGA Official Records, Fifty-first session (1996), UN Doc. Supp. No. 22 (A/51/22), para. 154.
[91] Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 181.
[92] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), UNGA Official Records, Fifty-first session (1996), UN Doc. Supp. No. 22 (A/51/22), para.157.
[93] Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 181.
[94] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UNGA Official Records, Fiftieth session (1995), UN Doc. Supp. No. 22 (A/50/22), para.43.
[95] Preparatory Committee on the Establishment of an International Criminal Court, 4-15 August 1997. Report of the Working Group

At the Rome Conference, China was firmly in support of the complementarity principle. It considered it to be 'the most important guiding principle of the statute' and that it should be 'fully reflected in all its substantive provisions and in the work of the court'.[96] This is reflected in the position it adopted during the preparatory negotiations where it said 'the primary responsibility for the prevention and suppression of crimes of international concern rests with the states'[97] and therefore that 'national criminal jurisdiction and the prevailing system of international universal jurisdiction should take precedence. The international criminal court should not supplant national courts, nor should it become a supranational court'.[98] India agreed. Its representative explained that 'the principle of complementarity, implying the primacy of national jurisdictions, should be the bedrock of the entire Statute'[99] on the basis that it 'was in conformity with the principles of territorial jurisdiction and the sovereignty of States.'[100] This again evidences a state-solidarist defence of state sovereignty and state-control.

However, while India accepted that the court 'should intervene in exceptional circumstances', it disagreed with the proposed means of determining when they should be permitted to occur.[101] China and India were both of the view the criteria that had been proposed for determining the unwillingness of a state to conduct an investigation or prosecution were 'highly subjective' and as such gave the court too much power over states at their expense. For China, this meant that the ICC would assume the role of a supranational institution overriding the role of states.[102] It also expressed the view that it would be acting as an appeal court, sitting in judgment upon states,[103] approaches that it had rejected firmly during the pre-Rome negotiations. Such opposition was shared by India, particularly because it holds its justice system in very high esteem and so resented the potential for any oversight or criticism of it by the ICC.[104] The Chinese representative thus proposed the court should only be allowed to assume the responsibility for investigating and prosecuting offences where a state was currently doing so 'in violation of the country's law' rather than, as the existing

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on Complementarity and Trigger Mechanism, 14 August 1997, UN Doc. A/AC.249/1997/L.6. *See also,* Coalition for the International Criminal Court, 'Working Group 3 on Complementarity and Trigger Mechanisms; Committee on the Establishment of an International Criminal Court (August 4-15, 1997)', available online at http://www.iccnow.org/documents/4PrepCmtWorkGrp3Summary.pdf (accessed 19/07/2018); Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 131.

[96] Rome Conference Official Records, Vol. II, 75.

[97] CICC, 'Statement by H.E. Ambassador Chen Shiqiu, Representative of China to the Sixth Committee on the Establishment of an International Criminal Court, 30 October 1995', available online at http ://iccnow. org/documents/China1 PrepCmt30Oct95.pdf (accessed 19/07/2018).

[98] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C.6/50/SR.25, 13.

[99] Rome Conference Official Records, Vol. II, 218. *See also,* UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 8.

[100] Rome Conference Official Records, Vol. II, 86.

[101] Rome Conference Official Records, Vol. II, 86.

[102] L. Jianping and W. Zhixiang, 'China's Attitude Towards the ICC', (2005) 3(3) *Journal of International Criminal Justice* 608-620, 611.

[103] Z. Dan, 'China, the International Criminal Court, and International Adjudication', (2014) 61(1) *Netherlands International Law Review* 43-67, 61.

[104] Ramanathan, 'India and the ICC', 628.

provision stated, 'for the purpose of shielding the person concerned from criminal responsibility',[105] a proposal with which India agreed.[106] This represents a very high threshold and an attempt by the states to minimise the authority of the court *vis-a-vis* States Parties and to make it more difficult for the court to assume the responsibility for prosecuting an offence. This position did not attract very much support and neither did the other suggestions that were put forward during the Preparatory Committee negotiations.[107] The majority of states supported the 'unable and unwilling' test that had been proposed.

In addition, there was also disagreement among states as to what constituted sufficient means of discharging obligations under the complementarity provisions of the Rome Statute. While South Africa strongly supported complementarity as the underpinning principle of the Rome Statute,[108] it argued that states should be able to discharge their obligations by means other than criminal prosecutions, particularly through the use of truth and reconciliation provisions which made use of amnesties, as it had done in the transition from apartheid.[109] Prior to this the United States had also advanced the view that the use of amnesties should be considered and it produced a paper outlining the existing state practice on the use of amnesties in support of this.[110] The South African proposal never gained traction, however, and thus neither truth and reconciliation commissions nor amnesty feature in the Statute. This demonstrates the continued dominance of retributive justice and the marginalisation of alternative methods of achieving transitional justice in liberal international society, as discussed in Chapter Two.

5.2.4. Disagreement about a Role for the Security Council

One of the most hotly contested issues during the Rome Conference, one that divided opinion amongst the BRICS states, was the relationship that would exist between the ICC and the Security Council. During the preparatory negotiations proponents argued that such a relationship 'properly took account of the current situation of international relations'[111] and the position was supported by permanent members of the Security Council.[112] The P-5 were also conscious the ICC should not

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[105] Rome Conference Official Records, Vol. II, 218 and 240.
[106] Rome Conference Official Records, Vol. II, 218.
[107] Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, 339.
[108] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 4; Rome Conference Official Records, Vol. II, 65.
[109] W. A. Schabas, *An Introduction to the International Criminal Court,* (CUP, 2007), 185; D. G. Newman, 'The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem', (2005) 20(2) *American University International Law Review* 293-357, 320.
[110] US Delegation Paper on State Practice Regarding Amnesties and Pardons, Non-Paper/WG.3/No.7 (6 August 1997).
[111] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), UNGA Official Records, Fifty-first session (1996), UN Doc. Supp. No. 22 (A/51/22), para.131.
[112] Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 181.

undermine its role in maintaining international peace and security, and to that effect had supported a draft provision which excluded the jurisdiction of the court in a situation where the Council was actively seized of the matter.[113] China advanced such a central role for the Security Council. Its delegation insisted the ICC assimilate into the existing global governance architecture and not amend it, stating that the court should not compromise 'the principal role of the United Nations, and in particular of the Security Council, in safeguarding world peace and security'.[114] However, in the course of the preparatory negotiations, China emphasised the importance of the court's independence and it noted that it 'shall give positive consideration to any proposal that would ensure the independence of the court on the one hand and reasonably reflect the special role of the Security Council in the maintenance of international peace and security on the other'.[115]

Russia also emphasised the need for a privileged role for the Security Council. It insisted the court 'function within the existing system of international relations' and also supported including references to the UN Charter and its principles in the preamble to the draft statute because 'the maintenance of international peace and security…were directly connected with the activities of the future court.'[116] It also said the 'task was to create a permanent international criminal court *to strengthen peace* and justice (emphasis added)' and that 'a court not working in close combination with the Security Council would be doomed to failure'[117] The importance placed on the preservation of international peace and security, and the role of the UN, is consistent with the state-solidarist vision of international society defended by these states. In addition to the normative justifications advanced by Russia and China, their advocating for a strong role for the Security Council can also be understood as an attempt to preserve their privileged position in global governance as permanent members of the mechanism, which reflects the continuing role that material concerns play alongside normative ones in the formation of a state's foreign policy. Although, it is somewhat ironic that quite ironically, both Russia and China also emphasised that the Court should not be subject to political influence and manipulation, which is what was likely to happen with a close relationship between the Security Council and the Court.[118]

In terms of specific powers, China along with Russia and Brazil, took the view the Security Council should be able to refer matters to the court and also to prevent the court from acting where necessary

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[113] CICC, 'United Nations Press Briefing on the International Criminal Court Preparatory Committee, 14 August 1997', available online at http ://www. iccnow. org/documents/4PrepCmtPress14Aug97.pdf (accessed 19/07/2018).
[114] Rome Conference Official Records, Vol. II, 75.
[115] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 12. *See also,* UNGA Sixth Committee Press Release, 'International Criminal Court should be independent body, and not subsidiary of Security Council, speakers tell committee', 21 October 1997, UN Doc. GA/L/3044.
[116] Rome Conference Official Records, Vol. II, 260.
[117] Rome Conference Official Records, Vol. II, 115.
[118] *See,* Rome Conference Official Records, Vol. II, 115 (Russia) and 75 (China).

in order to protect its position as the guarantor of international peace and security, a role which it perceived would be threatened by a strong court.[119] Russia's representative said 'the triggering role should be an unconditional right of the Security Council'[120] and Brazil agreed there 'should be a functional relationship between the UN and the court' within which 'the Security Council should be empowered to refer situations to the Court'.[121] The Brazilian representative however also sought to limit the Council's power in this respect, suggesting that the power to defer a prosecution should be available only in 'exceptional circumstances' and for a limited period of time.[122]

In contrast, India strongly opposed a role for the Security Council. It advanced its opposition on a number of bases. First, it contested the idea advanced by China, Russia and Brazil that the need to maintain international peace and security demanded that the Security Council have a formal relationship with the court. The Indian representative explained that the Security Council already had sufficient powers and that these could not be enhanced by the statute of the court.[123] India also expressed the view that only states should be able to refer matters to the court[124] and that the Security Council should not 'have the competence either to take matters up before the court or to bar States from taking to the court matters' on the basis that '[a]ny such pre -eminence of the Security Council over the court would subordinate the court's judicial independence to the political considerations of the Security Council, as well as divesting States of their legitimate competence to initiate jurisdiction.'[125] India particularly objected to the Council having the power to make a non-Party State subject to the court's jurisdiction, arguing it 'made a mockery of the distinction between States Parties and States not parties, thus straying sharply from established international law'.[126] It also said 'any preeminent role for the Council in triggering the Court's jurisdiction constituted a violation of sovereign equality'.[127] This represents a strong pluralist defence of the consent principle in international law. India also challenged the claim the Security Council had the power to do what was being proposed, arguing that states were attempting to confer 'on the Council a role never envisaged for it by the Charter of the United Nations'.[128] This was similar to the criticism India raised about the Security Council establishing the *ad hoc* tribunals, and represents a conservative approach to the law. South Africa also opposed the veto being used as a means of fettering the

[119] Rome Conference Official Records, Vol. II, 299 (China support for referral/deferral powers); 75 (Brazil's support for referrals).
[120] Rome Conference Official Records, Vol. II, 212.
[121] Rome Conference Official Records, Vol. II, 76 and 209.
[122] Rome Conference Official Records, Vol. II, 76 and 209.
[123] Rome Conference Official Records, Vol. II, 207. *See also,* Rome Conference Official Records, Vol. II, 86.
[124] Ramanathan, 'India and the ICC', 632.
[125] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 8.
[126] Rome Conference Official Records, Vol. II, 122. *See also,* Rome Conference Official Records, Vol. II, 300 and 322, and 'Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Court', 17 July 1998, available online at https://www.legal-tools.org/doc/9f86d4/pdf/ (accessed 20/07/2018).
[127] Rome Conference Official Records, Vol. II, 86. *See also,* UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 8 and D. F. Orentlicher, 'Politics by Other Means', 496.
[128] Rome Conference Official Records, Vol. II, 322. *See also,* Rome Conference Official Records, Vol. II, 86 and D. F. Orentlicher, 'Politics by Other Means', 489, 496.

court's powers.[129]

India was also concerned a relationship with the Security Council would politicise the court, a concern that had been raised generally in the preparatory negotiations.[130] India explained that 'the court should enjoy a relationship with the United Nations that did not compromise its judicial independence' and argued that the 'judicial process should be separated from the political process.'[131] Russia did not accept this attempt to maintain a stark separation between politics and law. It did not 'see any conflict between the "political" role of the Council and the activities of the Court. The Council was intended to have a political impact on States and the Court would be playing an essential role in the maintenance of peace and security.'[132] India also wanted to exclude any role for the Security Council as it was against further entrenching within the architecture of international society the role of a body which it, as well as many other states, considered was totally unrepresentative of world politics and it argued that a situation in which one of the permanent members of the Security Council could veto a situation being referred to the court was 'discriminatory'.[133] In the preparatory negotiations it similarly opined that it would be very 'counter-productive to concentrate so much power in the council, especially in view of the fact that it was one of the bodies that was least representative of the overall membership of the United Nations'[134] and concerns were raised that the permanent members would be able to control the work of the court.[135]

5.4. The Final Vote: The Rome Statute Splitting the BRICS

In the final days of the conference there was still no agreement on a number of fundamental issues, mainly relating to the jurisdiction of the court, and concern about whether a deal could be done at Rome began to mount as the end date of the conference was absolute.[136] The Bureau, the body responsible for organising the negotiations and managing the evolving draft throughout the proceedings, decided to take radical action and to present a 'package deal to the conference'. This was a take it or leave it offer on a version of the draft statute which the Bureau thought would attract

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[129] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 4.
[130] Report of the International Law Commission on the work of its 45th session (1993). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session prepared by the secretariat, 15 February 1994, UN Doc. A/CN.4/457, para.110.
[131] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 8.
[132] Rome Conference Official Records, Vol. II, 212.
[133] Rome Conference Official Records, Vol. II, 207. *See also,* Rome Conference Official Records, Vol. II, 86 - 'The anomaly of the composition and veto power of the Council could not be reproduced in an international criminal court.'
[134] Report of the International Law Commission on the work of its 45th session (1993). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session prepared by the secretariat, 15 February 1994, UN Doc. A/CN.4/457, para.110.
[135] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UNGA Official Records, Fiftieth session (1995), UN Doc. Supp. No. 22 (A/50/22), paras.120-121.
[136] Benedetti, Bonneau and Washburn, *Negotiating the International Criminal Court. New York to Rome,* 119.

sufficiently widespread support to be adopted. Kirsch and Robinson noted that the philosophy of the final package was to reflect the strong majority trends, but with efforts to accommodate minority views to the extent possible'[137] and they further explained the balance sought 'was to create a Statute strong enough to ensure the effective functioning of the Court, with sufficient safeguards to foster broad support among States.'[138] The Bureau chose this way forward rather than attempting further negotiations at a subsequent conference because the members thought, after consultation with state delegations, the outstanding issues would still not be resolved and, perhaps worse still, it would have resulted in a much weaker court being established.[139] Whilst it was a big gamble for the Bureau, the proposed draft was supported by the Like Minded Group and, significantly, Russia and France had also indicated their support for it.[140]

The Committee of the Whole convened at 6.00pm on Friday 17 July, the final day of the conference, to adopt the Bureau's proposed statute. With the floor opened, both the Indian and US delegations proposed further amendments to the draft statute. India wanted to limit the role of the Security Council, which showed how strongly it felt about the issue, and to include nuclear weapons in the list of prohibited weapons.[141] The US, supported by China, wanted to limit the court's jurisdiction so that the state of the alleged perpetrator had to consent to the court acting before it could do so,[142] which demonstrates the strength of China's feeling on the need to defend sovereignty. Concerned that this had the potential to derail the adoption of the long awaited statute Norway introduced a motion of no action in respect of both the Indian and US proposals. These were voted on and approved by the majority of states.[143] With no further amendments proposed the statute was adopted. Delegates burst into a spontaneous standing ovation which lasted for around ten minutes. It was, Bassiouni said, 'one of the most extraordinary emotional scenes ever to take place at a diplomatic conference. The prevailing feeling was that the long journey that had started after World War I had finally reached its destination.

This historic moment was of great significance.'[144] Kirsch and Holmes said that the delegates' reactions reflected a 'belief in, and commitment to, an instrument that they hoped would mark the beginning of a new era in which humanitarian values and the protection of victims might finally become centre stage, and not the usual side show to the protection of sovereignty or even the

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[137] P. Kirsch and D. Robinson, 'Reaching Agreement at the Rome Conference' in A. Cassese, P. Gaeta and J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary. Volume* 1, (New York, 2002), 76.
[138] Kirsch and Robinson, 'Reaching Agreement', 87.
[139] Kirsch and Holmes, 'The Birth of the International Criminal Court', 9.
[140] Kirsch and Robinson, 'Reaching Agreement', 76.
[141] Rome Conference Official Records, Vol. II, 360.
[142] Rome Conference Official Records, Vol. II, 361.
[143] Rome Conference Official Records, Vol. II, 316 and 362. India proposal: 114 in favour, 16 against and 20 abstentions. US proposal: 113 in favour, 17 against and 25 abstentions.
[144] Bassiouni, 'Negotiating the Treaty of Rome', 459.

exercise of raw power.'[145]

The statute and the Final Act of the Conference was formally adopted by a vote, as requested by the US delegation, at the Plenary with 120 states voting in favour, 7 against and 21 abstaining.[146] This represented a resounding endorsement of the ICC and international criminal justice as well as cosmopolitan progress in international society more generally, as will be explored in greater detail in the second part of this chapter. Those voting against the adoption of the Statute included the US and China in the company of Iraq, Israel, Libya, Qatar, and Yemen.[147] India abstained with Russia, Brazil and South Africa voting in favour.

While Brazil said '[t]hose that commit crimes against humanity must not, under any circumstances, go unpunished'[148] and that the ICC 'will be a historic victory for the cause of human rights',[149] the deputy head of the Chinese delegation explained that China could not support the Court in its current form because it 'imposed an obligation on non-parties and constituted interference in the judicial independence and sovereignty of States', and also '[t]he Prosecutor's right to conduct investigations or to prosecute proprio motu, without sufficient checks and balances against frivolous prosecution, was tantamount to the right to judge and rule on State conduct.'[150] He also said 'China had serious reservations over the power of the Prosecutor to initiate investigation proprio motu, which could entail interference with the internal affairs of States'.[151] These concerns were repeated in the Sixth Committee. Its representative explained that the Rome Statute 'hardly reflected the principle of complementarity; on the contrary, the Court seemed to have become an appeals court sitting above the national court' and he also complained the agreed *proprio motu* powers 'meant that the authority of the Prosecutor was so extensive that he or she could influence or interfere directly with the judicial sovereignty of a State.[152] The lengths that China went to in order to explain its specific and principled objections to the Rome Statute as agreed, objections that it had raised consistently during the course of the preparatory negotiations and the negotiations at Rime, demonstrate that China's decision not to sign the statute was not principally informed by a desire to shield itself from potential scrutiny by the Court, but was rather because the Court did not conform to its normative vision of international society, a state-solidarist one, where state

[145] Kirsch and Holmes, 'The Birth of the International Criminal Court', 37.
[146] Rome Conference Official Records, Vol. II, 121.
[147] Benedetti, Bonneau and Washburn, *Negotiating the International Criminal Court. New York to Rome,* 142. Because the vote on the adoption of the Statute was uncorded at the request of the U.S. there is no official record of state voting on the adoption of the final Statute.
[148] UNGA Official Records, Fifty-fifth session, 10th plenary meeting, 12 September 2000, UN Doc. A/55/PV.10, 6.
[149] UNGA Official Records, Fifty-sixth session, 44th plenary meeting, 10 November 2001, UN Doc. A/56/PV.44, 6.
[150] Rome Conference Official Records, Vol. II, 123-124.
[151] G. Wang, 'The Statute of the International Criminal Court', Legal Daily, 29 July 1998 (in Chinese) cited in Jia, 'China and the International Criminal Court: Current Situation', 6.
[152] UNGA Sixth Committee, Official Records, Fifty-third session, 9th meeting, 21 October 1998, UN Doc. A/C.6/53/SR.9, paras. 30-43

sovereignty was preserved to a significant extent. This is also supported by the fact that at that time China had no reason to fear that the ICC would target its nationals and it is also evidenced by the nature of its subsequent engagement with the Court, which can be characterised as tentative support for the institution.

The decision of the other states to support the adoption of the statute is the result of, at least partially, their more cosmopolitan leaning within the state-solidarist position but also a stronger support for international criminal justice which meant that they were willing to accept, to a greater extent than China, the challenges to pluralist primary institutions and values posed by the Court. Russia was also no doubt confident that it would be able to exercise sufficient control over the Court through the Security Council, having achieved important concession in the statute in this regard.

5.5. An Ongoing Commitment to the Court

Despite its objections to the Statute, China expressed an interest in continuing to follow the development of the ICC and a desire to engage with it, and to that end, it participated in the meetings of the Preparatory Commission, the body responsible for operationalising the Court following the adoption of the Statute. For example, the Chinese government confirmed that it 'will, as an observer state, continue to adopt a serious and responsible attitude to follow carefully the progress and operation or (sic) the International Criminal Court.'[153] Its representative also explained that China:

> had always appreciated the need for an international criminal court marked by genuine independence, impartiality, effectiveness and universality and very much hoped that it establishment would make it possible to bring to justice the perpetrators of the most serious international crimes, thereby helping to build confluence in international justice, but ultimately contributing to the maintenance of international peace and security.[154]

It reiterated such support on subsequent occasions.[155] Similarly, it welcomed the operationalisation of the Court and the contribution its effective operation would make to international peace and security, but also warned that the 'activities of the Court should not run counter to the provisions of the Charter of the United Nations'.[156] It also noted the test faced by the Court was 'to carry out

[153] Ministry of Foreign Affairs of the People's Republic of China, 'VI. China and the International Criminal Court', 28 October 2003, available online at http://www.fmprc.gov.cn/mfa eng/wjb 663304/zzjg 663340/tyfls 665260/tyfl 665264/2626 665266/2627 665268/t15473.shtml (accessed 20/07/2018). *See also,* Address by Liu Zhenmin, General Director of Treaties and Laws of the Ministry of Foreign Affairs, PRC, to the Symposium on the Comparative Study of International Criminal Law and the Rome Statute organized by the Chinese Society of International Law (Beijing, 15-17 October 2003) cited in Jianping and Zhixiang, 'China's Attitude Towards the ICC', 620.
[154] UNGA Sixth Committee, Official Records, Fifty-seventh session, 15th meeting, 15 October 2002, UN Doc. A/C.6/57/SR.15, 6.
[155] UNGA Sixth Committee, Official Records, Fifty-eighth session, 9th plenary meeting, 20 October 2003, UN Doc. A/C.6/58/SR.9, 12; UNGA Sixth Committee, Official Records, Fifty-ninth session, 6th meeting, 14 October 2004, UN Doc. A/C.6/59/SR.6, 6.
[156] Ministry of Foreign Affairs of the People's Republic of China, 'VI. China and the International Criminal Court'.

its mandate fairly without political bias and double standards'[157] and suggested the success of the Court largely depended on it.[158] Importantly, China confirmed that '[w]e do not exclude the possibility of considering the accession to the Statute at an appropriate time'.[159] Bosco notes how both China and Russia 'opted to watch the court closely' including by sending 'observers to the court's public briefings and to the Assembly of States Parties meetings' and that '[t]heir diplomats in the Hague remained in contact with the prosecutor's office.'[160] This engagement reflects both China's commitment to justice to the extent that makes a positive contribution to peace and order, not justice for the sake of it, which is demonstrative of its state-solidarist position, but also its desire as a rising power to influence the construction of international society; as Dan argues, China appreciated 'the benefits of positive engagement with the ICC.'[161]

The Russian Federation struck a cautiously optimistic tone in the years following the Rome Conference. It signed the Statute in September 2000 'as a logical consequence of its support for a stable international system of law and order based upon justice and the rule of law'[162] and it said that 'the establishment of the International Criminal Court would be of the utmost importance' and, moreover, that the 'work of the Court would strengthen justice, the observance of human rights and the primacy of the law'.[163] Brazil signed the Rome Statute in February 2000. Subsequently, its President emphasised 'the establishment of the Court was an urgent necessity and would be a victory for the cause of human rights'[164] and the country 'invited all States that had not yet done so to ratify or accede to the Statute as soon as possible.'[165] However, the Brazilian representative also cautioned that the Court would need 'to be even-handed in its judgments' and that the judges would need 'to strike a balance between the demands of justice and retribution and the exigencies of international relations',[166] which is reflective of its state-solidarist position. In light of the concerns it had expressed about the Statute, India appeared largely intent on remaining outside of the ICC regime and, as Bosco notes, despite attempts by ICC officials to encourage India's accession, 'senior Indian officials privately conceded that membership was unlikely'.[167]

Despite South Africa's proposal for alternative forms of justice to be included in the Rome Statute having been rejected, in a strong show of support for the Court it signed the Rome Statute on 17

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[157] UNGA Sixth Committee, Official Records, Fifty-eighth session, 9th meeting, 20 October 2003, UN Doc. A/C.6/59/SR.9, 12.
[158] UNGA Sixth Committee, Official Records, Fifty-ninth session, 6th meeting, 14 October 2004, UN Doc. A/C.6/59/SR.6, 6.
[159] Ministry of Foreign Affairs of the People's Republic of China, 'VI. China and the International Criminal Court'.
[160] D. Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics,* (OUP, 2014), 133.
[161] Dan, 'China, the Crime of Aggression and the International Criminal Court', 121.
[162] UNGA Sixth Committee, Official Records, Fifty-fifth session, 11th meeting, 19 October 2000, UN Doc. A/C.6/55/SR.11, 3.
[163] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 6.
[164] UNGA Sixth Committee, Official Records, Fifty-sixth session, 26th meeting, 13 November 2001, UN Doc. A/C.6/56/SR.26, 6.
[165] UNGA Sixth Committee, Official Records, Fifty-eighth session, 10th meeting, 20 October 2003, UN Doc. A/C.6/58/SR.10, 6. *See also*, Bosco, *Rough Justice,* 179.
[166] UNGA Sixth Committee, Official Records, Fifty-seventh session, 14th meeting, 14 October 2002, UN Doc. A/C.6/57/SR.14, 2.
[167] Bosco, *Rough Justice,* 133-134.

July 1998, that is as soon as it had been adopted,[168] and it ratified it two years later on 27 November 2000,[169] becoming the 23rd State Party.[170] It also welcomed the adoption of the Rome Statute which it said 'sent a message that the international community would no longer stand by and watch the perpetration of horrendous crimes' but also reminded everyone that 'it was vital for the universality, effectiveness and impartiality of the Court that the entire international community should contribute to its establishment and, ultimately, its functioning.'[171] It representative expressed hope 'States which had voted against the adoption of the Statute would put aside their misgivings and continue to offer their valuable contributions to the establishment of the Court'[172] and it continuously urged states that had not ratified the Statute to do so as soon as possible.[173] South Africa's commitment to the ICC is also evident from it enacting the implementing legislation within its domestic law within two years of ratifying the Rome Statute[174] and it being the first African state to do so.[175] It is also evident, as Grant and Hamilton argue, in its refusal to sign an Article 98 bilateral agreement with the US which would have precluded South Africa from surrendering US citizens to the custody of the Court and would have contributed to the US's objective of active marginalisation of the institution.[176] Grant and Hamilton also argue 'South Africa's decision to become an active proponent of efforts to establish the ICC was consistent with Mandela's vision for the country's new foreign policy' that was committed to the protection of human rights.[177]

5.6. The ICC: Cosmopolitan Progress and its Pluralist Limits

Building on the analysis of the Rome negotiations and the involvement of the BRICS states specifically, this section of the chapter offers a more detailed analysis of the Rome Statute and an explanation as to how its represents a compromise between a defence of pluralist institutions and cosmopolitan aspirations. This has specific consequences for the Court in discharging its mandate which will be explored at the end of this section.

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[168] United Nations Depository Notification, Rome Statute of the International Criminal Court Adopted at Rome on 17 July 1998 (Statute), 25 September 1998, UN Doc. C.N.501.1998.TREATIES-2 (Depository Notification).

[169] United Nations Depository Notification, Rome Statute of the International Criminal Court Adopted at Rome on 17 July 1998, South Africa (Ratification), 27 November 2000, UN Doc. C.N.1062.2000.TREATIES-43 (Depository Notification).

[170] M. du Plessis, 'South Africa's Implementation of the ICC Statute', (2007) 5(2) *Journal of International Criminal Justice* 460-479, 460.

[171] UNGA Sixth Committee, Official Records, Fifty-third session, 9th meeting, 21 October1998, UN Doc. A/C.6/53/SR.9, 3.

[172] UNGA Sixth Committee, Official Records, Fifty-third session, 9th meeting, 21 October 1998, UN Doc.A/C.6/53/SR.9, 3.

[173] *See,* for example, UNGA Sixth Committee, Official Records, Fifty-fifth session, 9th meeting, 18 October 2000, UN Doc. A/C.6/55/SR.9, 7; UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 8; UNGA Sixth Committee, Official Records, Fifty-seventh session, 13th meeting,14 October 2002, UN Doc. A/C.6/57/SR.13, 8; UNGA Sixth Committee, Official Records, Fifty-ninth session, 6th meeting, 14 October 2004, UN Doc. A/C.6/59/SR.6, 10.

[174] The Implementation of the Rome Statute of the ICC Act 27 of 2002.

[175] du Plessis, 'South Africa's Implementation of the ICC Statute. An African Example', 461.

[176] J. A. Grant and S. Hamilton, 'Norm dynamics and international organisations: South Africa in the African Union and the International Criminal Court', (2016) 54(2) *Commonwealth and Comparative Politics* 161-185, 171-172.

[177] Grant and Hamilton, 'Norm dynamics and international organisations', 163.

5.6.1. The ICC as a Compromise Court

On 18 July 1998 the Rome Statute was opened for signature by way of a ceremony which took place at II Campidoglio in Rome. At that ceremony the late Cherif Bassiouni, a prominent international lawyer and supporter of the Court, made a speech in which he stated that the ICC 'reminds governments that *realpolitik,* which sacrifices justice at the altar of political settlements, is no longer accepted.'[178] In English School terms, Bassiouni was expressing the view that the value of justice had trumped that of order, law was superior to politics, and cosmopolitanism had prevailed over pluralism. Similar sentiments were expressed by others. Ralph said of the Court, it 'offers a truly revolutionary vision of world society'[179] and Cassese similarly suggested it 'is a revolutionary institution' and 'could mark a real turning point in the world community.'[180] Lee described the institution as 'a landmark achievement in recent history',[181] Sedat opined that the Rome Conference was 'a constitutional moment',[182] Kirsch and Robinson said the Court was an 'extraordinary new institution',[183] David Scheffer described it as *sui generis*[184] and Simpson notes the Court 'is regarded by many observers as the brightest star in the cosmopolitan firmament.'[185] Megret therefore argues 'no international legal institution betters approximates the Kantian ideal - type vision of a cosmopolitan-federation-of-states-in-the-making' and also notes 'many features of the Rome Statute... seem to be premised on precisely such a cosmopolitan outlook'.[186]

However, the Court does not represent a complete or substantial departure from the international order that was established in 1945 and many pluralist institutions continue to constrain its more cosmopolitan aspirations, as will be explored in detail below. The result of this was that the new court represented a compromise between cosmopolitan aspirations for universal individual justice that is delivered through an international organisation, and pluralist concerns for the preservation of a state-centric international society, state sovereignty and order between states. For example, Eckert argues ' [w]hile the International Criminal Court (ICC) is in some respects a triumph of moral universalism, it is also an institution that depends on the state system for implementing the rules and principles of cosmopolitan morality' and she further explained 'the ICC is cosmopolitan

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[178] Bassiouni, 'Negotiating the Treaty of Rome', 467.
[179] J. Ralph, *Defending the Society of States. Why American Opposes the International Criminal Court and its Vision of World Society,* (OUP, 2007), 24, 103, 114.
[180] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 145.
[181] R. S. Lee, 'An Assessment of the ICC Statute', (2001) 25(3) *Fordham International Law Journal* 749-766, 765.
[182] L. N. Sedat, *The International Criminal Court and the Transformation of International Law. Justice for the New Millennium,* (Transnational, 2002), 109.
[183] Kirsch and Robinson, 'Reaching Agreement at the Rome Conference', 91.
[184] D. J. Scheffer and A. Cox, 'The Constitutionality of the Rome Statute of the International Criminal Court', (2008) 98(3) *Journal of Criminal Law and Criminology* 983-1068, 1011.
[185] Simpson, *Law, War and Crime,* 35.
[186] Mégret, 'The Endless Debate', 258-259.

at the abstract level, but less so at the practical level.'[187] Therefore, as Megret explains, '[t]he ICC is the ultimate (and perhaps for the first time totally unavoidable) manifestation of an increasing split between traditional inter-state law and an emerging cosmopolitan legal order'.[188] It is thus best described as an *evolutionary* rather than a *revolutionary* organisation. The Rome Statute's compromise features will now be examined.

5.6.2. Jurisdiction and Sovereignty: Limits to Cosmopolitan Progress

The creation of a permanent international criminal court which has the potential to exercise jurisdiction in every corner of the world unlike the *ad hoc* and other hybrid tribunals whose geographical reach is limited at the outset,[189] represents the cosmopolitan aspiration of universal justice. Peskin argues because the ICC has the possibility of delivering equal justice to everyone everywhere it 'embodies the cosmopolitan world view in which all victims are citizens deserving of the protection afforded by the rule of law.'[190] It also reinforces the principle that international society has a legitimate interest in what occurs within a state's territory and the manner in which it conducts its warfare. This contributes to entrenching an understanding of sovereignty which is limited and conditional on compliance with human rights and humanitarian law standards. As Bosco has argued, the ICC 'is a striking advance for the legalist worldview against the traditional concept of sovereignty'[191] and, Broomhall has noted the establishment of the Court created 'a new legitimation environment in which states are under increased pressure to justify their decisions and account for their conduct towards their own citizens'.[192]

However, this is tempered by the fact the Court was established by way of a multilateral treaty and states are thus only bound by its jurisdiction by way of their voluntary consent, in most instances. The Court's jurisdiction is thus only universal in theory, not in reality. This results in some states being subject to the Court's jurisdiction, whilst others are not. As such, the Court is embedded within a state-based global political order and its ultimate authority is based on a classical, pluralist approach to international law including the principle of consent derived from state sovereignty. In this sense, China and Russia had achieved important concessions in the Court's creation in

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[187] A. E. Eckert, 'The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide' in S. C. Roach (ed), *Governance, Order, and the International Criminal Court. Between Realpolitik and a Cosmopolitan Court,* (OUP, 2009), 205.

[188] Mégret, 'The Endless Debate', 260. *See also,* Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 161 and L. N. Sadat and S. R. Carden, 'The New International Criminal Court: An Uneasy Revolution', (2000) 88(3) *The Georgetown Law Journal* 381-474, 385.

[189] V. Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice' in R. Pierik and W. Werner (eds), *Cosmopolitanism in Context,* (CUP, 2010), 195.

[190] Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', 196.

[191] Bosco, *Rough Justice,* 4.

[192] B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law,* (OUP, 2003), 5.

accordance with their state-solidarist vision of international society in which cosmopolitan values, namely the delivery of criminal justice, is undertaken with deference to pluralist institutions, such as sovereignty.

5.6.3. The Prosecutor's *Proprio Motu* Powers as Cosmopolitan Progress

The granting of *proprio motu* powers to the Court's Prosecutor is one of the Court's main cosmopolitan and revolutionary features, a decision staunchly opposed by China, India and Russia, because it can exclude the state from the application of the law. More specifically, the Prosecutor is not reliant on a state to make a referral to the Court to trigger its jurisdiction nor can a state decide unilaterally that such powers should not be exercised in a given situation. The power and authority lies with the Prosecutor and thus the Court as a supranational institution. As Ralph states, 'an investigation and (because the judges are independent) a trial can be done without states being involved. The process of criminal justice is in this respect a 'world'...not an 'international' institution'.[193] However, the *proprio motu* power is subject to some limits which gives some ongoing role for states. For example, the prosecutor is obliged to notify the state when initiating an investigation or prosecution and a state can challenge the jurisdiction or admissibility of a case initiated *proprio motu* by the Prosecutor before the Pre-Trial Chamber. Whilst such provisions do not cede control over investigations and prosecutions to states, they do still represent a deference to the continuing authority of states in world order. Moreover, the Assembly of States Parties appoint a Prosecutor and thus exercise some control over the position that is afforded the powers.

5.6.4. Prosecuting Individuals and Denying Immunity as Cosmopolitan Progress

The cosmopolitan nature of the ICC is evident in the fact that it is concerned with prosecuting individuals, not determining the responsibility of states, consistent with its forebears, and that it denies immunity to sitting heads of state and other senior government officials, pursuant to Article 27 of the Rome Statute, which furthers the consolidation of the anti-impunity norm established at Leipzig and Nuremberg. These provisions gained widespread support during the preparatory negotiations and were approved and adopted without difficulty or debate at the Rome.[194]

Immunity from criminal prosecution is granted under international law to sitting heads of state and other senior officials on the basis that they embody the inalienable sovereignty of the state. Denying immunity to such individuals therefore pierces the sovereign veil and denies individuals the ability

[193] Ralph, *Defending the Society of State,* 102, 114. *See also,* Eckert, 'The Cosmopolitan Test', 218.
[194] W. A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute,* (OUP, 2010), 424, 447

to hide behind the shield of sovereignty to avoid prosecution by the Court. In addition, the purpose of immunity rules is to facilitate inter-state diplomacy and thereby the peaceful interaction of states. The denial of immunity by the ICC means that the obligations States Parties owe to the Court to arrest and surrender individuals of other States Parties subject to an ICC arrest warrant supersede diplomatic immunity obligations that exist between them. Therefore, it is argued the Court privileges the pursuit of prosecutions above inter-state relations or, in English School terms, justice above order. It also reflects more broadly the transition from state-based society to a more supranationalised one, regulated by international organisations.

However, Article 98 of the Rome Statute expressly articulates that the Court must not require the cooperation of a State Party where to do would require that state to violate diplomatic immunity or other obligations that it owes to a 'Third State' (a state not party to the Rome Statute). This provision sought to address the likely conflict of obligations that would arise for states. It also reflects the deference that the Rome Statute regime pays to the positivist consent-based nature of international law and subordinates the pursuit of justice to it. In other words, the cosmopolitan parts of the Statute, specifically the principles of individual criminal responsibility and irrelevance of official capacity, are subordinated to the constitutive rules of international society. It represents an acknowledgment of the Court's place within the society of sovereign states, the limited nature of its jurisdiction, and an acceptance of the consequential need to curtail the exercise of its authority. Williams and Sherif argue 'Article 98(1) recognizes that a state's other international commitments may override the duty to cooperate with the ICC'[195] and Needham notes that the provision 'is a reminder of the treaty- based limits of the Rome Statute'.[196] Despite its clear importance, Article 98 did not take up too much negotiating time at the conference and was not considered to be of the utmost sensitivity by delegations.[197]

The application of Article 27 and its relationship with Article 98 has, however, become controversial and contested, particularly after the decision of South Africa not to arrest Omar al-Bashir, the current president of Sudan who is wanted by the ICC, in 2015 and the legal proceedings that followed it, which will be explored in detail in Chapter Nine. This suggests that delegates either did not understand the complexity of the issues it raised or simply did not have sufficient time to explore them, and this would not have been assisted by the fact that despite their clear relationship they were not considered together during the Rome negotiations. This is reflected by the fact they are contained in separate parts of the Statute which, Bassiouni suggested, 'could potentially foster

[195] S. Williams and L. Sherif, "The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and International Criminal Court", (2009) 14(1) *Journal of Conflict and Security Law* 71-92, 86.
[196] J. Needham, 'Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law', (2011) 17 *Auckland University Law Review* 219-248, 234.
[197] Schabas, *The International Criminal Court. A Commentary on the Rome Statute,* 1037-1038.

inconsistent interpretation of the Statute's immunity provisions' and led him to argue that the content of these two Articles should have been joined.'[198] Bassiouni's prophecy did indeed come true and, moreover, the continuing controversy about these articles represents a continuing debate about the appropriate nature of global political order.

5.6.5. The Complementarity Regime: A Limit to Cosmopolitan Progress

The Court's complementarity regime reflects the compromise nature of the Rome Statute. This provides that the Court can only exercise jurisdiction where a State Party 'is unable or unwilling to genuinely carry out an investigation or prosecution'. This provision reflects the primacy of the state in matters of international criminal justice and the residual role for international organisations. It therefore pays deference to the pluralist, state-based vision of international society in the implementation of cosmopolitan values. This stands in contrast to the *ad hoc* Tribunals which had primacy over national legal systems. Moreover, as McAuliffe argues, 'Article 17 reinforces sovereignty and affirms that States may represent the most effective way of repressing international crimes.'[199] He further explains this was the only way states believed 'the putative Rome Statute system could be legitimate and sustainable' but notes it also 'disappointed those with more cosmopolitan visions of international law.'[200]

However, the fact the Court has the power to determine when a state is 'unable or unwilling' to investigate or prosecute reflects the limits of such deference. As Roach argues, 'while states retain a right to investigate and prosecute, the ICC's jurisdictional authority can trump state sovereignty when the ICC prosecutor determines...there is adequate evidence indicating a state's unwillingness or inability to investigate or prosecute'.[201] It also reflects the supranationalised nature of global governance and the fact that international society retains a legitimate interest in and control over the internal affairs of states. Peskin notes that on the one hand complementarity 'envisions a more horizontal relationship with states' but 'the ICC's relationship with a targeted state takes on a vertical dimension if the Court imposes justice on a state that is unwilling to undertake prosecutions itself.'[202] It can also be argued that while the complementarity principle reinforces state sovereignty, it specifically reinforces a limited, conditional and responsibility-based version of it and, as Knudson notes, it represents the 'accommodation of international criminal prosecution to other

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[198] Bassiouni, 'Negotiating the Treaty of Rome', 454.
[199] P. McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism', (2014) 13(2) Chinese Journal of International Law 259-296, 272.
[200] McAuliffe, 'From Watchdog to Workhorse', 272-273, 286.
[201] S. C. Roach, *Politicizing the International Criminal Court. The Convergence of Politics, Ethics, and Law*, (Rowman and Littlefield Publishing Group, Inc., 2006), 42.
[202] Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', 206. *See also*, McAuliffe, 'From Watchdog to Workhorse', 261; Jessberger and Geneuss, 'The Many Faces of the International Criminal Court', 1087

fundamental institutions', namely state sovereignty.[203]

The complementarity regime can be said to meditate between competing claims to authority in relation to the investigation and prosecution of international crimes.[204] McAuliffe argues that the 'primary characteristic of the complementarity regime is balance...[i]t caters for State authority but responds to the traditional Westphalian failure to protect individuals from atrocity, balancing legitimacy with efficacy, supra-national authority with domestic constitutional orders.'[205] In a similar vein, Ralph argues complementarity is a means by which different visions of international order, specifically international society and world society, are able to co-exist, although it is perhaps better described as how state-solidarist and cosmopolitan-solidarist visions of society can be reconciled. Ralph states that this principle 'limits the revolutionary impact of the ICC and in effect acts as a bridge to Grotian conceptions of international society',[206] making the Statute palatable for the largest number of states.

5.6.6. A Focus on Retributive Justice: The Prioritisation of Law over Diplomacy

The Court's narrow, retributive approach to justice reflects its cosmopolitan nature. Like the *ad hoc* Tribunals before it, the ICC recognises '[j]ustice is a key prerequisite for lasting peace'[207] and is unwilling to sacrifice it at the altar of political settlements. It is focused on bringing individuals to justice, not on facilitating negotiated settlements to conflicts, although prosecutions can incidentally contribute to that.[208] This is echoed in the sentiments expressed by the late Kofi Annan at the ICC's inauguration ceremony when he stated '[t]here are times we are told justice should be put aside...[b]ut we have come to understand that without justice there can be no lasting peace.'[209] As Bosco has noted, the ICC's 'march toward the rule of law was conceived of as a march away from something else: politics and expediency.'[210]

This can be seen in the absence of provision for amnesties within the Rome Statute. It is also seen in the Office of Prosecutor's narrow interpretation of Article 53 of the Rome Statute. Article 53

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[203] T. B. Knudson, 'Master Institutions of International Society: Theorizing continuity and change'., paper prepared for the 8th Pan-European Conference on International Relations 18-21 September 2013, Warsaw, 30.
[204] S. C. Roach, *Politicizing the International Criminal Court,* 51.
[205] McAuliffe, 'From Watchdog to Workhorse', 274.
[206] J. Ralph, 'International society, the International Criminal Court and American foreign policy', (2005) 31(1) *Review of International Studies* 27-44, 36.
[207] *See,* ICC, 'About', available online at https://www.icc-cpi.int/about (accessed 30/072017).
[208] *See* H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil,* (Penguin Book, 1977), 5 in which she argues that the sole purpose of criminal trials is to render justice.
[209] Secretary-General Kofi Annan's Statement to the Inaugural Meeting of the Judges of the International Criminal Court, 11 March 2003, The Hague cited in Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', 211.
[210] Bosco, *Rough Justice,* 3.

provides that the Prosecutor shall initiate an investigation unless it 'would not serve *the interests of justice*' (emphasis added)[211] and the Prosecutor has interpreted this test as being confined to legal issues, such that it is not informed by the affect that an investigation and a subsequent prosecution may have on peace negotiations.[212] This interpretation and approach has been approved by leading academic commentators, which confirms the narrow and legalistic approach that has, and should be (according to the Rome Statute), adopted by the Court. As Stahn explains:

> [i]f the phrase 'in the interests of justice' is construed in light of the object and purpose of the Rome Statute, a construction that permits consideration of a domestic amnesty, domestic truth commission or peace process and results in permanently not initiating an investigation or proceeding from investigation to trial would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble.[213]

This potentially puts the Court on a path of conflict with states, like the BRICS, who emphasise the need for justice to be pursued pragmatically and not to compromise the pursuit of the peaceful settlement of conflicts through diplomacy and negotiation, and alternative means of confronting gross human rights violations. This issue became a reality as is evident from the BRICS states contestation of the ICC, as will be examined in Chapters Seven to Nine.

5.6.7. The Court's Relationship with the Security Council: The Limits of Juridification

The ICC's legal relationship with the Security Council reflects the compromise nature of the Court. Whilst the ICC represents a move towards supranationalisation, the control the Security Council is able to exercise over the Court, with its power to refer and defer cases, reasserts the continuing role of the state in global governance. In addition, given the powers of the P-5 in the Security Council, this allows them to exercise a disproportionate amount of control over the Court and thus, as Simpson argues, '[t]he ICC's cosmopolitanism is similarly qualified in its subservience to sovereignty and hegemony.'[214] Furthermore, the trajectory of solidarist progress also includes the legalisation and judicialisation of international society, and the consequential marginalisation of

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[211] Article 53 (1) Rome Statute.

[212] Office of the Prosecutor, 'Policy Paper on the Interests of Justice - September 2007' available online at https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf (accessed 19/07/2018). *See also,* Office of the Prosecutor, 'Speech by Mr. James Stewart, Deputy Prosecutor of the International Criminal Court, "Transitional Justice in Colombia and the Role of the International Criminal Court", Bogota, Colombia', 13 May 2015, available online at https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf (accessed 19/07/2018), 16 - the Deputy Prosecutor has explained 'considerations of peace and security will ordinarily fall outside of the scope of the interests of justice formula in the Rome Statute' and that 'peace-making is the responsibility of other bodies'.

[213] C. Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court', (2005) 3(3) *Journal of International Criminal Justice* 695-720, 703, 718. *See also,* D. A. Arcarazo, R. Buchan and R. Uruena, 'Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law', (2015) 26(2) *Criminal Law Forum* 291-318, 313.

[214] Simpson, *Law, War and Crime,* 38.

inter-state politics and the institution of diplomacy. Whilst the Court's legal regime marginalises politics and diplomacy in a number of respects, as discussed above, the ability of the Security Council to exercise some control over the Court permits the continued political control over the Court's work. As Peskin argues, '[t]he promise of the ICC as a legal body independent of and untarnished by international politics is also called into question' when the Security Council is able to suspend investigations.'[215] Furthermore, given the Security Council's primary function is to address matters of peace and security and because it can defer cases subject to the ICC's jurisdiction when it determines that it poses a threat to international peace and security, this highlights that pluralist concerns for order within international society temper the Court's aspirations to achieve justice or, as Ralph argues, 'a reasonable balance is struck between the pursuit of order and justice.'[216] However, the fact that the Security Council can refer non-States Parties to the Court, and thereby make them subject to the Court's jurisdiction, can work to support the cosmopolitan aspirations of the Court by making justice theoretically universal, albeit subject to political will, particularly that of the P5. But, Ralph notes that this is 'small consolation for those who sought to separate international justice from the political consideration of the Security Council.'[217]

5.7. The Consequences of a Compromise Court

The compromise nature of the Rome Statute reflects the pluralist restraint on the cosmopolitan-solidarist progress of international society. While there are some benefits to the state-based nature of the Rome Statute regime - as Ralph notes the drafters 'saw international society as part of the solution' in that states would bear the primary responsibility for delivering justice [218] - it has also presented the Court with a number of challenges. As Ralph also argues, '[concessions to these traditional ideas have weakened the Court and mitigated its impact on international society'.[219] Sedat and Carden have similarly opined that the Rome Statute is an 'uneasy revolution'[220] and a 'fragile compromise which may or may not succeed.'[221]

First, it can be argued the compromise nature of the Court means that it has two, often competing, identities and two different expectations that are placed upon it. On the one hand the states that wanted a strong court will expect it to act robustly in the pursuit of ending impunity and delivering justice to victims of egregious human rights violations, and advancing a thickly solidarist vision of

[215] Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', 199.
[216] Ralph, *Defending the Society of States,* 24.
[217] Ralph, *Defending the Society of States,* 116.
[218] Ralph, *Defending the Society of States,* 24.
[219] Ralph, *Defending the Society of States,* 2.
[220] Sadat and Carden, 'The New International Criminal Court: An Uneasy Revolution', 388.
[221] Sadat and Carden, 'The New International Criminal Court: An Uneasy Revolution', 459.

international society. It will be expected to follow the belief that 'there can be no peace without justice'. If the Court does so, however, it will likely bring it into conflict with those states that support a conservative court based upon the pluralist institutions of international society and do not wish to see the institutions, such as state sovereignty, being substantially reconceptualised in a cosmopolitan way, and who do not wish to see justice pursued at the expense of peace and order. These conflicting visions and expectations put the Court in the unenviable positions of having to tread a very careful line to maintain the support of the largest number of states and to avoid contestation. The perceived failure of the Court on the part of some states, including the BRICS, to do this and to instead pursue a robust cosmopolitan agenda has detrimental implications for the Court's legitimacy and its authority, as will be explored in the latter part of this thesis.

Second, the Rome Statute's complementarity provisions serve both normative and practical purposes but also present challenges for the Court. Whilst they represent the primacy of the state within the Rome Statute system and international society more widely, they serve the important purpose of placing the primary responsibility and burden of investigating and prosecuting crimes on national systems, they promote justice being delivered close to the victims, and they serve to embed norms of international criminal justice in domestic systems and assist in developing national capacity, what is known as positive complementarity. As Akhavan argues, '[t]he role of the ICC in catalysing internalization of relevant international norms in domestic systems may be less sensational than trials in The Hague. But in the long term, it is a far more important and far-reaching contribution to ending impunity.'[222] However, in order for the regime to function effectively states need to conduct genuine and effective investigations and prosecutions.

Third, the reliance the Court is forced to place on state cooperation more generally in discharging its mandate in respect of, for example, obtaining funding and securing evidence and the arrest of suspects, also places the Court in a vulnerable position.[223] As Cassese has argued 'the framers of the Rome Statute were not sufficiently bold to jettison the sovereignty oriented approach to state cooperation with the Court and opt for a 'supra-national' approach. Instead of granting the Court greater authority over states, the draughtsman have left too many loopholes permitting states to delay or even thwart the court's proceedings'.[224] This has consequences for the Court's legitimacy, as it is derived from its a-political nature and solely evidence-led prosecutions.

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[222] P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', (2013) 11(3) *Journal of International Criminal Justice* 527-536, 532. *See also,* Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', 206.

[223] *See,* Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', 200.

[224] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 170. *See also,* J. N. Clark, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities', (2011) 9(3) *Journal of International Criminal Justice* 521-545, 527; Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', 215.

The politicisation of the Court is also caused by its relationship with the Security Council and dealing with that relationship in practice was to prove a significant challenge for the Court, as will be explored in the course of Chapters Seven to Nine. Jessberger and Geneuss argue 'there is the danger of politicization and instrumentalization of the Court, and the ICC becoming a mere 'bargaining chip' in peace negotiations in the hands of the powerful permanent members of the Security Council'[225] which, as Kochler highlights, creates a risk of the ICC being used as a means of delivering 'victor's justice'.[226] This is particularly true given that the P-5 members can shield themselves from the Court's jurisdiction, yet subject others to it by way of referring a situation to the Court pursuant to Article 13(b) of the Rome Statute.

One of the main challenges faced by the Court, however, is the consent-based nature of its jurisdiction, which is predicated upon a continuing deference to state sovereignty. Because states are required to voluntarily join the Rome Statute before the Court can exercise jurisdiction over it, this allows states to remain outside of the Court's reach, including the most powerful states, creating what can be described as a 'patchwork jurisdiction'. The potential universality of the Court is currently undermined by states such as China, India, Russia and the US refusing to become States Parties.[227] The patchwork limits the Court's ability to end impunity and results in selective prosecutions, undermining its authority and potentially resulting in questions about its very purpose. As Kochler notes:

> [u]nder the circumstances, the ICC cannot dispel the perception of a "discriminatory approach" to the prosecutions of the most serious crimes...[e]ven if exercising its mandate to the fullest extent possible, it can do nothing about the existence of double standards insofar as officials of some of the most powerful countries cannot be investigated of prosecuted for crimes within the Court's jurisdiction.'[228]

This problem has manifested in the perceived anti-African bias and targeting of African states by the ICC, which has significant implications for the Court's legitimacy and has resulted in a large backlash against it. As Clark explains, 'the ICC has encountered difficulties' with regard to perceptions of bias and selectivity and goes on to note that '[q]uestions have inevitably been raised, for example, concerning the quality and impartiality of any 'justice' dispensed by a court that is only focussing on crimes committed in Africa and is completely powerless to act against the United

[225] Jessberger and Geneuss, 'The Many Faces of the International Criminal Court', 1094.
[226] H. Kochler, 'Justice and Realpolitik: The Predicament of the International Criminal Court', (2017) 16(1) *Chinese Journal of International Law* 1-9, 5.
[227] Peskin, 'An idea becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice', 208.
[228] Kochler, 'Justice and Realpolitik', 2-3.

States',[229] as well as other major powers. The problem of certain states remaining outside of the Court's jurisdiction is mitigated to some extent by the ability of the Security Council to refer situations to the Court even where a state has purposefully remained outside of the Rome Statute regime, such as in the cases of Sudan and Libya, which will be examined in due course.

5.8. Conclusion

This chapter has examined the BRICS states' contributions to the creation of the ICC, particularly their role and negotiating positions during the Rome conference negotiations. It has also provided an English School-framed analysis of the Rome Statute. It was first argued that the BRICS states supported the creation of a permanent enforcement mechanism for international criminal justice. It was demonstrated how the BRICS states played a significant and constructive role during the preparatory negotiations throughout the 1990s and at the final negotiations in Rome in 1998. It was also shown, however, that at the same time the BRICS states demanded that the Court should assimilate within a state-solidarist conception of international society, paying sufficient deference to pluralist values and primary institutions, which is consistent with their approach to international criminal justice in the preceding years. More specifically, the chapter demonstrated that China's primary concern throughout the negotiations was to ensure that the court did not undermine state sovereignty or challenge the primary authority of the state in matters of global governance, which is seen in it advocating for a limited jurisdiction for the Court, the complementarity principle, and that the Prosecutor should not have *proprio motu* powers. Russia was similarly concerned that the Court should be established in a manner consistent with established, classical international law, and in its closing statement at the Rome conference it said 'the new International Criminal Court would successfully take its place in the system for the maintenance of international peace and security' and 'could act fully in accordance with recognized norms and standards of intenational law and human rights'.[230] Russia was also insistent the Court not threaten peace and security, and we see this in its strident support for a strong role for the Council *vis-a-vis* the Court, a view that was shared by China.

India also sought to ensure the Court integrated into a state-solidarist conception of international society. This can be seen in its support for state consent with regard to jurisdiction, opposition to prosecuting non-States Parties' citizens and, like China, a rejection of the *proprio motu* powers. It differed, however, in that it staunchly opposed a role for the Security Council, fearing it would further entrench the post-1945 political settlement, it would lead to the ICC becoming involved in

[229] Clark, 'Peace, Justice and the International Criminal Court', 524.
[230] Rome Conference Official Records, Vol. II, 128.

political game playing,[231] and risked politicising the work of the court and making it 'a tool for western states, opening the door to European neo-colonialism.'[232] Ultimately, China and India felt that the final version of the Rome Statute proposed by the states did not sufficiently address their pluralist concerns and were unable to vote in favour of it. China did however commit to continuing to engage with the Court which serves as both evidence of its support for the ICC and its desire to play a meaningful role in global governance as a rising power. Russia was more positive, it signed the Rome Statute and also engaged with the Court in its early years.

Brazil adopted a moderate and pragmatic position, assimilating a cosmopolitan vision of the court with the reality of the state-based international society in which the new institution would have to exist and function. This can be seen in the support it expressed for the 'opt-in' approach to the Court's jurisdiction and its support for *proprio motu* powers. After voting in favour of the statute, the Brazilian delegate explained his country strongly supported the establishment of the Court.[233] South Africa had the most cosmopolitan and hopeful vision of the Court of all the BRICS states. Its delegates spoke passionately in support of a strong and independent court that would put an end to impunity for perpetrators of gross human rights violations, words that had not been used by the other BRICS states. It supported the German proposal for an inherent jurisdiction, *proprio motu* powers for the prosecutor, and was unfazed by the Court being able to exercise jurisdiction over non-States Parties. It did, however, adopt a pragmatic and constructive approach like Brazil, willing to compromise on its more radical positions for the sake of ensuring that the Court would be established. It accepted the prosecutor's *proprio motu* powers had to be subject to safeguards, that automatic jurisdiction was necessary and it did not speak that strongly against a role for the Security Council during the debates. It also, like the other BRICS states, insisted that the Court be established in accordance with international law. The position is consistent with South Africa's past commitment to human rights and transitional justice, and its identity as a moral authority in international society. South Africa's strong support for the ICC was demonstrated by its decision to sign the Rome Statute on the day it opened for signature, being one of the first states to sign it, and its subsequent very rapid development and implementation of domestic legislation enshrining the Rome Statute in national law.

It is argued that the BRICS states support for the ICC and their involvement in the process of establishing the Court is demonstrative both of their normative commitment to the institution of criminal justice but also a material desire to play a meaningful role in the construction of global order commensurate with their evolving rising power status and to ensure that the Court was

[231] Ramanathan, 'India and the ICC', 634. *See also,* Rome Conference Official Records, Vol. II, 121.
[232] Bosco, *Rough Justice,* 47.
[233] Rome Conference Official Records, Vol. II, 123.

developed in accordance with their state-solidarist vision of international society. Moreover, some of the BRICS states' positions in relation to specific aspects of the Rome Statute legal regime were likely informed, at least in part, by self-interested concerns to protect their internal affairs from the scrutiny of the Court and to protect their nationals from prosecution, such as by objecting to the Court having jurisdiction over internal armed conflicts and nationals of non-States Parties, and by opposing *proprio motu* powers for the prosecutor. Thus we see that the BRICS states' foreign policy in respect of the Court is informed by both normative and material concerns.

It the second part of the chapter, it was argued the Rome Statute reflects a compromise between the cosmopolitan aspirations that drove the process of creating a permanent international criminal court and the need to pay sufficient deference to the pluralist values and primary institutions of international society, and that it should be described as *evolutionary* rather than *revolutionary*. It was shown that these compromises manifested in the rules concerning the Court's jurisdiction, which preserved to a large extent the consent-based nature of classical international law, and the Statute's complementarity provisions, which placed the primary responsibility and authority upon states for the investigation and prosecution of crimes but gave the Court the residual jurisdiction and the power to determine when such jurisdiction should be implemented. Moreover, while state sovereignty was curtailed by denying incumbent heads of state immunity from prosecution before the Court, Article 98 of the Rome Statute sought to limit its applicability in furtherance of the preservation of diplomatic immunity obligations that exist between States Parties and non-States Parties, these simultaneously deferring to the sovereign right of states to remain outside of the Rome Statute regime and accepting the prioritisation of diplomacy over justice. Furthermore, the relationship established between the Court and the Security Council ensured that there was some state-led political control over the implementation of the law and establishing a role for diplomacy alongside it.

One of the most significant cosmopolitan aspects of the ICC was its focus on criminal justice to the exclusion of all other mechanisms of delivering transitional justice, such as the use of truth and reconciliation and amnesties, as had been proposed by South Africa and supported by other states during the Rome Conference. This would, it was argued, likely bring the Court into conflict with states who supported a more holistic approach to addressing gross human rights violations and facilitating post-conflict reconciliation, as will be addressed in the remainder of the thesis. The chapter also pointed out the risk of the politicisation of the Court as a result of its relationship with the Security Council and consent-based jurisdiction, and the threat this posed to the Court's legitimacy which is derived from its a-political, legal, and non-discriminatory approach to the delivery of its mandate, as is the case with all other international courts and tribunals.

The future of the Court, it has been argued, depends on 'whether state sovereignty will restrict the ICC's juridical power, or whether the application of the ICC's new standards of legitimacy (and its attendant ability to promote its political legitimacy) will allow it to overcome the tensions between state sovereignty and its global juridical power'.[234] If the Court is successful in doing so it 'will continue to push us further in the direction of world society'[235] and, as Megret suggests, might well one day precipitate a revolution of Westphalian proportions which, although it may not do away with the state system, would certainly rest its legitimacy on an entirely different footing'.[236] McAuliffe has added that the ICC is likely to push an increasingly cosmopolitan agenda in its practice of international criminal justice and implementation of the Rome Statute on the basis that cosmopolitan-inclined actors, namely ICC staff and the Court's supporters, 'have always proven willing to exploit any cracks and fissures to push international criminal law in a direction which may not necessarily correspond with that envisioned by its creators, but which will build towards establishing a more cosmopolitan institution.'[237] This, however, risks bringing the Court into conflict with states, like the BRICS states, who defend pluralist values and primary institutions in the face of substantial cosmopolitan progress.

This issue will now be looked at in the remainder of this thesis and consideration will be given as to whether the 'fragile compromise' of the Rome Statute, as described by Sedat and Carden, will or will not succeed in light of the shift in the balance of power in international society and the creeping cosmopolitanism of the ICC. This is important given the BRICS states had not formed the grouping at the time of the Rome Conference and so the remainder of this thesis will examine how those states subsequently identified as rising powers and having coalesced into the political grouping engaged with international criminal justice and particularly the ICC as aspirant norm-shapers and participants in global governance.

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[234] S. C. Roach, *Politicizing the International Criminal Court,* 89.
[235] Ralph, 'International Society, the International Criminal Court, and American Foreign Policy' cited in Roach, *Politicizing the International Criminal Court,* 90.
[236] Mégret, 'The Endless Debate', 266.
[237] McAuliffe, 'From Watchdog to Workhorse', 295.

CHAPTER SIX

THE BRICS, THE CRIME OF AGGRESSION AND THE ICC

6.1. Introduction

This chapter builds on the preceding analysis of the development of international criminal justice, particularly the establishment of the ICC, by focusing on a specific and particularly controversial aspect of the ICC's jurisdiction, namely the crime of aggression. The chapter is structured as follows. It begins by briefly charting the history of the regulation of the use of force[1] and the early attempts to criminalise aggression, identifying the important contributions of BRICS states in that process. It then goes on to examine the negotiations on the crime of aggression within the Rome Statute regime, including the Rome negotiations in 1998 and the Kampala negotiations in 2010, again with a particular focus on the contributions and positions adopted by the BRICS states.

It is argued while the BRICS supported the criminalisation of aggression as a matter of principle, demonstrative of their longstanding commitment to international criminal justice, concerns were raised as to how the crime should be operationalised. This is consistent with the argument made throughout the thesis that the concerns raised by the BRICS in relation to cosmopolitan progress in international society centre upon matters of implementation and governance rather than the content of cosmopolitan institutions and norms. Moreover, it is demonstrated how the BRICS states sought to defend pluralist values and institutions when agreeing to the inclusion of the crime of aggression in the Rome Statute and the rules relating to its operationalisation. This, it is argued, provides further evidence of the BRICS states' state-solidarist vision of international society and their attempts to ensure that global governance is constructed in accordance with such a vision.

There are, however, divergences in opinion among the BRICS states as to what conformity with a state-solidarist conception of international society requires and this is reflected in the positions adopted by states on the implementation of the crime of aggression. For example, whereas the position adopted by Russia and China had the strongest pluralist tendencies, in that they advocated for a privileged role for the Security Council in operationalising the crime of aggression within the Rome Statute, Brazil and South Africa advanced compromise positions which supported greater cosmopolitan progress with less restrictive pluralist limits. It is further argued that the operationalisation of the crime of aggression in the Rome Statute reflects a compromise between

[1] As O'Connell and Niyazmatov have noted, '[t]he place to begin any consideration of today's law against aggression is the *jus ad bellum*' – M.E. O'Connell M. Niyazmatov, 'What is Aggression? Comparing the *Jus Ad Bellum* and the ICC Statute', (2012) 10(1) *Journal of International Criminal Justice* 189-207, 192.

solidarist ambitions and pluralist concerns, more than the balance struck at Rome, which reflects the overriding concerns for peace and security which are engaged with the crime of aggression.

6.2. The Regulation of Aggressive Use of Force in International Law

Prior to the evolution of the crime of aggression, states sought to regulate the use of force under international law, which had hitherto been a matter which fell solely within the domain reserve of states, in order to promote international peace and security.[2] This development represented the progressive juridification of international society and the emergence of a global governance framework capable of enforcing law vertically on states. War thus became an institution of law.[3] This development was facilitated by the creation of the League of Nations[4] and, later, the United Nations,[5] whose constitutive documents circumscribed the right of sovereign states to use force and established systems for dealing with unlawful uses of it, including in the case of the UN, the suppression of acts of aggression.[6] As Knudson notes, the UN Charter 'signalled fundamental changes in the constitutive principles of war as an institution.'[7] This was later supplemented by the adoption of a General Assembly Resolution defining aggression, it having not been defined in the UN Charter at the insistence of the major powers, including China and the USSR.[8]

It is worth noting that the BRICS states made a significant contribution to the evolution of a legal framework which sought to supress aggression. In addition to China and the USSR's involvement in determining how aggression should be addressed in the UN Charter, they also contributed to the process of defining aggression in the second half of the twentieth century. The USSR put a draft resolution to the General Assembly which provided a definition of aggressive conduct[9] and it contributed extensively to subsequent discussions on the topic in both the Special Committee on the Question of Defining Aggression,[10] which was established to define aggression[11] following a proposal put forward by the USSR[12], and the Sixth Committee of the General Assembly.[13] China

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[2] *See*, S. C. Neff, *War and the Law of Nations: A General History,* (CUP, 2005), 49-68.
[3] M. de Hoon, 'The Law and Politics of the Crime of Aggression', (doctoral thesis on file at the Vrije Universiteit Amsterdam), available online at http://dare.ubvu.vu.nl/handle/1871/55318 (accessed 20/07/2018), 67-69.
[4] Covenant of the League of Nations (adopted on 28 June 1919, entered into force on 10 January 1920), Article 10.
[5] Charter of the United Nations (adopted on 24 October 1945), Article 1(1), Article 2(4) ('UN Charter').
[6] Article 11 Covenant of the League of Nations; Chapter VII UN Charter.
[7] T. B. Knudson, 'Master Institutions of International Society: Theorizing continuity and change', paper prepared for the 8th Pan-European Conference on International Relations 18-21 September 2013, Warsaw, 23.
[8] P. Grzeybk, *Criminal Responsibility for the Crime of Aggression ',* (Routledge, 2013), 45.
[9] UNGA Official Records, Fifth session, Annexes, Agenda Item 72, 'Union of Soviet Socialist Republics: draft resolution on the definition of aggression', 4 November 1950, UN Doc. A/C.1/608.
[10] Report of the Special Committee on the Question of Defining Aggression, 11 March - 12 April 1974', 36-37.
[11] UNGA Res. 2330 (XXII) (18 December 1967), UN Doc. A/RES/2330(XXII).
[12] B. Ferencz, 'Defining Aggression: Where its Stands and Where it's Going', (1972) 66(3) *American Journal of International Law* 491508, 494.
[13] UNGA Sixth Committee, Official Records, Twenty-ninth session, 1472nd meeting, 9 October 1974, UN Doc. A/C.6/SR. 1472, 43-44

also contributed its views to the process,[14] as did Brazil.[15]

6.3. The Origins of the Crime of Aggression and the Contribution of BRICS States

The criminalisation of aggression 'has been a hugely controversial and chequered project'[16] nearly one hundred years in the making, involving slow incremental progress and many setbacks. This is because it is a 'hard case' for international law given 'war-making is the ultimate sovereign prerogative...and because war has long been viewed as an essential political activity', one which should not be subject to legal constraint.[17] Moreover, as Meron explains, the crime of aggression targets the highest leadership of the state and therefore 'necessarily involves sensitive questions of national defense and state security',[18] and can be perceived as undermining the constitutional foundations of sovereign states. It therefore poses the ultimate question of where the line should be drawn between politics and law or, in English School terms, where the pluralist limits of cosmopolitan-solidarist progress should lie. As a result, it has generated much debate among states and the BRICS have made substantial contributions to such debates as they seek to shape global political order in accordance with a state-solidarist vision of international society.

Alongside attempts to prohibit state aggression and to develop systems to respond to such acts in order to maintain international peace and security, during the twentieth century attempts were also made to criminalise acts of aggression and to punish individuals responsible for organising and directing such acts. The beginning of this process was the attempt by Allied powers to prosecute Kaiser Wilhelm II at the end of World War One at the Leipzig Trials.[19] The next substantial step in the criminalisation of aggression, there having been ongoing discussions on criminal responsibility in the *inter bellum* period[20] but an 'absence of legal milestones marking the advance toward the criminalisation of aggression',[21] came with the creation of the Military Tribunals after World War Two, to which Russia and China made substantial contributions.

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[14] UNGA Sixth Committee, Official Records, Twenty-eighth session, 1442nd meeting, 20 November 1973, UN Doc. A/C.6/SR.1442, 248-249; UNGA Sixth Committee, Official Records, Twenty-ninth session, 1503rd meeting, 21 November 1974, UN Doc. A/C.6/SR.1503, 232; UNGA Sixth Committee, Official Records, Twenty-ninth session, 1475* meeting, 14 October 1974, UN Doc. A/C.6/SR.1475, 62; UNGA Sixth Committee, Official Records, Twenty-ninth session, 1503rd meeting, 21 November 1974, UN Doc. A/C.6/SR.1503, 232.

[15] UNGA Sixth Committee, Official Records, Twenty-eighth session, 1442nd meeting, 20 November 1973, UN Doc. A/C.6/SR.1442, 245.

[16] G. Simpson, *Law, War and Crime. War Crimes Trials and the Reinvention of International Law,* (Polity Press, 2007), 157.

[17] Simpson, *Law, War and Crime,* 133.

[18] T. Meron, 'Defining Aggression for the International Criminal Court', (2001) 25 *Suffolk Transnational Law Review* 1-15, 3.

[19] Z. Lulu, 'Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law' in M. Bergsmo and L. Yan (eds), *State Sovereignty and International Criminal Law,* (Torkel Opsahl Academic Publisher, 2012), 22. *See also,* Treaty of Versailles (adopted on 28 June 1919, entered into force on 10 January 1920), Article 227 and Article 231.

[20] P. Grzeybk, *Criminal Responsibility for the Crime of Aggression',* (Routledge, 2013), 82-85.

[21] K. Sellars, *'Crimes against Peace' and International Law,* (CUP, 2013), 45.

The London Charter establishing the International Military Tribunal at Nuremberg (IMT), which was agreed by *inter alia* the US, Great Britain and the USSR, provided that crimes against peace, 'namely, planning, preparation, initiation or waging of a war of aggression' are crimes that fall 'within the jurisdiction of the Tribunal for which there shall be individual criminal responsibility'.[22] Furthermore, the indictment placed before the Tribunal charged the defendants with, *inter alia,* crimes against peace in 'that the defendants planned, prepared, initiated, and waged wars of aggression';[23] as Gaja explains, '[i]n the Nuremberg Charter aggression was considered as a subcategory of crimes against peace'.[24] The USSR played a critical role in developing crimes against peace and aggression in the Nuremberg Charter. Aron Trainin, a Soviet scholar who later served on the USSR's prosecution team, had been working on the concept of the crime of aggression and, as Esakov argues, Trainin's 'ideas on crimes against peace (namely, the waging of aggressive war) and conspiracy clearly influenced the Charter'.[25]

Aggression was not, however, defined within the Charter due to a lack of agreement between the parties as to whether it should be defined.[26] Whilst the US and the UK supported the inclusion of a definition, the USSR considered it to be unnecessary and inappropriate. It simply wanted to punish the Nazi war criminals, not establish international law precedent.[27] The USSR also considered that as states could not agree upon a definition of aggression for the UN Charter, this should not now be attempted for the IMT.[28] Moreover, the USSR wanted to preserve its newly acquired great power status as a permanent member of the Security Council and as such it did not wish to dilute its power to determine the existence of aggression by creating a competing source of authority in the Nuremberg Charter.[29] Iona Nikitchenko, a judge of the Supreme Court of the Soviet Union who also contributed to the drafting of the Nuremberg Charter and later served as one of the USSR's judges, expressed his 'plain and unvarnished fear that the London Conference would take away privileges won at the San Francisco Conference.'[30] This is a position that Russia would later maintain in relation to the inclusion of aggression in the Rome Statute.

The crime of aggression was subsequently tried at the IMT and the International Military Tribunal

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[22] Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'), 8 August 1945, available online at http://www.refworld.org/docid/3ae6b39614.html (accessed 20/07/2018), Article 6 (a).

[23] Nuremberg Tribunal Official Records, Vol. I, Indictment, available online at https://www.loc.gov/rr/frd/Military Law/pdf/NT Vol-I.pdf (accessed on 21/07/2018), 29.

[24] G. Gaja, 'The Long Journey towards Repressing Aggression' in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (OUP, 2002), 427-441, 428.

[25] G. Esakov, 'International Criminal Law and Russia: From 'Nuremberg' Passion to 'The Hague' Prejudice', (2017) 69(8) *Europe-Asia Studies* 1184-1200, 1188.

[26] Sellars, *'Crimes against Peace ' and International Law*, 98-100.

[27] Grzeybk, *Criminal Responsibility for the Crime of Aggression*' 92-93.

[28] de Hoon, 'The Law and Politics of the Crime of Aggression', 114; Sellars, *'Crimes against Peace' and International Law,* 99.

[29] Sellars, *'Crimes against Peace' and International Law,* 99-100.

[30] Sellars, *'Crimes against Peace' and International Law,* 99-100.

for the Far East (IMTFE). The Declaration of Potsdam, which was issued by the US, Great Britain and China, and to which the USSR later acceded, stated Japanese criminals would be tried for the same crimes as the Nazis. The Charter of the IMTFE, modelled on the Nuremberg Charter, confirmed that the defendants would be charged with offences that included crimes against peace including 'the planning, preparation, initiation or waging of a declared or undeclared war of aggression' and the 'indictment accused 28 defendants of 36 counts of Crimes Against Peace.. .[a]ll defendants were also accused of having "waged a war of aggression".'[31] Following the IMT, 'the Tokyo Tribunal made no attempt to provide a universal definition of aggression'.[32]

The Indian Judge, Radhabinod Pal, strongly objected to the inclusion of crimes against peace in the Nuremberg and Tokyo Charters.[33] He expressed the view the treaties prohibiting aggressive war between states, such as the Kellogg-Briand Pact, which were relied upon to establish aggression as a prosecutable crime at the Tribunals, made no such provision for individual criminal responsibility and, furthermore, on a normative level, that individuals could not be held responsible for aggression as it was an act of state.[34] On the latter point, Pal considered 'holding policy-makers accountable under international law would abrogate the sovereignty of the states they led' and this was not appropriate as it presupposed a world community which he thought did not exist.[35] Pal adopted a narrow, strictly positivist understanding of international law and was unwilling to employ a purposive interpretation to implement cosmopolitan aspirations because, as Kopelman notes, he 'was sceptical about the progressive character of international law'.[36] More specifically, Pal was sceptical of the motivation of liberal powers, in particular their desire to paralyse the struggle against colonialism.[37] Simpson argues, for Pal, [t]he deepening juridification of war was intended to remove armed struggle from the repertoire of anti-colonial, anti-Western political movements and states.'[38] Furthermore, in his dissenting opinion, Pal was particularly critical of the fact Japanese aggression was being prosecuted whereas aggressive acts by Allied states remained beyond the jurisdiction of the Tribunal. He thought that this was part of the manifestation of imperialism through the law.[39] Simpson notes, 'it seemed arbitrary to Pal that Japanese colonialism should be subject to criminal sanctions while European aggression over the past four centuries should be implicitly endorsed; the prosecution of the Japanese was an act of imperial hypocrisy.'[40]

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[31] Ferencz, *Defining International Aggression. The Search for World Peace,* 45.
[32] Grzebyk, *Criminal Responsibility for the Crime of Aggression,* 100.
[33] Sellars, *'Crimes against Peace' and International Law*, 234.
[34] R. Pal, *Crimes in International Relations,* (Calcutta University Press, 1955), 166-167, 187.
[35] E. S. Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Tribunal', (1991) 23(2) *New York University Journal of International Law and Politics* 373-444, 415.
[36] Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Tribunal', 411 -413.
[37] Sellars, *'Crimes against Peace' and International Law*, 236-237.
[38] Simpson, *Law, War and Crime,* 147.
[39] L. Varadarajan, 'The trials of imperialism: Radhabinod Pal's dissent at the Tokyo tribunal', (2015) 21(4) *European Journal of International Relations* 793-815, 806-807.
[40] Simpson, *Law, War and Crime,* 147.

This type of scepticism was apparent in India's contribution to the Rome Statute negotiations and informed India's position on the regulation of aggression including through the ICC because, as Ogden argues, 'residual suspicions from the colonial era continue to influence India's approach to international institutions' [41] This is most clearly evidence in India's strident rejection of the Security Council exercising control over the Court's activities.

Following this watershed moment in the criminalisation of aggression, in 1946 the UN General Assembly adopted a resolution affirming the international criminal law principles set out in the Nuremberg Charter and the Judgment of the Tribunal,[42] including those relating to the crime of aggression. Furthermore, in 1947 it directed the International Law Commission (ILC) to codify the Nuremberg Principles and to prepare a draft code of offences against the peace and security of mankind.[43] This process continued intermittently over the subsequent fifty years with various draft codes being produced. Commenting on the work of the ILC, the USSR noted the 'resumption of work on the draft Code of Offences against the Peace and Security of Mankind is particularly timely and important' and it stated that the code should 'reflect the international legal instruments in which there has been further development of the principle of individual responsibility'[44] The final version of the draft code, adopted in 1996, contained the crime of aggression and provided greater specificity as how it should be criminalised as opposed to merely recognising it as an act of states.[45] Despite the flaws in the process and the outcome, Grzebyk emphasised the importance of the ILC's work in that it 'affirmed that aggression gives rise of individual criminal responsibility.'[46] At the same time the ILC had been working on a draft statute for a permanent international criminal court, a project ongoing since the end of the Second World War, and its final draft statute included the crime of aggression.[47] Despite such progress, the crime of aggression was omitted from the Statutes of the ICTY and the ICTR. This was likely because of the political nature of the crime[48] and the fact that there was not a well-established consensus among states as to what the crime entailed or how it should be applied in practice. The failure to include the crime of aggression in the Statutes was arguably the 'most serious blow to the juridification project'.[49]

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[41] C. Ogden, 'Great-Power Aspirations and Indian Conceptions of International Society' in J. Gaskarth (ed), *China, India and the Future of International Society,* (Rowman and Littlefield, 2015), 60.
[42] UNGA Res. 95 (11 December 1946), UN Doc. A/RES/96.
[43] Grzebyk, *Criminal Responsibility for the Crime of Aggression,* 105.
[44] Yearbook of the International Law Commission 1982, Volume II, Part One, p.279 (UN Doc. A/CN.4/358 and Add.1-4.
[45] Grzebyk, *Criminal Responsibility for the Crime of Aggression,* 106-110.
[46] Grzebyk, *Criminal Responsibility for the Crime of Aggression,* 110.
[47] Grzebyk, *Criminal Responsibility for the Crime of Aggression,* 112.
[48] *See,* Grzebyk, *Criminal Responsibility for the Crime of Aggression,* 130 and Simpson, *Law, War and Crime,* 150.
[49] Simpson, *Law, War and Crime,* 150.

6.4. The Criminalisation of Aggression at the ICC and the Role of BRICS States

6.4.1. A Brief Overview of the Aggression Negotiations at the ICC[50]

The ILC's work on the crime of aggression and statute of a permanent international criminal court was taken up by the Ad Hoc and then the Preparatory Committee for establishing an international criminal court during the 1990s in preparation for the Rome Conference in 1998. Both Committees grappled with the crime of aggression and specifically the issue of whether it should fall under the Court's jurisdiction and, if so, how it should be operationalised.[51] The issue was then debated extensively during the Rome Conference. The majority of states present supported the crime of aggression being included within the Court's statute but as no agreement could be reached on critical jurisdictional issues, as will be identified below, a compromise was reached whereby aggression was listed in the Rome Statute but the ICC's jurisdiction over it would not be activated until an agreement was reached on the questions of when, and in what circumstances, the Court could prosecute it. Kreb and von Holtzdendorff describe this as a 'partial awakening' for the crime of aggression.[52] The Preparatory Commission, which was created after the Rome Statute had been adopted, subsequently took up the difficult task of facilitating agreement among states on these issues and this role was later taken over by the Special Working Group on the Crime of Aggression ('Special Working Group').

The Special Working Group held numerous meetings over a five and half year period and eventually produced a definition of the crime of aggression and suggestions as to how the ICC should exercise jurisdiction over it. Its proposals were submitted to the Assembly of States Parties (ASP) for consideration and at its 2010 meeting in Kampala, Uganda, the States Parties adopted a definition and agreed upon the provisions to operationalise it. However, due to continuing divergences of opinion and to give the Court time to prepare before taking on such an immense responsibility, it was decided that the Court's jurisdiction should be activated only after a seven year period by way of a vote at the sixteenth ASP meeting in 2017. After some last minute wrangling among states, the ICC's jurisdiction over aggression was finally activated on 15 December 2017 and came into effect on 18 July 2018.

This was undoubtedly a historic achievement, a culmination of over one hundred years of progress

[50] This is just a brief overview for the purposes of providing a context. For a detailed explanation of the process *see* S. Barriga, 'Negotiating the Amendments of the crime of aggression' in S. Barriga and C. Kreb (eds), *The Traveaux Preparatoires of the Crime of Aggression,* (CUP, 2012).
[51] Grzebyk, *Criminal Responsibility for the Crime of Aggression,* 112-133.
[52] C. Kreb and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', (2010) 8(5) *Journal of International Criminal Justice* 1179-1217, 1182.

and it represents the continued cosmopolitan evolution of international society in that it further curtails sovereignty by way of limiting states' ability to undertake aggressive war through the prosecution of individuals. However, as will be examined, there was significant disagreement among states, including among the BRICS states, on numerous key issues and as a result the crime of aggression at the ICC is a compromise. It is so referred to as the 'Kampala Compromise'.[53] It balances competing views which reflect divergences in opinion about how international society should be organised and governed, divergences between the pluralist and cosmopolitan-solidarist visions, with a clear division between concerns about order and justice, which has potentially negative implications for the Court. As Van Schaack argues, '[t]he final package, designed not with the best interests of the court in mind, has merit solely as an expedient solution that enables the Assembly of States Parties to claim completion-if not success.'[54]

6.4.2. Support for the Inclusion of the Crime of Aggression in the Rome Statute

All the BRICS, like the majority of states, supported in principle the inclusion of the crime of aggression in the statute of the ICC throughout the extensive negotiation process,[55] which is demonstrative of their commitment to international criminal justice and the ICC. This is consistent with the support they expressed for the criminalisation of aggression and for international criminal law generally since the Nuremberg and Tokyo Trials. In more self-interested terms, the BRICS states likely supported the inclusion of the crime of aggression in the Rome Statute because, in their view, it would give them some additional protection against the West, which they considered to be a threat to their rising power status. However, the support they indicated for the crime of aggression was conditional on an acceptable definition and jurisdictional regime being established, and there was substantial disagreement among states, including among the BRICS, on such issues.

The South African representative stated that his country 'supported inclusion of the crime of aggression, subject to agreement on a definition and a clear spelling-out of the Security Council's role',[56] and he further stated that '[i]t would be regrettable for the crime of aggression not to be covered in the Statute' and suggested '[i]t should at least be kept open for consideration by the

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[53] *See,* Kreb and von Holtendorff, 'The Kampala Compromise on the Crime of Aggression'.

[54] B. Van Schaack, 'Negotiating at the Interface of Power and Law: The Crime of Aggression', (2011) 49 *Columbia Journal of Transnational Law* 505-600, 599.

[55] C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court,* (CUP, 2013), 9.

[56] Rome Conference Official Records, Vol. II, 65. *See also*, Statement by H.E. Ambassador Khiphusizi J. Jele, Permanent Representative of South Africa on Behalf of Member States of the Southern African Development Community (SADC) of the 52 nd General Assembly, Regarding Item 150: Establishment of an International Criminal Court, New York, 21 October 1997, available online at http://www.iccnow.org/documents/SouthAfricaSADC6Comm21Oct97.pdf (accessed 20/07/2018) - 'aggression should also be included within the jurisdiction of the court if consensus can be so reached'; UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 3.

Preparatory Commission or a review conference at a later stage.'[57] Subsequent to this, South Africa stressed 'we must exert all efforts in achieving an agreement on a definition of the Crime of Aggression and the conditions under which the Court shall exercise jurisdiction in respect to this crime'[58] and it encouraged states to work towards this objective,[59] reflecting its support for the criminalisation of aggression, the ICC and international criminal justice more generally. Moreover, at the Kampala Review Conference in 2010, South Africa led the so called 'Africa Group' of States Parties which consistently supported the aggression amendments[60] and South Africa's representative stated that'[w]e firmly believe that the scourge of aggressive war must be addressed by putting in place an effective system of individual criminal liability for acts of aggression, thereby giving full effect to the prohibition of aggressive war in the Charter of the United Nations '. Its representative further noted 'the Review Conference offers us the opportunity to criminalise the waging of aggressive war and so conclude a process that has its roots in the horrors of the Great War, almost a century ago' and he stated that '[w]e should be mindful of our historic responsibility to humanity in this regard'.[61]

During the Rome Conference, the Brazilian representative also expressed regret that 'aggression could not be included [in the Rome Statute] for lack of a definition' and, like South Africa, suggested it 'could be dealt with in the context of a further review'.[62] He had earlier explained that his delegation 'did not favour the inclusion of the crime of aggression in the Statute'[63] on the basis that 'he still had serious doubts about the possibility of broad agreement on a definition of aggression as an individual crime and foresaw serious problems related to conflicts of competence between the Security Council and the Court'.[64] After the Rome Conference, Brazil continued to support the Court having jurisdiction over the crime of aggression in the future. The Brazilian representative confirmed that 'his delegation supported the continuance of the work of the Special Working Group on the crime of aggression'[65] and it was said that operationalising the crime of aggression 'is probably the most urgent issue facing this Assembly. It is up to us to make just ice

[57] Rome Conference Official Records, Vol. II, 301.
[58] Statement by the Minister for Justice and Constitutional Development Mrs B S Mabandla, 6th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 3 December 2007, available online at https://asp.icc-cpi.int/iccdocs/asp docs/library/asp/Statement GD South Africa EN 6ASP.pdf (accessed 20/07/2018).
[59] Statement by Nkhulu Daniel Sebothoma, Charge D'Affaires of the South Africa Embassy to the Netherlands, General Debate of the Seventh Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 14 November 2008, available online at https://asp.icc-cpi.int/iccdocs/asp docs/library/asp/ICC-ASP-ASP7-GenDebe-SAfrica-ENG.pdf (accessed 20/07/2018).
[60] Van Schaack, 'Negotiating at the Interface of Power and Law', 518-519.
[61] Opening Statement by Deputy-Minister A.C. Nel, MP, Deputy-Minister for Justice and Constitutional Development Republic of South Africa, General Debate: International Criminal Court, Review Conference of the Rome Statute, Kampala, Uganda, 31 May 2010, available online at https://asp.icc-cpi.int/iccdocs/asp docs/RC2010/Statements/ICC-RC-GenDeba-SouthAfrica-ENG.pdf (accessed 20/07/2018) ('South Africa Review Conference Statement, 31 May 2010').
[62] Rome Conference Official Records, Vol. II, 322-333.
[63] Rome Conference Official Records, Vol. II, 179.
[64] Rome Conference Official Records, Vol. II, 179.
[65] UNGA Sixth Committee, Official Records, Fifty-eighth session, 10th meeting, 20 October 2003, UN Doc. A/C.6/58/SR.10, 5.

fully able to reach the reality of war.'[66] Furthermore, at Kampala, the Brazilian representative, stressing his government's support for the crime of aggression, emphasised:

> [t]he history of the last decade leaves no doubt that we have no time to lose. Egregious acts of aggression continue to take place in the pretence of sacred values and high principle. Fully integrating this crime into the Rome Statue remains a crucial step towards a more stable, just and democratic world order.. ..the vast majority of States Parties is convinced that the time has come to conclude our work. Not to do so would be to ignore the wishes of so many States. We look forward to accomplishing the task left unfulfilled twelve years ago - defining the crime of aggression as well as deciding on the conditions for the exercise of jurisdiction of the Court.[67]

The Indian representative confirmed his country's view that 'aggression, if properly defined, should in principle be included under the Statute of the Court'[68] and when it appeared that the crime of aggression may be excluded from the Statute, the Non-Aligned Movement, of which India was a prominent member, submitted a proposal for its inclusion which was subsequently reflected in Article 5(2) of the Rome Statute.[69]

China similarly adopted a reserved and hesitant position in respect of aggression, stating early on in the negotiations 'the inclusion of aggression in the court's jurisdiction should be handled with the utmost circumspection'.[70] It also noted, '[a]s for the crime of aggression, the greatest difficulty is how to define the term in law' and said whilst the General Assembly had provided a definition 'so far it has proved difficult to reach consensus on a legal definition of aggression that can be applied by an international criminal court.'[71] More fundamentally, China indicated there remains 'disagreement over whether individuals should bear criminal responsibility for aggression.'[72]

Nevertheless, it confirmed '[i]f a proper term as such can be established, we will have no difficulty to having it covered by the Statute'[73] and it repeated this commitment during the Rome Conference, its representative stating 'she could agree to the inclusion of the crime of aggression on two conditions. First, there should be a clear and precise definition of the crime of aggression. Secondly, there should be a link with the Security Council'.[74] However, the failure of the Rome Conference

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[66] Statement by Ambassador Maria Luiza Ribeiro Viotti, Permanent Representative of Brazil to the United Nation, Sixth Assembly of States Parties to the Rome Statute, New York, 3 December 2007, available online at https://asp.icc-cpi.int/iccdocs/asp docs/library/asp/Statement GD Brazil EN 6ASp.pdf (accessed 20/07/2018) ('Brazil ASP6 Statement').
[67] Statement by Ambassador Marcel Biato on Behalf of the Brazilian Delegation to the Review Conference, available online at https://asp.icc-cpi.int/iccdocs/asp docs/RC2010/Statements/ICC-RC-gendeba-Brazil-ENG.pdf (accessed 20/07/2018) ('Brazil ASP Review Conference Statement').
[68] Rome Conference Official Records, Vol. II, 207.
[69] S. Barriga, 'Negotiating the Amendments of the crime of aggression' in S. Barriga and C. Kreb (eds), *The Traveaux Preparatoires of the Crime of Aggression,* (CUP, 2012), 7.
[70] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C.6/50/SR.25, 14.
[71] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C.6/50/SR.25, 14.
[72] UNGA Sixth Committee, Official Records, Fiftieth session, 25th meeting, 30 October 1995, UN Doc. A/C.6/50/SR.25, 14.
[73] UNGA Sixth Committee, Official Records, Fifty-second session, 11th meeting, 21 October 1997, UN Doc. A/C.6/52/SR.11, 12.
[74] Rome Conference Official Records, Vol. II, 180.

to reach agreement on such issues were 'barriers preventing [China's] move towards full participation in the ICC in 1998.'[75]

This tentative support continued after Rome. China confirmed that it 'supported the establishment of a working group on the crime of aggression' and resolved that it 'would continue to play an active part' in its work.[76] Its representative further confirmed 'his delegation was ready to work with the other delegations to reach a pragmatic and satisfactory outcome ' on defining aggression as a crime under the Rome Statute and also establishing its jurisdictional prerequisites, including the function of the Security Council,[77] and expressed hope 'the working group on the crime of aggression would make progress.'[78] As an observer state, China contributed to the work of the Preparatory Commission including their work on aggression, the discussions of the Special Working Group on the Crime of Aggression and the negotiations at the Kampala Conference.[79] This continuing engagement demonstrates a clear commitment to the operationalisation of the crime of aggression, particularly in light of China's historical approach, but is also likely inspired by a desire to ensure it is implemented in a way that is consistent with a state-solidarist conception of political order. It is also likely informed by a desire on the part of China to play a role in global governance and to be involved in the development of relevant regulatory frameworks.

Russia was arguably the most supportive of aggression being included within the Rome Statute, having played a significant role in elaborating a definition and furthering its criminalisation in various forums. The Russian representative at Rome stated that 'the inclusion of aggression in the jurisdiction of the Court was of particular importance' because '[c]rimes against humanity were often committed as part of wars of aggression'[80] and he further noted 'his delegation had always been in favour of including aggression within the jurisdiction of the Court'.[81] Furthermore, when it appeared that the crime may be excluded from the draft statute, the representative confirmed that his country 'regretted the omission'.[82] Russia continued to press for the activation of the Court's jurisdiction over aggression in the years after the Rome Conference. Russia confirmed it 'attached paramount importance to defining the crime of aggression'[83] and at Kampala its representative stated that '[i]t is also obvious that the definition of the crime of aggression and the conditions of

[75] Z. Dan, 'China, the Crime of Aggression, and the International Criminal Court', (2015) 5(1) *Asian Journal of International Law* 94122, 95.
[76] UNGA Sixth Committee, Official Records, Fifty-fourth session, 13th meeting, 21 October 1999, UN Doc. A/C.6/54/SR. 13, 3.
[77] UNGA Sixth Committee, Official Records, Fifty-fifth session, 9th meeting, 18 October 2000, UN Doc. A/C.6/55/SR.9, 5.
[78] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 9.
[79] Z. Dan, 'China, the International Criminal Court, and International Adjudication', (2014) 61(1) *Netherlands International Law Review* 43-67, 44-45. *See also,* Dan, 'China, the Crime of Aggression, and the International Criminal Court', 95.
[80] Rome Conference Official Records, Vol. II, 115.
[81] Rome Conference Official Records, Vol. II, 289.
[82] Rome Conference Official Records, Vol. II, 289.
[83] UNGA Sixth Committee, Official Records, Fifty-fifth session, 11th meeting, 19 October 2000, 3.

Court's exercising of jurisdiction are of crucial significance to ensure the universality of the Rome Statute. There is no doubt that without such a definition the Court's jurisdiction remains incomplete.'[84] Russia however noted that although 'the determination of aggression was of particular importance, it was 'inseparably bound up with the conditions required for the exercise of the Court's jurisdiction',[85] and Russia remained consistently forthright in its position on what those conditions should be, as will be examined shortly.

6.4.3. The BRICS States' Contributions to Defining Aggression

Reaching a widely acceptable definition of aggression was one of the most challenging aspects of the negotiations. Barriga explains '[s]ome delegations wished to limit criminal responsibility to wars of aggression, as spelled out in the Nuremberg Charter'.[86] This included Russia, which submitted a proposal providing that 'the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a *war of aggression*' (emphasis added).[87] The Russian representative subsequently confirmed his country proposed a general definition [of the crime of aggression] based on the Charter of the Nurnberg Tribunal, but did not object to a more detailed definition inspired by the General Assembly Resolution 3314'.[88] Many developing nations, as well as South Africa, favoured a wider definition based on General Assembly Resolution 3314 from the very start, given that it had been negotiated extensively in a genuinely multilateral forum and provided strong protections against aggressive states. South Africa explained during the Rome conference that the definition 'should...take account of contemporary forms of aggression, particularly the elements set out in General Assembly resolution 3314'[89] and the Brazilian representative similarly asserted '[w]e are ready to support a definition that. conveys, as useful indications, the elements set forth in General Assembly's resolution 3314.' Brazil also stressed the definition should 'adequately preserve the independence of the Court as a judicial organ',[90] which reflects its overall support for the Court and its more cosmopolitan leaning. China 'favoured a

[84] Statement by H. E. Kirill G. Gevorgyan, Director of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation, Head of the Delegation of the Russian Federation to the Review Conference of the Rome Statute of the ICC, 1 June 2010, available online at https://asp.icc-cpi.int/iccdocs/asp docs/RC2010/Statements/ICC-RC-gendeba-RussianFederation-ENG.pdf (accessed 21/07/2018) ('Russian Federation ASP Review Conference Statement').

[85] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 6.

[86] Barriga, 'Negotiating the Amendments of the crime of aggression', 10.

[87] 1999 Proposal by the Russian Federation, PCNICC/1999/DP.12.

[88] UNGA Sixth Committee, Official Records, Fifty-fifth session, 11th meeting, 19 October 2000, UN Doc. A/C.6/55/SR.11, 4. *See also,* Statement by the Delegation of the Russian Federation (Observer State) at the Eleventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court', 15 November 2012, available online at https://asp.icc- cpi.int/iccdocs/asp docs/ASP11/GenDeba/ICC-ASP11-GenDeba-RUS-ENG.pdf (accessed 21/07/2018) ('Russian Federation ASP11 Statement') and Statement of the Russian Federation to the 13 th Assembly of States Parties to the Rome Statute of the International Criminal Court, delivered by Ms. Diana Eloeva First Secretary of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation', 12 December 2014, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP 13/GenDeba/ICC-ASP 13-GenDeba- Russian-ENG.pdf (accessed 21/07/2018) ('Russian Federation ASP13 Statement').

[89] Rome Conference Official Records, Vol. II, 278.

[90] Brazil ASP6 Statement.

definition which referred to Resolution 3314 in its entirety, insisting that the text had been drafted as a careful compromise after lengthy negotiations.'[91]

China also stressed that the definition should be precise as required by the criminal law, that it should take account of 'international realities' and the basis of the definition 'should be customary international law'.[92] This arguably demonstrates a desire by China to restrict the potential for abusive interpretations of the definition which seek to exclude responsibility for aggressive acts and to ensure the definition adopted has a wide consensus among states, reflecting its commitment to genuine multilateralism. This position is shared by Meron for similar reasons. Meron argues that creating a new crime by way of a treaty and following a legislative approach, rather than basing it on existing customary international law, 'would open the door to governments and individuals contesting the ICC's legitimacy',[93] as occurred with IMTs' prosecution of aggression.

Ultimately, the definition that was adopted,[94] as contained in Article 8 *bis* of the Rome Statute, states that the crime of aggression 'means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the UN Charter.' The 'manifest violation' threshold was supported by China on the basis that an appropriate threshold should be set and it reflected customary international law.[95] The provision also defines 'act of aggression' and makes reference to the acts set out in General Assembly Resolution 3314, but it does not incorporate it entirely, as advocated by China. The definition thus confirms that in order for a crime to be committed it must first be shown that an act of aggression was committed by a state but it omits any reference to 'war of aggression', an element that was advocated by Russia, on the basis that it was too restrictive.[96] The definition adopted was very broad in order to achieve consensus among states and, as de Hoon argues, its definitive contours would be left to judges to determine in criminal proceedings. This, she further argues, left the ICC open to politicisation and thus put at risk its legitimacy as an independent judicial institution.[97] The other question which had to be determined was who had the power to decide whether and when an act of aggression had been committed?

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[91] Dan, 'China, the Crime of Aggression, and the International Criminal Court', 109.
[92] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 9..
[93] Meron, 'Defining Aggression for the International Criminal Court', 12.
[94] The Definition was adopted without debate at the Kampala Conference, it having been settled in advance through the work of the Special Working Group on the Crime of Aggression. *See,* C. Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective', (2010) 23(4) *Leiden Journal of International Law* 883-887, 883.
[95] Dan, 'China, the Crime of Aggression, and the International Criminal Court', 110.
[96] M. Mancini, 'A Brand New Definition for the Crime of Aggression: The Kampala Outcome', (2012) 81(2) *Nordic Journal of International Law* 227-248, 232.
[97] de Hoon, 'The Law and Politics of the Crime of Aggression', 194-198

6.4.4. China and Russia's Support for a Role for the Security Council

The role of the Security Council in relation to the operationalisation of the crime of aggression, including the role that it would have in triggering the Court's jurisdiction over the crime, was another one of the most difficult issues during the extensive negotiations.[98] This was because of the complexity of the issue, a complexity which 'is rooted in the fact that it brings together the highly political world of the Security Council, dominated by the rule of power, and the international criminal justice world of the ICC, governed by the rule of law.'[99]

During the preparatory negotiations it was clear that while some states supported the exclusive capacity of the Security Council to determine whether an act of aggression had occurred as a prerequisite to criminal responsibility being established by the Court, as provided for in the ILC's draft statute,[100] other states were more hesitant, expressing a willingness to support some limited role for the Security Council if this could be balanced appropriately with the functions of the Court.[101] This differs from the other crimes outlined in Article 5 of the Rome Statute for which no prior Security Council authorisation is required for the Court to initiate proceedings in respect of citizens of States Parties. Some states questioned why the ICC could not determine when an act of aggression has occurred prior to it determining whether a particular individual had committed a crime, excluding any role for the Security Council. They argued that:

> the political question of whether a country had perpetrated an act of aggression was in principle separate from the legal question of whether an individual from a particular country could be held responsible for the act and that the Court would be perfectly capable of taking note of an act of aggression without the Security Council having first determined it.'[102]

States also expressed reservations about this provision on the basis that it was 'in contradiction with the principle of the independence of the judiciary' because it would essentially be affording prosecutorial powers to a political organ which would not be applying the strict legal criteria that a court would in determining whether criminal proceedings are brought.[103] This concern about the

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[98] Grzebyk, Criminal Responsibility *for the Crime of Aggression'*, 115. *See also,* J. Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', (2011) 11(1) *International Criminal Law Review* 49-104, 61

[99] N. Blokker, 'The Crime of Aggression and the United Nations Security Council', (2007) 20(4) *Leiden Journal of International Law* 867-894, 869.

[100] Report of the International Law Commission on the work of its forty-sixth session (2 May - 22 July 1994), UN Doc. A/49/10, 43-44. *See also,* Blokker. 'The Crime of Aggression and the United Nations Security Council', 871.

[101] Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee During the Period 25 March - 12 April 1996, 7 May 1996, UN Doc. A/AC.249/1, 11.

[102] Report of the International Law Commission on the work of its 46th session (1994) 2 May - 22 July 1994). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the secretariat. Addendum. UN Doc. A/CN.4/464/Add. 1, para.121.

[103] Report of the International Law Commission on the work of its 45th session (1993). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session prepared by the secretariat, 15 February 1994, UN Doc.

potential politicisation of the process led some States to point out 'the need to avoid a situation in which the use of the veto in the Security Council might preclude the prosecution of a person by the court'.[104] Other states, while recognising the issues, took the view that whilst the provision was not ideal, it was a realistic solution.[105]

China and Russia, together with the other members of the P-5, were resolute in their position that the Security Council should first determine that an act of aggression by a state has occurred before the Court could go on to consider whether the crime of aggression had been committed by a particular individual; a finding of aggression by the Security Council was a trigger to the Court's jurisdiction over the crime. The P-5 adopted the ILC proposal and defended it with 'the greatest possible vigour until the last minutes of the [Rome] negotiations'.[106] During the preparatory negotiations, Russia stated that the determination of aggression by the Council was 'a necessary prerequisite for the realization of the jurisdiction of the court' and maintained this position during the Rome Conference, its representative asserting that '[w]ith respect to aggression, the Council would first have to determine that such an act had occurred.'[107] It continued to reiterate this position after Rome, its representative stating in the Sixth Committee that:

> a decision of the Council that action by a state constituted aggression was the basic element of the crime of aggression for the purposes of the Statute. Accordingly, in the case of a presumed preparation of the crime of aggression by an individual, the Court could only become involved after the Security Council determined the existence of an act of aggression [by a state].[108]

It also argued that 'the Rome Statute should contain an explicit reference to the role of the Security Council in establishing...that an act of aggression had been committed before the Court obtained jurisdiction in such a case.'[109] China similarly argued the Security Council should 'have the power to determine whether acts of aggression had been committed'.[110] It also asserted that '[t]he five Permanent Members all along insist that the determination of the Security Council is the prerequisite for the court to exercise jurisdiction over the crime of aggression and that this content should become an indispensable part of the definition of the crime of aggression' and, furthermore,

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A/CN.4/457, paras.121-122.

[104] Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee During the Period 25 March - 12 April 1996, 7 May 1996, UN Doc. A/AC.249/1, paras.33 and 155.

[105] Report of the International Law Commission on the work of its forty-fifth session (1993). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session prepared by the secretariat, 15 February 1994, UN Doc. A/CN.4/457, para. 123.

[106] Kreb and von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 1194.

[107] Rome Conference Official Records, Vol II, 115.

[108] UNGA Sixth Committee, Official Records, Fifty-fifth session, 11th meeting, 19 October 2000, UN Doc. A/C.6/55/SR.11, 3. *See also,* UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 6.

[109] UNGA Sixth Committee, Official Records, Fifty-ninth session, 6th meeting, 14 October 2004, UN Doc. A/C.6/59/SR.6, 7.

[110] Rome Conference Official Records, Vol II, 209.

'in the absence of a determination by the Security Council on the situation of aggression, the court lacks the basis to prosecute the individual for his criminal liability.'[111] The states rejected the idea of the ICC determining acts of aggression on its own volition, Russia stating that '[t]wo organs should not have overlapping powers in that area.'[112]

Russia and China defended this position expressly on the basis of the need for the Rome Statute to be consistent with the UN Charter, which provides that the Security Council is responsible for matters of peace and security, including acts of aggression. This represents a strong defence of state-solidarism with a particularly pluralist leaning given their emphasis on the importance of compliance with the UN Charter framework and the centrality of the Security Council in matters of global governance, as examined in Chapter Three. Russia explained that the Security Council's 'powers under the Charter of the United Nations should be fully reflected in the definition'[113] and it subsequently argued:

> there could not be a situation in which the individual criminal responsibility on the part of the organizers of aggression would be recognized without recognizing at the same time the responsibility of the state. *According to the Charter of the United Nations,* such a qualification of the acts of a state could only be made by the Security Council (emphasis added).[114]

Moreover, at the Kampala Conference its representative explained:

> [a]s it is known, according to the UN Charter, which is the most universal and authoritative treaty preempting all other international treaties, the prerogative to determine the existence of an act of aggression belongs to the UN Security Council. This reality of the modern world dictates us to agree that without the UN Security Council decision on the existence of an act of aggression the ICC may not exercise its jurisdiction with respect to it.[115]

This is consistent with the emphasis the USSR placed on the General Assembly's 1974 definition of aggression being compliant with the UN Charter. The Chinese government similarly expressed its view that ' [t]he provisions of its Statute should not run counter to those of the Charter of the United Nations'[116] and 'especially should be in keeping with the provisions of the Charter of the

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[111] China, 'VI. China and the International Criminal Court', 19 April 2004, available online at http://www.chma- un.ch/eng/gihvfv/hflygz/t85684.htm (accessed 21/07/2018).
[112] Rome Conference Official Records, Vol II, 177.
[113] Rome Conference Official Records, Vol II, 177.
[114] UNGA Sixth Committee, Official Records, Fifty-fifth session, 11th meeting, 19 October 2000, UN Doc. A/C.6/55/SR.11, 3. *See also,* UNGA Sixth Committee, Official Records, Fifty-ninth session, 6th meeting, 14 October 2004, UN Doc. A/C.6/59/SR.6, 7.
[115] Russian Federation ASP Review Conference Statement, 1 June 2010.
[116] Rome Conference Official Records, Vol II, 75.

United Nations on the question of crimes of aggression.'[117] Furthermore, China argued that 'allowing the court to exercise jurisdiction before the Security Council makes the determination was practically bestowing on the court the right of determination on the state act of aggression [which] runs counter to the provisions of the Charter.'[118]

This position reflects the states deference to the UN Charter as the constitution of international society and a willingness to defend it against threats to its integrity. Moreover, it demonstrates an unwillingness to support cosmopolitan developments, namely the criminalisation of aggression, where it would result in a challenge to the primacy of Charter rules and where power would be transferred from the UN to other organisations. This was particularly objectionable in the case of the ICC because of its supranational character and, more specifically, the consequent inability of Russia and China, as well as other members of the P-5, to exert control over the organisation as they do with the UN. Therefore, it represents a much larger rejection of supranationalism in favour of multilateralism, and more specifically, the particular type of UN multilateralism where Russia and China are able to exercise substantial control through their privileged positions on the Security Council. This position was also adopted because, as Dan notes, permanent members have 'a particular interest in the making sure that the ICC's jurisdiction over the crime of aggression would not encroach on the Security Councils' special role [maintaining peace and security] and the permanent members' privileged positions therein.'[119] Similarly, McDougall argues that '[t]he P-5 position on jurisdiction demonstrates an unmistakable preoccupation with the retention of their role as principal arbitrators in relation to the use of force.'[120] However, in relation to its position on the role of the Security Council concerning the crime of aggression Russia stated, perhaps slightly disingenuously, that it is concerned *only* with preserving the legitimacy of the organisations, not its power:

> this is not a formalism nor an intention to safeguard the UN Security Council permanent members' special powers. It is obvious that in case of contradictions between the UN Security Council and the ICC with respect to the existence of an act of aggression both organs will lose their authority, legitimacy and credibility from States and the international community.[121]

This does, however, demonstrate that Russia's position and that of the other BRICS is strongly guided by their normative views which are supplemented by material concerns about advancing

[117] China, 'VI. China and the International Criminal Court', 28 October 2003, available online at http://www.fmprc.gov.cn/mfa eng/wjb 663304/zzjg 663340/tvfls 665260/tvfl 665264/2626 665266/2627 665268/t15473.shtml (accessed 21/07/2018).
[118] China, 'VI. China and the International Criminal Court', 19 April 2004.
[119] Dan, 'China, the Crime of Aggression, and the International Criminal Court', 96.
[120] McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 50.
[121] Russian Federation ASP Review Conference Statement.

their status and role in global governance, as has previously been argued.

Russia and China also refused to accept any limitation on the role for the Security Council including a proposal that the Court could proceed to determine whether an act of aggression had occurred, prior to determining whether a crime had been committed, if the Security Council failed to make a determination in a specific period of time. The Russian representative also confirmed '[h]is delegation did not, however, agree that the Court would have jurisdiction over a crime of aggression if no such decision had been reached within a specified time limit, since the Charter of the United Nations did not make the prerogative of the Security Council under Chapter VII conditional upon any time factor.'[122] Furthermore, Russia also rejected the suggestion that if the Security Council failed to make a determination, the ICC could make a request to it that such a determination be made. Its representative stated that:

> the fact that the Court could ask the Security Council to qualify the act of a State as aggression was hardly consonant with the Charter, because Articles 10, 35 and 99 thereof contained an exhaustive list of the legal or natural persons who could refer a matter to the Security Council and that list could not be extended by any other treaty.[123]

On the same issue the representative said:

> it was important to remember that Article 103 of the Charter asserted the priority of the Charter obligations under those contracted under any other agreement. It was essential to respect the prerogative of the Security Council, since otherwise there would be a conflict of interest between the Court and the Council. That being so, his country took the view that the Court could not be given a right to address requests to the Security Council, according to Articles 39 and 24 of the Charter, responsibility for the maintenance of peace lay with the Council.[124]

China argued that if 'the Court was left to determine whether a State had committed an act of aggression after the Security Council had failed to do so within a given period of time, the Court would run a high risk of being politicized.'[125] As Guan argues, China held the view '[t]o avoid political abuse of litigation, it is necessary to have the UN Security Council first determine the existence of aggression before pursuing individual criminal responsibility, as is stipulated in Article 39 of the UN Charter.'[126] Meron concurs, noting that 'to ask the ICC, in the absence of a determination by the Security Council, to decide that an act of aggression has taken place would

[122] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 6.
[123] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 6.
[124] UNGA Sixth Committee, Official Records, Fifty-fifth session, 11th meeting, 19 October 2000, UN Doc. A/C.6/55/SR.11, 3-4.
[125] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 9.
[126] J. Guan, 'The ICC's Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle to China's Accession?', (2010) 28(4) *Penn State International Law Review* 703-754, 743-744.

force the ICC to become immersed in political controversies between states' and would also require it to decide upon complex issues of public international law, such as whether armed force was used lawfully in self- defence as opposed to being aggressive.[127] He further argues '[s]uch an immersion would endanger the ICC's judicial role and image' and that '[n]one of these adverse consequences would occur if the ICC's role were confined to the question of individual criminal responsibility...following a determination by the Security Council that an act of aggression has taken place.'[128] Brazil adopted the contrary view, noting politicisation was perhaps a necessary and unavoidable risk to take. Its representative explained that '[t]o argue that introducing the crime of aggression risks "politicizing" the Court is to pretend that we can avoid difficult options. Matters of world peace and security are by definition political in nature'.[129]

Russia and China also rejected the proposal that in the absence of a determination of aggression by the Security Council another UN organ could make it, such as the General Assembly or the International Court of Justice (ICJ). The Chinese representative stated:

> [a]s for the proposal of making the determination by the General Assembly or the International Court, there is no relevant foundation in the Charter. Though the General Assembly could discuss affairs related to international peace and security, on the question of the determination of aggression, the exclusive power the Charter confers on the Security Council is explicit.[130]

Furthermore, in relation to the proposed for role the ICJ, the Chinese representative said:

> [h]is delegation also doubted whether the advisory opinions or judgements of the International Court of Justice should be used as the basis for the Court's jurisdiction, as proposed by some countries. According to the Charter of the United Nations and the Statute of the International Court of Justice, the latter's advisory role was limited to giving its opinions on any legal question; it had no mandate to make findings of fact. Moreover, it took a long time to give an advisory opinion, and that ran counter to the requirements of criminal justice.[131]

The Russian representative similarly asserted that 'on the basis of the Charter and the Statute of the ICJ, there were no legal possibilities for…[i]t, through the Statute of the International Criminal Court, to obtain the right to decide whether a State's actions constituted an act of aggression.'[132] He also stated:

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[127] Meron, 'Defining Aggression for the International Criminal Court', 13.
[128] Meron, 'Defining Aggression for the International Criminal Court', 13.
[129] Brazil ASP Review Conference Statement.
[130] China, 'VI. China and the International Criminal Court'.
[131] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 9.
[132] UNGA Sixth Committee, Official Records, Fifty-fifth session, 11th meeting, 19 October 2000, UN Doc. A/C.6/55/SR. 11, 4.

> his Government did not support the proposal that, in the absence of a decision by the Security Council, the International Court of Justice should be made the trigger mechanism for the exercise of jurisdiction by the International Criminal Court in respect of the crime of aggression, or that the International Criminal Court should be authorized to request an advisory opinion from the International Court of Justice, because it was improper even to contemplate the possibility of the International Court of Justice handing down an advisory opinion about the existence of an act of aggression since, according to its Statute, it was competent to establish facts only when examining disputes between States and could give an advisory opinion solely on points of law. Moreover it was also the prerogative of the Security Council to give due consideration to any situations linked to threats to peace and breaches of peace.[133]

This reasoning has been rejected by academic commentators. Akande, for example, argued the Security Council's responsibility for international peace and security is primary, not exclusive, and furthermore, that the ICJ is competent to determine whether an act of aggression has occurred, and he cites extensive evidence in support of this.[134] Similarly, Blokker argues 'there are strong arguments for a view that this is not an exclusive power for the Security Council' and the General Assembly and the ICJ have 'the competence to determine whether or not a state has committed an act of aggression.[135] Therefore, China's and Russia's objection is a political and normative one partially disguised in legal terms.

In contrast to the position of the P-5, South Africa objected to such a role for the Security Council and instead argued that the Court should have inherent or automatic jurisdiction over the crime of aggression, as it had advocated for all of the other crimes within its jurisdiction.[136] During the Rome Conference the South African representative said that '[h]is delegation had no objection to the inclusion of aggression. However, to superimpose the Security Council's role on that of the Court would politicize the Court. Some means must be found whereby aggression could be included without such politicization of the Court.'[137] It reiterated the same view at Kampala: 'our position is that the Court is an independent international judicial institution with the authority to make a determination that an act of aggression has occurred for the purposes of individual criminal responsibility.'[138] This reflects the more cosmopolitan position taken by South Africa, at least at

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[133] UNGA Sixth Committee, Official Records, Fifty-sixth session, 25th meeting, 12 November 2001, UN Doc. A/C.6/56/SR.25, 6..

[134] D. Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', *Oxford Institute for Ethics, Law and Armed Conflict Working Paper*, available online at http://www.elac.ox.ac.uk/downloads/dapo%20akande%20working%20paper%20may%202010.pdf (accessed 21/07/2018), 9. *See also,* G. Yang, 'International Criminal Court: A Judicial Guarantee for International Peace and Security' in M. Bergsmo and L. Yan (eds), *State Sovereignty and International Criminal Law*, (Torkel Opsahl Academic EPublsher, 2012), 122.

[135] Blokker. 'The Crime of Aggression and the United Nations Security Council', 879. For a contrary view, *see* Meron, 'Defining Aggression for the International Criminal Court', 14.

[136] Rome Conference Official Records, Vol II, 65 and 331.

[137] Rome Conference Official Records, Vol II, 178.

[138] South Africa Review Conference Statement.

that time, which supported the granting of strong powers for the Court and its independence as a judicial institution tasked with delivering justice universally.

6.5. The Kampala Comprise and Brazil's Role as a Bridge-Builder

After extensive negotiations, in 2010 the States Parties adopted a definition of aggression and agreed how the Court could exercise jurisdiction over it. The agreement reflected a compromise between those, such as the P-5, who supported an exclusive role for the Security Council and states, such as South Africa and other African and Latin American countries, who opposed any role for the political body. The agreement was reached with the assistance of a proposal of Brazil, Switzerland and Argentina, states that did not support the Security Council acting as a filter for the Court's jurisdiction. This is evidence of Brazil's self-styled role as a bridge builder and compromise facilitator. As Politi notes, Brazil was one of a number of states that acted as an overall mediator during the negotiations and[139] Van Schaack argues that it represented efforts by Brazil 'to play a big power role in opposition to the P-5, perhaps to burnish its reputation'.[140] It also reflects Brazil's previously expressed support to 'set the appropriate framework within which we can effectively connect the act of the State to the individual conduct of men and women in a position to lead their people into war'[141] and its support for a limited role for the Security Council *vis-a-vis* the ICC, which is evidence of its state-solidarist position. As Brazil stated during the Kampala Conference, '[a] peaceful world order requires a strong and independent ICC to work side by side with other organizations envisioned by the UN's founding fathers, such as the Security Council, the General Assembly and the International Court of Justice.'[142]

The ABS Proposal, as it was otherwise known, provided different jurisdictional filters depending on how the situation reached the Court. It was proposed that 'the Security Council could make a determination of an act of aggression...however, if after six months of non -action by the Security Council, the Pre-Trial Chamber could also authorize the commencement of an investigation after state referral or *proprio moto*'[143] but, if the situation reached the Court by way of a Security Council referral, the Court could not commence an investigation without the approval of the Council regardless how of much time passed. This division of filters sought to protect the prerogatives and function of the Council whilst simultaneously freeing States Parties to the Court from the control of the Council to an extent the P-5 may be willing to accept, thereby preserving the Court's independence as much as possible in accordance with the Rome Statute. As Brazil emphasised in

[139] M. Politi, 'The ICC and the Crime of Aggression', (2012) 10(1) *Journal of International Criminal Justice* 267-288, 272.
[140] Van Schaack, 'Negotiating at the Interface of Power and Law', 518-519.
[141] Brazil ASP6 Statement.
[142] Brazil ASP Review Conference Statement.
[143] Trahan, 'The Rome Statute's Amendment on the Crime of Aggression', 68.

its statement to the conference, whilst it was important to grant the ICC jurisdiction over the crime of aggression '[w]e need, however, to respect the integrity of the Statute.'[144] In other words, the proposal paid deference to the Security Council's important role in maintaining international peace and security as well respecting the right of sovereign states to subject themselves to an independent treaty regime. As Barriga notes, the proposal 'contained a compromise suggestion for the question of jurisdictional filters' and was a 'highly significant development...[which] brought new momentum into a discussion that had turned in circles for years'.[145] Kreb and Holtzendorff also note that the ABS proposal 'significantly influenced the further course of the negotiations.'[146]

Whilst there was widespread support for the ABS proposal, there was also significant opposition to it,[147] and more work was required before a compromise agreement could be reached. As Politi explains, 'until the last day, [states] were sharply divided on key issues pertaining to the 'balance of power' between the Court and the Security Council and to the other conditions for the exercise of the Court's jurisdiction.'[148] After further proposals had been put forward, including by Canada, Slovenia and the President of the Conference,[149] and after further difficult debate facilitated masterfully by Ambassador Wenaweser and Prince Zeid Ra'ad Zeid Al -Hussein, an agreement was reached by consensus on the final night of the Review Conference. It is said the scenes were reminiscent of the Rome Conference in 1998 with the clocks being stopped at midnight and uncertainty as to whether a deal would be concluded, particularly as the UK and France 'firmly and consistently indicated that the compromise package was undermining the position of the UN Security Council' and maintaining that position until the very end.[150] Moreover, as the states were about to adopt the amendments by consensus, Japan raised its 'serious doubt as to the legal integrity of the amendment procedure', causing hearts to drop, although it ultimately supported the resolution.[151]

Trahan notes, '[t]he final result, at least as to jurisdiction, was clearly very much of a compromise - one that left few states entirely happy'.[152] The compromise reflected that which had been proposed by Brazil and others whereby there would be different filters depending on how the situation reached the Court. Article 15 *bis* provides that where a situation reaches the ICC by way of a state

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144 Brazil ASP Review Conference Statement.
145 Barriga, 'Negotiating the Amendments of the crime of aggression', 49.
146 Kreb and von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 1202.
147 S. Barriga and L. Grover, 'A Historic Breakthrough on the Crime of Aggression', (2011) 105(3) *American Journal of International Law* 517-533, 525.
148 Politi, 'The ICC and the Crime of Aggression', 287.
149 Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective', 885-887; Barriga and Grover, 'A Historic Breakthrough on the Crime of Aggression', 525-526.
150 N. Blokker and C. Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala', (2010) 23 *Leiden Journal of International Law* 889-895, 890.
151 McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court,* 30-31.
152 Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', 82.

referral or via the Prosecutor's *proprio motu* powers, before the Prosecutor commences an investigation 'he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.' It goes on to state that '[w]here the Security Council has made such a determination, the Prosecutor may proceed' and [w]here no such determination is made within sixth months...the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division had authorized' it. Article 15 *ter* provides that the Security Council can refer a situation of aggression to the ICC and where it does so the Court can proceed without the Council having to make a determination of an act of aggression. Importantly, both provisions confirm '[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute', which asserts the ICC's independence.

The other elements of the compromise, which sought to satisfy those states which supported a more pluralist vision of international society, were that States Parties could opt-out of the Court's jurisdiction over aggression[153] and that nationals of Non-States Parties and crimes committed on the territory of Non-States Parties are excluded from the Court's jurisdiction.[154] This compromise was a trade-off 'to evade the prospect of the Security Council's exclusive control over the crime of aggression.'[155] Additionally, in order to further accommodate the P-5 and secure their support, it was agreed that neither provision would go into effect until a vote by States Parties after 1 January 2017 and after 30 ratifications of each amendment.[156] Whilst accepting the necessity of an additional compromise, South Africa emphasised that it 'should not become a dream deferred, but should generate the necessary momentum to ensure that this decision is taken in 2017' and it called upon 'all States Parties to ratify the amendments on the definition of the crime of aggression as soon as possible, in order for the Court to exercise jurisdiction over the crime',[157] which is again demonstrative of its strong support for the ICC and international criminal justice.

The adoption of the amendments by consensus at Kampala was another significant breakthrough in the evolving history of international criminal justice, and particularly the criminalisation of aggression. Barriga describes it as 'without doubt a historic achievement'[158] and Trahan argues

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153 Article 15 *bis* (4) Rome Statute.

154 Article 15 *bis* (5) Rome Statute.

155 McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court,* 205.

156 Articles 15 *bis* (2) and (3) and 15 *ter* (2) and (3) Rome Statute. *See also,* Kreb and von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 1208. For a detailed analysis of the Kampala provisions, *see* McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court,* 249-280.

157 Opening Statement by Mr A.C. Nel, MP, Deputy-Minister for Justice and Constitutional Development Republic of South Africa, General Debate: Ninth Meeting of the Assembly of States Parties to the International Criminal Court, New York, 6-10 December 2010, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP9/Statements/ICC-ASP9-GenDeba-SouthAfrica-ENG.pdf (accessed 21/07/2018) ('South Africa ASP9 Statement').

158 Barriga, 'Negotiating the Amendments of the crime of aggression', 3. *See also,* Blokker and Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala', 889.

'[t]he Review Conference has taken a tremendous step towards fulfilling the vision of the drafters of the Rome Statute, a vision similar to that of the prosecutors and judges of International Military Tribunals at Nuremberg and Tokyo'.[159] South Africa said that it was 'a moment of great historical significance when...we were able...to adopt a definition on the crime of aggression' and its representative went on to state while the compromise 'bears the marks of its difficult birth and is not necessarily perfect in every sense', 'the adoption of the crime of aggression is a significant moment in a long and ongoing historical process by which humanity had attempted to limit, control and eventually outlaw war and aggression'.[160] Brazil noted that 'the amendments adopted. represent a comprehensive compromise deal that is acceptable to all States Parties, even though it does not reflect entirely any delegation's initial position on the matter'.[161] But while many states were satisfied with the outcome, or were at least willing to accept it, Russia and China were not.

Despite having encouraged states to 'follow principles of realism and [a] balanced approach'[162] during the negotiations, other words for 'sufficient deference to pluralist concerns', at the conclusion of the conference the Russian representative said that 'we do not consider that the consensus decision which was found here reflects to the full extent the existing system of maintenance of peace and security headed by the Security Council and first of all in the sphere of the Security Council prerogatives in defining the existence of an act of aggression.'[163] The representative also stressed Russia's hope, which also appeared as a warning, the Court would exercise its jurisdiction over the crime of aggression 'in full compliance with the United Nations Charter'[164] and it later reiterated its view that '[u]nfortunately, the Kampala compromise does not fully take into account the powers of the Council'.[165] With similar disappointment, the Chinese representative said:

> [t]he existence of an act of aggression should be determined by the Security Council. This is not only what is provided by the United Nations Charter, but it is also what is required by article 5, paragraph 2, of the Rome Statute with regard to articles on the crime of aggression. The Chinese delegation is concerned with the above-mentioned failure.[166]

Concerned with the implications of this development for the primacy of the UN Charter, it later

[159] Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', 94.
[160] South Africa ASP9 Statement.
[161] Official Records of the Review Conference of the Rome Statute of the International Criminal Court (Kampala, 31 May - 11 June 2010), ICC Doc. RC/9/11, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP9/OR/RC-11-ENG.pdf (accessed 21/07/2018), ('Kampala Conference Official Records'), 122.
[162] Russian Federation ASP Review Conference Statement.
[163] Kampala Conference Official Records, 125-126.
[164] Kampala Conference Official Records, 125-126.
[165] UNSC Verbatim Record, 6849th meeting 17 October 2012, UN Doc. S/PV.6849, 20. Russian Federation ASP 11 Statement and Russian Federation ASP13 Statement.
[166] Kampala Conference Official Records, 125

emphasised 'the amendment shall be implemented orderly within the framework of international law established by UN Charter. The highest authority of the Charter shall be maintained, and all the international legislation should be consistent with the provisions of the Charter.'[167] India also expressed its disappointment with the compromise reached at Kampala but this was for a different reason to that of the P-5, namely that 'the possibility of States parties opting out of the jurisdiction of the Court for the crime of aggression' which it, quite legitimately, considered to be 'a case in point when we talk of double standards.'[168] This highlights India's overriding concern, and the basis of its opposition to the Court, that the institution reflects power political dynamics too much, in contrast to China and Russia who believe they are not preserved enough.

6.6. The Activation of the Crime of Aggression at the ICC

Subsequently, at the 16th Assembly of States Parties Meeting in 2017, the Court's jurisdiction over the crime of aggression was activated,[169] sufficient State Parties having voted in favour of activation and the relevant amendments to the Rome Statute having received the necessary number of ratifications over the preceding years. Brazil and South Africa have not ratified the aggression amendments, however. China attended the meeting as an observer state as part of its continued commitment to the Court and it renewed its opposition to the relevant amendments. Its representative noted that 'the controversies triggered by the Amendment have not been settled' and he argued, consistent with the pluralist concerns that had been expressed previously, the:

> [a]mendment on the Crime of Aggression [Article 15 *bis],* which allows the Prosecutor to investigate crimes of aggression without a determination by the Security Council on the existence of the act of aggression, will practically undermine the integrity and authority of the UN Charter as the basis of international legal order.[170]

However, China also explained that '[w]e look forward to forging a partnership featuring win-win cooperation between the Court and the Security Council based on mutual respect', which

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[167] Statement by Mr. MA Xinmin, Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (Observer Delegation), At the 13th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, New York, 8-17 December 2014, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP13/GenDeba/ICC-ASP13-GenDeba-China-ENG.pdf (accessed 21/07/2018) and Statement by Ms. Guo Xiaomei, Counselor of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (China Observer Delegation) at the 14th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 18-26 November 2015, available online at https://asp.icc-cpi. int/iccdocs/asp docs/ASP 14/GenDeb/ASP14-GenDeb--OS-China-ENG.pdf (accessed 21/07/2018).

[168] UNSC Verbatim Record, 6849th meeting 17 October 2012, UN Doc. S/PV.6849, 11.

[169] Resolution ICC-ASP/16/Res.5, Activation of the jurisdiction of the Court over the crime of aggression (adopted at the 13th plenary meeting, on 14 December 2017, by consensus), ICC Doc. ICC-ASP/16/Res.5, available online at https://asp.icc- cpi.int/iccdocs/asp docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf (accessed 21/07/2018).

[170] Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, Mr. Ma Xinmin, Deputy Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (New York, 7 December 2017), available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP16/ASP-16-CHI.pdf (accessed 21/07/2018) ('China ASP16 Statement').

demonstrates an acceptance of the progress that has been achieved, despite its serious reservations, and a desire to work constructively to implement it, although with deference to pluralist institutions.[171] For example, China emphasised that 'for a State that has not accepted the Amendment or is not a Party to the Rome Statute, the Court should not exercise jurisdiction over acts of aggression committed by that state's nationals or on its territory', noting '[t]hat is requisite for international law as "state-based consent law", and is in line with rules of international treaty law'.[172]

Here we see China advancing its pluralist defence of international society, advocating a strictly positivist consent-based nature of law. Finally, demonstrating China's commitment to genuine multilateralism and the international criminal justice project, its representative emphasised his country's belief that the activation of the Court's jurisdiction over the crime of aggression 'should be based on broad consensus' and criticised the exclusion of Non-States Parties from the discussions on the amendments in the lead up to the meeting. He also explained '[h]aste does not bring success' and that '[t]he premature activation of the Court's exercise of jurisdiction over the crime of aggression will not be beneficial for the universality of the Statute or the authority of the Court.'[173] Here we see China's state-solidarist position, it is willing to support the crime of aggression where it consistent with a governance framework that pays sufficient deference to pluralist values and primary institutions.

Surprisingly, Brazil made no mention of the activation of aggression in its statement during the General Debate.[174] Neither did South Africa, its statement was solely concerned with ongoing issues it had with the ICC, which will be fully explored in Chapter Nine. The UK confirmed it 'is willing to support an activation of the crime of aggression - provided there is clarity that the Court does not have jurisdiction over States Parties that have not ratified the aggression amendments', affirming a positive, rather than a presumed consent-based approach to international law, like that advanced by states including Russia and China.[175] The UK, together with other states including Norway and Japan, maintained this position during the meeting whereas other states advocated a wide position whereby the Court would have jurisdiction in the absence of the ratification, forcing states to use the opt-out provision if they wished to shield themselves from the ICC's jurisdiction over the crime of aggression. After protracted negotiations, lasting well beyond the allotted time, the narrow

[171] China ASP16 Statement.
[172] China ASP16 Statement.
[173] China ASP16 Statement.
[174] Statement by H.E. Ambassador Mauro Vieira, Head of Delegation to the 16th Assembly of States Parties Permanent Representative of Brazil to the United Nations, 16th Assembly of States Parties of the Rome Statute of the International Criminal Court, 7 December 2017, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP16/ASP-16-BRA.pdf (accessed 21/07/2018).
[175] United Kingdom, 'Draft UK statement - ASP General Debate 06 December 2017', available online at https://asp.icc- cpi. int/iccdocs/asp docs/ASP 16/ASP-16-UK.pdf (accessed 21/07/2018).

position prevailed,[176] the Resolution activating the crime of aggression stating:

> in the case of a State referral or propio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party *that has not ratified or accepted these amendments* (emphasis added).[177]

Durr notes 'the resistance against a broad interpretation among the powerful states was so strong that a rejection of this approach would have meant the complete rejection of the activation.'[178] This allows states to remain outside of the Court's jurisdiction with respect to aggression without having to open themselves up to the criticism and shame of opting-out, denying civil society a vital mechanism for encouraging compliance with evolving legal and normative standards which existed with the wide position.[179] Moreover, as Van Schaack notes, 'there thus remains no obvious incentive for a state party to ratify the aggression amendments because the provisions generate no exposure to such states absent ratification',[180] potentially hindering the implementation of the criminalisation of aggression.

6.7. Conclusion

The inclusion of the crime of aggression in the Rome Statute in 1998 and the more recent granting of jurisdiction to the Court over the crime, represents the culmination of over one hundred years of cosmopolitan-solidarist progress in international society. The prohibition of aggressive acts by states, as codified *inter alia* in the UN Charter, sought to curtail the ultimate and worse excesses of state power and to submit unbridled politics to the international rule of law for the purpose of maintaining peace and order amongst sovereign nations. Moreover, the attribution of individual responsibility to the state leaders for acts of aggression was part of the cosmopolitan international criminal justice project which sought to individualise international politics and, in doing so, it transcended the edifice of the state in the name of accountability. The primary institution of war has been continuously de-legitimised and narrowed in scope through the evolution of the primary institutions of international law and, more recently, criminal justice which now comprehensively

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[176] D. Akande, 'The International Criminal Court Gets Jurisdiction Over the Crime of Aggression', *EJIL Talk,* 15 December 2017 , available online at https://www.eiiltalk.org/the-international-criminal-court-gets-iurisdiction-over-the-crime-of-aggression/ (accessed 20/07/2018) and N. Sturchler, 'The Activation of the Crime of Aggression in Perspective', *EJIL Talk,* 26 January 2018, available online at https://www.eiiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/ (accessed 20/07/2018).

[177] Resolution ICC-ASP/16/Res.5, Activation of the jurisdiction of the Court over the crime of aggression (adopted at the 13th plenary meeting, on 14 December 2017, by consensus), ICC Doc. ICC-ASP/16/Res.5, available online at https://asp.icc- cpi.int/iccdocs/asp docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf (accessed 21/07/2018), para.2.

[178] B. Durr, 'The Challenges of Prosecuting Wars of Aggression', *Groningen Journal of International Law Blog*., 29 January 2018, available online at https://groiil.org/2018/01/29/the-challenges-of-prosecuting-wars-of-aggression/ (accessed 20/07/2018).

[179] Van Schaack, 'Negotiating at the Interface of Power and Law', 585.

[180] Van Schaack, 'Negotiating at the Interface of Power and Law', 586.

regulates state aggression.

One of the most significant achievements in the operationalisation of aggression at the ICC was the primacy given to the both the rule of law and criminal justice over international politics which can be seen in the rejection of an exclusive role for the Security Council. The majority of states refused to bow to the pressure of the P-5 to make a determination by the Security Council of the existence of an act of aggression by a state, in all circumstances, a prerequisite to the Court exercising jurisdiction over it. Van Schaack concurs, noting that 'the amendments signal a subtle erosion of Security Council power'[181] and argues that the outcome in Kampala is 'a microcosm of the continual thinning of state sovereignty and the indelible shift in the balance between power and law in contemporary international relations.'[182]

However, it must be noted that the progress achieved at Kampala and beyond has not been without its pluralist limits, as was the case at Rome. The Security Council continues to retain the ability to control investigations and prosecutions into aggression by the ICC through its Article 16 deferral powers, as it can exercise in relation to the other crimes within the Court's jurisdiction. Furthermore, as noted above, in order to satisfy the P-5 members, it was necessary to provide an opt-out provision for States Parties and to explicitly exclude the ability for the Court to exercise jurisdiction over Non-States Parties' citizens in all situations. This differs from the jurisdictional arrangements for the other core crimes and reflects the implementation of a 'positive consent approach' to international law, a feature of state-solidarist international society given it seeks to protect the authority and autonomy of the state or, in other words, it represents the 'triumph of voluntarism'.[183] This situation is described by de Hoon as 'an off mixture of a vertically organized criminal law - between law enforcer and (alleged) criminal - and decentralist and horizontally based international law, based on sovereign equality of states.'[184] This is something the Court moved beyond at Rome with respect to the other crimes and it can therefore be viewed as a step back for the Court in terms of institutionalising cosmopolitan aspirations. This is partly the result of the increasing influence of rising powers on normative evolution, given the prominent role Russia and China played in advancing the P-5 position, and it also reflects the limits of solidarist progress where it directly confronts pluralist concerns about peace and order.

This is particularly detrimental as it creates the possibility for States Parties to shield themselves from the Court's jurisdiction over aggression therefore undermining the authority and universality

[181] Van Schaack, 'Negotiating at the Interface of Power and Law', 559.
[182] Van Schaack, 'Negotiating at the Interface of Power and Law', 509.
[183] Van Schaack, 'Negotiating at the Interface of Power and Law', 559.
[184] de Hoon, 'The Law and Politics of the Crime of Aggression', 152-153.

of the Court they claim to support as States Parties, as well as the advancement of international criminal justice generally. Moreover, the complex jurisdictional regime that has been established will likely limit the application of the provision.[185] Furthermore, the complexity and ambiguity of the regime is likely to result in extensive pre-trial litigation when the first prosecution occurs challenging 'the very legitimacy of the crime and its provenance' and will require the Court to pronounce on highly contested and sensitive issues 'in a fraught political context', therefore potentially planting 'a time bomb in the ICC Statute that will indelibly harm the court or jeopardize its work in responding to atrocity crimes.'[186]

The Court's legitimacy may also be compromised by selective prosecutions of the crime of aggression, the result of the Court's limited, patchwork jurisdiction over it. This will potentially aggravate supportive states more than with the selective prosecutions of other crimes because prosecuting aggression involves a greater direct confrontation of wrongful *state* conduct[187] and therefore when the Court is unable to confront it, it demonstrates starkly the Court's susceptibility to *realpolitik* and its unfortunate preservation of power privilege within international society. A further challenge it poses for the Court is that given aggression is a 'leadership crime' - it is only committed by those in control of government - the Court will likely have difficulty obtaining custody of suspects and it will raise difficult questions of immunity, with which the Court is already grappling, which may affect the perception of the Court's authority and, ultimately, its value as an institution. As was explained in Chapter One, achieving recognition as a legitimate institution requires the perception of effectiveness, amongst other things.

It is clear all of the BRICS states have supported both the prohibition and the criminalisation of aggression over a substantial period of time, and each has contributed to the long process of granting the ICC jurisdiction over it. This is consistent with all five BRICS states' demonstrable past commitment to the international criminal justice project. The support is also likely derived from the fact that, unlike for the other crimes under the Court's jurisdiction, aggression also contributes directly to promoting peace and security within international society, and so concerns for both order and justice dovetail. In other words, the criminalisation of acts of aggression are much more in line with the central aims of the UN Charter - which the BRICS support robustly - than genocide, war crimes and crimes against humanity, which have a greater individualist focus and aim at mitigating the effects of war or protecting human rights. Moreover, the BRICS states support for the criminalisation of aggression is also consistent with their national interests as rising powers in

[185] Durr, 'The Challenges of Prosecuting Wars of Aggression'. *See also*, Van Schaack, 'Negotiating at the Interface of Power and Law', 559.
[186] Van Schaack, 'Negotiating at the Interface of Power and Law', 600.
[187] Van Schaack, 'Negotiating at the Interface of Power and Law', 578-579. *See also,* Meron, 'Defining Aggression for the International Criminal Court', 3.

avoiding and minimising the potential for great power war which would be disruptive to their objectives of peaceful rise within international society. It also potentially constrains the ability of Western states, particularly the US, in their military adventurism and thus serves the BRICS objectives of limiting Western influence in international affairs.

However, there were contrasting views amongst the BRICS states as to how the crime should be operationalised and this reflects their slightly different normative visions of international society, as has been identified in previous chapters. For example, Russia and China wanted to exercise control over the Court's jurisdiction over the crime of aggression by supporting an exclusive role for the Security Council, reasserting the primacy of the state and political control over justice. This reflects their more pluralist leaning within the state-solidarist position. They also argued that this was required by the UN Charter, reflecting their absolute deference to it as the constitution of international society. Their views differed slightly, however, in respect of the definition of aggression. Russia supported a narrow definition that extended only to 'wars of aggression' whereas China strongly advocated for the definition to include wholesale the agreement reached in the General Assembly in 1974. This evidences Russia's preference for limited multilateralism with a preferential role for great powers and China's genuine commitment to achieving consensus among the greatest number of states including developing nations. Although, when it came to the determination of aggression, China preferred exclusive Security Council control and a complete unwillingness to defer authority to the General Assembly. From this we can conclude that China supports widespread input into the creation of norms but prefers centralised control over their application.

In contrast, South Africa and India argued against an exclusive role for the Council on the basis it would politicise the Court and compromise its independence, concerns they had expressed generally during the Rome conference. Brazil shared the concerns of South Africa and India but also recognised the need to find a compromise between the two positions and, consistent with its developing role as a bridge-builder, Brazil worked hard to find a balance between the pluralist concerns and cosmopolitan ambitions in relation to the criminalisation of aggression in the Rome Statute regime, which ultimately provided the basis of a breakthrough in the negotiation and facilitated the reaching of a compromise position, albeit one that deferred more greatly to the pluralist concerns that had been raised.

Having reviewed the BRICS states' engagement with the development of the ICC at Rome and beyond, the thesis will now go on to analyse how the BRICS states have engaged with the ICC in relation to the discharge of its mandate and its practice of international criminal law. The next chapter will examine specifically the positions adopted by the BRICS in relation to the Court's

intervention in Sudan, including particularly its decision to issue an arrest warrant for the current sitting head of state, President Omar al-Bashir.

CHAPTER SEVEN

THE ICC'S INTERVENTION IN DARFUR: SUPORT AND CONTESTAION BY THE BRICS STATES

7.1. Introduction

This thesis has so far examined the approaches and contributions of the BRICS states to the evolution and development of international criminal justice and its permanent enforcement mechanism, the ICC. Based on this research, it was found that the BRICS states supported the evolution of international criminal justice but only to the extent it was developed and implemented in accordance with a state-solidarist conception of international society, with sufficient deference paid to pluralist primary institutions, such as sovereignty, diplomacy and a classical interpretation of international law, and with a recognition of the need to prioritise order over justice where they conflict. There are, however, divergences within the grouping which were identified. Russia, China and India adopt a more pluralist leaning, whereas Brazil and South Africa generally seek to advance a more cosmopolitan vision of international criminal justice and the Court. Despite such differences of opinion on specific matters, they still share a generally common view about how the ICC should assimilate into the existing global governance architecture and how it should operate.

The next part of the thesis, comprising three chapters, will examine the engagement and responses of the BRICS states to the practice of international criminal justice by the ICC. It will do so by way of three case studies: Sudan, Libya and Syria. The case studies are used to generate an understanding of the views of the BRICS states on the implementation of international criminal justice by the ICC through an examination of the positions and actions they adopt in respect of the particular situations and the issues that have arisen within them. Additionally, given that the issue of regime change and the relationship between retributive justice and the negotiated settlement of armed conflicts arise in all three cases, and these represent the interaction between the values of order and justice in international society, as has been previously discussed in this thesis, the views of the BRICS states on these specific issues will be a particular focus of the chapters.

This first chapter will examine the views and approaches of the BRICS states to the Court's intervention in Sudan. It begins with an analysis of the Security Council referral of the situation in Darfur to the ICC in 2005, including of the votes and expressed views of the BRICS states in respect of that referral. It will then examine the BRICS states' views on the ICC's subsequent actions, including decisions taken by the Chief Prosecutor, in the Darfur situation in the period 2005-2017.

This will involve an analysis of their views on the balance struck between the objectives of peace and justice by the Court, the role of the Security Council and the issue of non-cooperation by states. One of the main issues in the situation was the Court's decision to issue an arrest warrant for the incumbent President of Sudan, Omar al-Bashir, and its subsequent attempts to enforce his arrest and surrender in the face of resistance from many states. The BRICS states' views on this specific issue will therefore be a focus in this chapter. This provides an insight into their views on the appropriate balance to be struck between the values of order and justice in international society.

It will be shown the BRICS states demonstrated considerable support for the Court's intervention in Sudan and for the implementation of international criminal justice there but only to the extent that it was done in accordance with a state-solidarist conception of international society, including paying sufficient deference to pluralist values and primary institutions, which is consistent with their previously expressed views. This is evident in their contestation of the Court where it failed to pay such deference, such as it issuing an arrest warrant for al-Bashir and insisting he be arrested by states and surrendered to the Court in circumstances they considered to be detrimental to the ongoing efforts to settle the conflict through political negotiations and in contravention of established international law. It is also evident in the BRICS states' support for the deferral of the Court's intervention by the Security Council, as proposed by the Africa Union (AU), and their insistence that the pursuit of justice must not undermine the peaceful resolution of the conflict in Darfur. This is a continuation of a longstanding concern of the BRICS states about the destructive potential of retributive justice efforts on peace. It is also recognised, however, that in addition to supporting the implementation of international criminal justice in accordance with their normative vision of international society, the engagement of the BRICS in respect of the Darfur referral is also driven by their desire to be seen as responsible emerging powers that are willing and able to contribute to the management of international affairs, as identified in Chapter Three. It is also said that Russia, China and India's criticism of the ICC and concerns about its interventions in Sudan, and particularly about the issuing of an arrest warrant for al-Bashir, are also informed by the states developed economic relations with Khartoum.

7.2. The Darfur Referral: Cosmopolitan Progress and Pluralist Limits

On the 31 March 2005, the UN Security Council acting under Chapter VII of the UN Charter referred the situation in Darfur, Sudan to the ICC pursuant to Article 13(b) of the Rome Statute, the mechanism that allows the Court to exercise jurisdiction over non-States Parties.[1] It did so on the

[1] Sudan is not a State Party to the Rome Statute.

grounds the ongoing civil war constituted a threat to international peace and security.[2] The referral was made on the basis of a report prepared by the International Commission of Inquiry on violations of international humanitarian law and human rights in Darfur (the Commission).[3] The Commission, which included a former member of the South African Truth and Reconciliation Commission, Mr Dumisa Ntsebeza, among other esteemed individuals, 'established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law' and it recommended that the UN Security Council immediately refer the situation in Darfur to the ICC.[4]

7.2.1. The Cosmopolitan Progress of Resolution 1953

Both the recommendation of the Commission and the subsequent ICC referral were significant developments. They reflected the continuing entrenchment of criminal justice as the primary or 'arch- response' response to gross human rights violations committed in the context of ongoing conflicts and also contributed to the crystallisation of international criminal justice as a primary institution of international society. As Mills has argued, the referral 'demonstrated the world's commitment to international criminal justice'[5] and du Plessis said 'the Security Council referral is a significant step in the history of the Court'.[6] They were also an endorsement of the ICC, confirming its fragile legitimacy, particularly given that alternatives to the use of the ICC were also being mooted, such as extending the jurisdiction of the ICTR or creating a new *ad hoc* tribunal.[7] As Udombana argues, in adopting Resolution 1594, the Security Council 'acknowledges the important role the ICC will play in the international criminal justice system'.[8]

Moreover, and importantly for the Court and its supporters, it demonstrated that the ICC could operate outside of the narrow confines of its States Parties to reach those states which had deliberately sought to place themselves beyond the reach of the law, and thus achieve universality. In this sense, the referral reflected the cosmopolitan progress which had been envisioned during the Rome Conference, at least by some, that states could be subjected to international criminal law and the jurisdiction of a supranational organisation without their consent for the purpose of delivering

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[2] UNSC Res. 1593 (31 March 2005), UN Doc. S/RES/1593(2005).
[3] UNSC Res. 1564 (18 September 2004), UN Doc. S/RES/1564(2004), para. 12.
[4] United Nations, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005), available online at http://www.un.org/news/dh/sudan/com inq darfur.pdf (accessed 19/08/2018), 5.
[5] K. Mills, '"Bashir is Diving Us": Africa and the International Criminal Court', (2012) 34(2) *Human Rights Quarterly* 404-447, 415.
[6] M. du Plessis, 'Critical Appraisal of Africa's Response to the World's First Permanent International Criminal Court', (doctoral thesis on file at the University of KwaZulu-Natal), available online at https://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/8404/Du Plessis Max 2011.pdf?sequence=1&isAllowed=y (accessed 21/07/2018).
[7] *See* D. Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics*, (OUP, 2014), 21 and 111.
[8] N. J. Udombana, 'Pay Back Time in Sudan - Darfur in the International Criminal Court', (2005) 31(1) *Tulsa Journal of Comparative and International Law* 1-57, 18.

justice and upholding human rights and the laws of war.[9] France explained in its statement following the adoption of Resolution 1953, 'it sends the same message beyond Darfur to the perpetrators of crimes against humanity and war crimes, who until now have all too often escaped justice...that there is no impunity.'[10] Similarly, the ICC's then Chief Prosecutor, Luis Moreno-Ocampo, said that when the ICC was established it sent out a powerful message there can be no impunity for gross human rights violations and, furthermore, that referring the situation in Darfur to the Court 'sent an even more concrete message: there can be no impunity for perpetrators of massive atrocities' and that it provided 'an historic opportunity to confirm those messages, to move from principles to action'[11]

7.2.2. The Pluralist Limits of Resolution 1953

Whilst the referral of the situation in Darfur to the ICC reflected cosmopolitan progress, it should be noted that such progress was only permitted by the members of the Security Council, and particularly the P-5, given their veto powers. This reflects the privileged role of permanent UN Security Council members and undermines the idea of a universal rule of law where ' [t]he law is meant to apply to all equally'.[12] This impairs the legitimacy of the referral on the basis that the legitimacy of courts is derived partly from their a-political actions.[13] The referral is an example of cosmopolitan progress subject to state control which is the consequence of the ICC's legal regime straddling the international and world society conceptions of global political order. As Eckert argues, 'the ICC can deliver a universal and impartial standard of justice only when...the state system allows it to; its cosmopolitan promise is still heavily dependent on the willingness of the state system to fulfil it.'[14] The resolution also evidences the pluralist limits to cosmopolitan progress, including the ability of powerful states, particularly the permanent members of the Security Council, to influence criminal justice in accordance with their beliefs and interests. Specifically, at the insistence of the US, resolution 1593 excluded from the ICC's jurisdiction 'nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute'.[15] It also referred to Article 98(2) of the Rome Statute in the preambular section. This article provides that '[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under

[9] *See*, A. E. Eckert, 'The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide' in S. C. Roach, *Governance, Order, and the International Criminal Court. Between Realpolitik and a Cosmopolitan Court,* (OUP, 2009), 219.
[10] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 8.
[11] UNSC Verbatim Record, 5905th meeting, 5 June 2008, UN Doc. S/PV.5905, 2.
[12] R. Cryer, 'Sudan, Resolution 1593 and International Criminal Justice', (2006) 19(1) *Leiden Journal of International Law* 195-222, 217
[13] *See also,* Cryer, 'Sudan, Resolution 1593 and International Criminal Justice', 217.
[14] Eckert, 'The Cosmopolitan Test', 224.
[15] UNSC Res. 1593 (31 March 2005), UN Doc. S/RES/1593(2005), para.6.

international agreements' and it is this provision which the US relies upon to shield its citizens from the Court's jurisdiction. This is on the basis that the US concluded agreements with many states, known as 'Article 98 Bilateral Surrender Agreements', which preclude those states from surrendering US citizens to the Court and also prevents the Court for requesting surrender because to do so would require the requested state to act inconsistently with its agreement with the US not to surrender it citizens which is prohibited under the Rome Statute.[16]

It is also important to note that the resolution emphasised 'the need to promote healing and reconciliation.in order to complement judicial processes and thereby reinforce the efforts to restore long lasting peace, with African Union and international support as necessary'.[17] This reflects a concern within the Council, one that it also shared more widely, that international criminal justice processes need to operate alongside other mechanisms in order to serve the ultimate goal of achieving long term peace. This issue of the relationship between peace and justice became a site of increasing debate and disagreement as the ICC's interventions in Sudan evolved, with the BRICS states giving priority to political settlements and liberal Western states continuing to emphasise the importance of accountability for human rights violations, which is consistent with the legalism inherent in the liberal approach, as discussed in Chapter Two.

7.3. The BRICS States' Support for Resolution 1953

One thing that made the Sudan referral even more significant was that the Security Council resolution was adopted with the support or, in some cases, acquiescence of BRICS states. Russia voted in favour of the resolution, expressly supporting the application of criminal justice in Sudan delivered by the ICC, and both China and Brazil abstained, albeit for different reasons, demonstrating a caveated commitment to the use of criminal justice in Darfur.

In explaining its vote to the Security Council, the Russian representative said that '[a] ll who are guilty of gross violations of human rights in Darfur must be duly punished'[18] and, moreover, '[w]e believe that the resolution adopted today...will contribute to an effective solution in the fight against impunity in Darfur'.[19] This is consistent with Russia's long history of supporting international criminal justice and the ICC, it having voted in favour of the adoption of the Rome Statute and having signed it in September 2000. The UK, which proposed the resolution, and France expressed

[16] D. Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent', (2005) 3(2) *Journal of International Criminal Justice* 333-353.
[17] UNSC Res. 1593 (31 March 2005), UN Doc. S/RES/1593(2005), para.5.
[18] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 10.
[19] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 10.

similar support for the referral.[20] It cannot be doubted, however, that Russia's decision to vote in favour of the resolution was also informed by a desire to be seen by other states as a responsible power in international society, willing to shoulder the burden of managing international crises and supporting global governance institutions, such as the ICC. There was also likely a desire not to diplomatically isolate itself in light of the overwhelming support for the referral. This was arguably made easier by the fact that, at that time, Russia did not have particularly strong relations with Khartoum, although it did supply the regime with military hardware.[21] Therefore, it can be said that Russia's position was informed by both normative and material concerns.

China abstained on the resolution, ostensibly because of principled concerns about how the pursuit of criminal justice may negatively affect the ability to achieve a political settlement in Darfur, concerns that it would continue to raise over the coming years as the ICC's intervention developed, and also because, in its view, the referral was a violation of the principle of state consent. Its representative explained that while 'perpetrators must be brought to justice…we believe that, when trying to ensure justice, it is also necessary to make every effort to avoid any negative impact on the political negotiations on Darfur.' Moreover, China was:

> not in favour of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government, because we are afraid that that would not only severely complicate efforts to secure an early settlement of the Darfur issue, but also have unforeseeable consequences for the north-south peace process in the Sudan.[22]

Its representative also confirmed that '[w]e cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties, and we would find it difficult to endorse any Security Council authorization of such an exercise of jurisdiction by the ICC.'[23] Nevertheless, despite the concerns that it expressed, China abstained on the resolution rather than vetoing it. The reason for this must be that China in fact supported a role for the ICC in Sudan but needed to be seen to be expressing some caution in order to protect its extensive political and economic relations with Khartoum, and also not be seen to be endorsing wholesale a violation of the principle of state consent, which is a key element of its state-solidarist vision of international society. China was arguably put in a difficult position and its response had to be sufficiently nuanced.

China has had significant relations with Sudan for a long period of time. China established a diplomatic mission to Sudan some 50 years ago, the fourth that it opened in Africa, and it has

[20] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 7 (United Kingdom) and 8 (France).
[21] J. Burger, 'The return of Russia to Africa', *New African,* 12 November 2018, available online at https://newafricanmagazine.com/news-analysis/politics/the-return-of-russia-to-africa/ (accessed on 24/02/2019).
[22] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 5.
[23] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 5.

deepened its political engagement with the country over time.[24] Moreover, China has long been one of Sudan's most important economic partners and, perhaps, even its most important partner. China has developed significant economic relations with Sudan, particularly concerning the oil industry,[25] but this has gradually expanded to include a broad range of commercial activities.[26] China's decision to abstain on the resolution rather than support it, as Russia did, was in part influenced by a desire to protect its political and economic relations with Sudan, but it also reveals support for the role of international criminal justice and the Court. China was concerned with working towards ending the conflict in Sudan including in order to protect its economic interests and so China arguably sees the ICC referral as a means of facilitating conflict resolution, even if just to put some pressure on the regime; as Large argues, 'Chinese diplomacy changed from passive, blind support for Khartoum to more active involvement in pressure politics aimed at ending conflict.'[27] China's desire to promote conflict resolution in Sudan was arguably informed by the risk that the ongoing conflict in Darfur posed to its economic investments and operations in the country; as Large also argues, '[t]hreats and attacks against their own interests provided a self-interested reason for Beijing to promote conflict resolution in Sudan and was one driver of a more active Chinese political engagement.'[28] It is also driven, however, by a desire on the part of China to be seen as a responsible power in international society, making a positive contribution to the cooperative management of international crises. While this position appears to conflict with China's express statement that it abstained because of concerns about the negative effect of an ICC referral on conflict resolution, this arguably served as a warning to the ICC to take care in its intervention and to be sure to promote a political resolution to the conflict rather than disrupt it. As will be demonstrated below, when concerns began to be realised about the impact of the ICC's intervention in Sudan, China adopted a more robust approach to the ICC. It can therefore be argued that China's view of international criminal justice in this case is partly an instrumental one but, in any event, it evidences China's support for the role of criminal justice and the ICC, and cannot simply be described as an attempt by China to hold back or damage the ICC, or to appease Sudan while at the same time avoiding attracting the criticism of the international community. It can therefore be said that China's position was a complex one that was informed by both normative and material concerns, and reflects the taking into account of numerous different constituencies.

It could be argued, however, that Russia and China allowed the referral resolution to pass solely

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[24] D. Large, 'China's Sudan Engagement: Changing Northern and Southern Political Trajectories in Peace and War', (2009) 199 *The China Quarterly* 610-626, 610-611.

[25] L. Patey, 'Learning in Africa: China Overseas Oil Investments in Sudan and South Sudan', (2017) 27(107) *Journal of Contemporary China* 756-768, 760-762.

[26] Large, 'China's Sudan Engagement', 615.

[27] Large, 'China's Sudan Engagement', 612.

[28] Large, 'China's Sudan Engagement', 618-619.

in order to gain the kudos of the other states and to show themselves as responsible powers but did so knowing that the referral would not give the ICC ultimate control over the future of Darfur and that they would be able to thwart any action that was not consistent with their views or adverse to their political relations with the Sudanese state. In other words, Russia and China knew they could remain in control of the situation, having their cake (international kudos) and eating it too (preserving their political and economic relations with Sudan). This should be doubted as a credible explanation of Russia and China's position at this time, however, on the basis that referring the situation in Darfur to the ICC would have very serious consequences for Khartoum, which the states would of course have known about, and that would have been the result of their votes. Moreover, it would not have been possible for Russia and China to predict with any degree of certainty what the ICC would do and how they would be able to respond to control the situation in order to maintain their relationship with the state under investigation. It would therefore have been a very risky strategy for Russia and China, one which it is difficult to believe would have been adopted. The more plausible explanation is that Russia genuinely supported a criminal investigation and accountability in Sudan, and that China also supported it for the purposes of conflict resolution but disagreed with the approach to engage the ICC is Sudan, and therefore abstained, and that their subsequent opposition to the ICC's work in the country was primarily a result of their disagreement with how investigations and prosecutions were being conducted, as will be identified in the remainder of the chapter.

Brazil's decision to abstain was made on entirely different grounds, specifically that the resolution was too pluralist. Despite expressing its support for international criminal justice in Darfur, Brazil felt compelled to abstain because it was of the view the resolution compromised the integrity of the Rome Statute, specifically by referring to Article 98 of the Rome Statute in the preamble. As was explained in Chapter Five, this provision sought to restrict the jurisdiction of the ICC where obligations for states under the Rome Statute conflicted with other obligations that held towards states under general international law, particularly inter-state diplomatic immunity obligations. The Brazilian representative explained that his 'delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue', and he also noted that such a provision 'would constitute an inadequate and risky interference of the Council in the constitutional basis of an independent judicial body'.[29] Moreover, Brazil objected to the referral recognising the existence of exclusive jurisdiction in operative paragraph 6 of the resolution which it considered to be contrary to international law.[30] It also noted that 'the ICC provides all the necessary checks and balances to

[29] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 11.
[30] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 11.

prevent possible abuses and politically motivated misuse of its jurisdiction. Thus, efforts to secure broader immunities from the jurisdiction of the Court are both unwarranted and unhelpful'.[31] In summary, its representative explained 'the ICC remains the only acceptable instance of criminal law for dealing with the issue of accountability in the Sudan' but that there 'are substantial issues that, in our view, will not contribute to strengthening the role of the ICC — which is our aspiration.'[32] The support Brazil expressed for international criminal justice and its robust defence of the integrity of the Court reflects the more cosmopolitan position, as compared to that of China, which is consistent with its long term support for the ICC project, as can be seen throughout this thesis. Its rising power credentials are however also demonstrated in its strident rejection of US exceptionalism and the politicking of justice at the expense of the rule of law.

7.4. From Support to Contestation among the BRICS States

The ICC's intervention in Darfur, which has now been ongoing for over 12 years, has been marred by controversy and is subject to substantial criticism. Despite the serious nature of the crimes charged, which include genocide, war crimes and crimes against humanity, and six arrest warrants having been issued by the Court so far, including for the incumbent President, Omar al-Bashir, who is the first person to be charged with genocide by the ICC, no one has appeared before the Court to face the accusations made against them.[33] This is primarily due to the lack of cooperation by Sudan and other States Parties, as well as a lack of follow up support from the Security Council, particularly in enforcing arrest warrants. This issue has been systematically highlighted by the Court's current and former Chief Prosecutors with great frustration.[34] However, in the absence of an effective response from the Security Council, the Office of the Prosecutor has been forced to shelve its investigation into Darfur indefinitely.[35] This problem sharply highlights the limits of the cosmopolitan-solidarist progress embodied in the Court in that, despite its supranationalised nature, it remains dependent on the will of sovereign states to enforce its mandate and to deliver on its promise of universal justice. This section will examine the involvement of the BRICS states over the course of the Court's intervention in this situation in order to demonstrate how and where they have either supported or hindered the implementation of criminal justice through the ICC, and the reasons for their actions.

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[31] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 11.
[32] UNSC Verbatim Record, 5158th meeting, 31 March 2005, UN Doc. S/PV.5158, 11.
[33] *See,* ICC Situations and Cases, Darfur, Sudan', available online https://www.icc-cpi.int/darfur (accessed 7/3/2018).
[34] *See,* for example, UNSC Verbatim Record, 7199th meeting, 17 June 2014, UN Doc. S/PV.7199, 2-3; UNSC Verbatim Record, 7585th meeting, 15 December 2015, UN Doc. S/PV.7582, 2-3; UNSC Verbatim Record, 7710th meeting, 9 June 2016, UN Doc. S/PV.7710, 23.
[35] UNSC Verbatim Record, 7337th meeting, 12 December 2014, UN Doc. S/PV.7337, 2 - '[f]aced with an environment where my Office's limited resources for investigations are already overstretched, and given the Council's lack of foresight on what should happen in Darfur, I am left with no choice but to put investigative activities in Darfur on hold as I shift resources to other urgent cases'.

In the years following the referral of the situation in Darfur to the ICC, the BRICS states followed the Court's work closely and engaged with it extensively, offering views on its successes and limitations, as well as suggestions as to how the Court should behave in discharging its mandate and achieving peace in Darfur. This demonstrates, as noted above, not only an attempt on the part of the BRICS states to inform the practice of the ICC in accordance with their normative vision of global political order but also a means of demonstrating their ability and willingness to discharge the responsibilities expected of leading powers in international society and to contribute effectively to global governance.

More specifically, as will be considered below, the states expressed opinions on the relationship between peace and justice, the role of the Security Council *vis-a-vis* the ICC, and the non-cooperation of states in relation to the Court's work. This included their views on the Court's controversial decision to issue an arrest warrant for al-Bashir which engages the sensitive issue of head of state immunity and its relationship with the pursuit of justice and accountability. Overall, it is argued that the positions adopted by the BRICS states reflect a desire on their part to see international criminal justice implemented in accordance with a state-solidarist conception of international society paying sufficient deference to pluralist values and primary institutions. There is also a clear willingness on the part of these states to contest the Court where it diverges from the state-solidarist conception of international society and acts in a more cosmopolitan way, challenging pluralist primary institutions and values. However, consistent with the findings of previous chapters, the extent of the pluralist leanings varied between the states, with Brazil and South Africa, at least initially in the case of the latter, offering a more cosmopolitan vision for the Court and support for its work.

7.4.1. Expressions of Support for the ICC in Darfur

It is important to note at the outset that all of the BRICS states, except India, expressed some degree of support for the ICC and its ongoing work in Sudan, which demonstrates a commitment to the institution of criminal justice and to the Court. However, this support waned over time as states became increasingly critical of aspects of the Court's behaviour which they considered to be inconsistent with international law and a threat to the ongoing and delicate peace process in Sudan. In essence, the backlash against the Court was the result of its failure to act with sufficient deference to the BRICS pluralist values and primary institutions, as will be demonstrated below. This stands in contrast to the alternative, less plausible explanation, as identified above, that Russia and China always opposed the ICC's intervention in Sudan but permitted the referral to pass simply in order to show the world that they were responsible members of international society ready to shoulder

the burden of global leadership.

Russia said in 2007 that it 'commends the efforts of the Prosecutor's Office to resolve the very difficult issue of bringing to justice those accused of committing crimes in Darfur'[36] and, despite criticisms that were expressed in the interim, in 2014 Russia explained it still 'supports the efforts of the International Criminal Court (ICC) to investigate the situation in Darfur, pursuant to resolution 1593 (2005).'[37] China was more tentative in its support for the Court due to its underlying unease about the referral. Its representative explained 'China supports the international community's continuing efforts to resolve the problem of impunity in the region'[38] and also 'supports a constructive role for the International Criminal Court (ICC) in appropriately resolving the problem of impunity in Darfur.'[39] More generally, it said '[a]lthough China is not a party to the *Rome Statute*, it always supports the purposes and objectives for which the ICC was established'[40] and expressed 'hope that the Court would win wide support through its work'.[41] This is demonstrative of its support for justice as an institution but caution about its implementation by the ICC. This caution later turned into concern as China began to extensively criticise the Court's work, as examined below, and ceased to express support for it. Its general comments referred to what the ICC *should do* and 'hope' that it would make a contribution to the realisation of peace and justice.[42] India expressed no support for the Court's work, although it said that '[t]he States concerned must also bring to justice those responsible for violations of [the right to life in Darfur]',[43] thus expressing support for international criminal justice but not the ICC specifically.

South Africa expressed the strongest support for the Court and its work over a number of years. For example, South Africa explained that as one the ICC's founding members 'we remain fully committed to supporting its work',[44] 'to all the objectives of the Rome Statute system',[45] to assist

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[36] UNSC Verbatim Record, 5789th meeting, 5 December 2007, UN Doc. S/PV.5789, 10. *See also,* UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 17.

[37] UNSC Verbatim Record, 7119th meeting, 17 June 2014, UN Doc. S/PV.7199, 16.

[38] UNSC Verbatim Record, 5789th meeting, 5 December 2007, UN Doc. S/PV.5789, 11; UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10.

[39] UNSC Verbatim Record, 5905th meeting, 5 June 2008, UN Doc. S/PV.5905, 15.

[40] Statement by Mr. Xu Hong, Head of Chinese Delegation, At the General Debate of the Eighth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (20 November 2009), available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-China-ENG.pdf (accessed on 22/07/2018) ('China ASP8 Statement').

[41] Statement of China at 11th Session of the Assembly of States Parties', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP11/GenDeba/ICC-ASP11-GenDeba-CHN-ENG.pdf (accessed 22/07/2018) ('China ASP11 Statement').

[42] Statement by Mr. MA Xinmin, Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (Observer Delegation), At the 13th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, New York, 8-17 December 2014, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP13/GenDeba/ICC-ASP13-GenDeba-China-ENG.pdf (accessed 21/07/2018) ('China ASP13 Statement').

[43] UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 12.

[44] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 16.

[45] UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 10; UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 9; Opening Statement by Mr AC Nel, MP, Deputy Minister of Justice and Constitutional Development of the Republic of South Africa, During the General Debate at the Ninth Meeting of the Assembly of States Parties of

the ICC 'so that it can function efficiently and effectively'[46] and it '[called] on States that have not yet ratified the Rome Statute, to do so expeditiously' in order to strengthen the battle agains t impunity through the Court.[47] Its representative further explained that '[o]ur support for the work of the Prosecutor and the ICC in Darfur is based on the conviction that those who have committed serious crimes against the men, women and children of the Sudan must be held accountable'.[48] South Africa's support at that time for the ICC's intervention in Sudan can be believed because of the extent of the support expressed and because such support is consistent with its longstanding and enthusiastic committed to the ICC, as identified in Chapter Five. Furthermore, in expressing support for the ICC in Sudan, South Africa was potentially opening itself up to criticism of lacking African solidarity and would therefore not have taken this course of action without a genuine commitment to international criminal justice and a belief in the work of the ICC. These expressions of support ceased dramatically in 2015, however, and switched to strident contestation following the decision of South Africa not to arrest at-Bashir when he travelled to South Africa to attend an AU Summit and the criticism that it received as a result, which will subject to detailed examination in Chapter Nine. This demonstrates very starkly that how subsequently criticism of the ICC's work in Sudan was primarily the result of the way that the institution acted in that situation.

While Brazil spoke strongly in support of the Court it did not do so specifically in respect of the Court's intervention in Sudan. This is likely because it did not have the platform to do so. It was only a member of the Security Council once, and for one year only, following the Darfur referral during which time the ICC intervention in Sudan was not formally discussed. However, Brazil did say more generally during the relevant period that '[t]he Brazilian Government, as an early supporter of the ICC, takes this opportunity to reaffirm its commitment',[49] that 'Brazil attaches great

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the International Criminal Court, United Nations, New York, 14 December 2011, available online at https://asp.icc- cpi.int/iccdocs/asp docs/ASP10/Statements/ICC-ASP10-GenDeba-SouthAfrica-ENG.pdf (accessed on 22/07/2018); Opening Statement by Mr J.H. Jeffrey, MP, Deputy Minister of Justice and Constitutional Development, Republic of South Africa, General Debate: Twelfth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 20-28 November 2013, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP12/GenDeba/ICC-ASP12-GenDeba-SouthAfrika-ENG.pdf (accessed on 22/07/2018) ('South Africa ASP12 Statement').

[46] Statement by The Minister for Justice and Constitutional Development, Mrs B S Mabandla, 6th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, New York, United Nations, 03 December 2007, available online at https://asp.icc-cpi.int/iccdocs/asp docs/library/asp/Statement GD South Africa EN 6ASP.pdf (accessed on 22/07/2018) ('South Africa ASP6 Statement). *See also,* Statement by Nkhulu Daniel Sebothoma, Charge D'Affaires of the South Africa Embassy to the Netherlands, General Debate of the Seventh Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague', 14 November 2008, available online at https://asp.icc-cpi.int/iccdocs/asp docs/library/asp/ICC-ASP- ASP7-GenDebe-SAfrica-ENG.pdf (accessed 20/07/2018) ('South Africa ASP7 Statement)

[47] Statement by Peter Goosen, Ambassador of the Republic of South Africa to the Kingdom of the Netherlands, General Debate of the Eighth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, November 2009, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-South%20Africa-ENG.pdf (accessed 21/07/2018) ('South Africa ASP8 Statement').

[48] UNSC Verbatim Record, UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 9.

[49] Statement by Ambassador Maria Luiza Ribeiro Viotti, Permanent Representative of Brazil to the United Nation, Sixth Assembly of States Parties to the Rome Statute, New York', 3 December 2007, available online at https://asp.icc-cpi.int/iccdocs/asp docs/library/asp/Statement GD Brazil EN 6ASp.pdf (accessed 20/07/2018) ('Brazil ASP6 Statement').

importance to the development of international criminal law provided by the Rome Statute'[50] and, in 2017, after states begun to forcefully contest the Court, it said it 'is pleased to see that the Court continues to gain strength as the first permanent tribunal set out to help end impunity for the most serious international crimes...the ICC is a vehicle for justice and peace.[51] This is illustrative of Brazil's more cosmopolitan position in which it expresses greater concern for the promotion of accountability and the delivery of justice than for pluralist institutions.

7.4.2. The Pursuit of Justice should not threaten the Prospects of Peace

Whilst the BRICS states were generally supportive of the Court and its work in Darfur, at least initially, they were clear in their view that criminal justice is not an isolated process and must be pursued as part of a multifaceted approach to conflict resolution and post-conflict reconciliation, which involves both legal and political mechanisms, albeit there are divergent opinions between the BRICS states as to how this should be achieved. Moreover, the BRICS states were clear in their view the pursuit of justice must not undermine the prospects of achieving a negotiated settlement in Darfur. This demonstrates a view, shared among the BRICS states, about the limits and potential negative effects of unbridled legalism in conflict resolution and transitional justice, and a willingness to suspend criminal proceedings in order to achieve a political settlement through diplomacy and negotiation. This position does not represent a rejection of criminal processes but rather a pragmatic balancing of the values of peace and justice, although, ultimately, it prioritises the former over the latter, at least in the short term. This is consistent with the BRICS' state-solidarist vision of global political order which supports cosmopolitan progress, such as the implementation of international criminal justice, but only to the extent that it does not undermine pluralist primary institutions, such as state sovereignty and diplomacy, or threaten order within international society.

This position is demonstrated in the various statements of the BRICS. The Russian representative said '[w]e fully agree with the need for justice to be done in Darfur, including against persons indicted of heinous crimes. It must be done, however, without neglecting other equally important factors that could have an impact on the stability of an important region of Africa.'[52] Furthermore,

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[50] Statement by H.E. Ambassador Maria Luiza Ribeiro Viotti, Permanent Representative of Brazil to the United Nations, X Assembly of States Parties to the Rome Statute of the International Criminal Court, December 2011, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP 10/Statements/ICC-ASP 10-GenDeba-Brazil-ENG.pdf (accessed on 21/07/2018) ('Brazil ASP10 Statement').

[51] Statement by H.E. Ambassador Mauro Vieira, Head of Delegation to the 16th Assembly of States Parties Permanent Representative of Brazil to the United Nations, 16th Assembly of States Parties of the Rome Statute of the International Criminal Court, 7 December 2017, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP16/ASP-16-BRA.pdf (accessed 21/07/2018) ('Brazil ASP16 Statement').

[52] UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 3-4.

it was said there is 'a need to balance the demands of personal responsibility and the interests of the peace process. Work in the legal sphere must proceed taking into account the joint efforts towards a settlement of the situation in Darfur and in the Sudan as a whole'[53] and that '[a] delicate balance must also be struck between the interests of reconciliation and justice'[54] but, ultimately, the legal work of the Court in Darfur 'should not stand in the way of the process of restoring peace and post - conflict normalization.'[55]

China similarly recognised that '[e]nding impunity is an essential component of resolving the problem of Darfur' and expressed its 'support [for] the ICC in playing a constructive role' in achieving a solution to the conflict,[56] which is consistent with its approach to the referral as stated above. However, it argued that legalism, in the form of criminal proceedings, was only part of the solution, noting that 'in dealing with the Darfur problem, we should comprehensively address all its aspects — political, security, humanitarian, development and judicial. We must strike a balance in undertaking measures involving those aspects' and it stressed that the ICC's work 'should also complement the efforts of the international community to advance the political process'.[57] China highlighted its more instrumental view of international criminal justice, noting 'the pursuit of international judicial justice should be carried out with the *ultimate aim* of putting an end to conflict and in the wider context of restoring peace' (emphasis added)[58] and it emphasised its belief 'that justice cannot be achieved at the expense of peace.'[59] On this last point the government further stated that:

> [t]o equate punishing crimes with justice, sometimes even at the expense of national

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[53] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10. *See also,* UNSC Verbatim Record, 5905th meeting, 5 June 2008, UN Doc. S/PV.5905, 15.

[54] UNSC Verbatim Record, 7199th meeting, 17 June 2014, UN Doc. S/PV.7199, 16. *See also,* UNSC Verbatim Record, 7337th meeting, 12 December 2014, UN Doc. S/PV.7337, 5 - 'the Court's actions in implementing its mandate in the Darfur investigation should not be carried out independent of general efforts to normalize the situation in the long-suffering province' and Statement of the Russian Federation delivered by Ms. Diana Eloeva First Secretary of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation, 13th Assembly of States Parties to the Rome Statute of the International Criminal Court', 12 December 2014, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP13/GenDeba/ICC-ASP13-GenDeba-Russian-ENG.pdf (accessed 21/07/2018) ('Russian Federation ASP13 Statement').

[55] UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 17.

[56] UNSC Verbatim Record, 5789th meeting, 5 December 2007, UN Doc. S/PV.5789, 11.

[57] UNSC Verbatim Record, 5789th meeting, 5 December 2007, UN Doc. S/PV.5789, 10-11. *See also,* UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 6; UNSC Verbatim Record, 6230th meeting, 4 December 2009, UN Doc. S/PV.6230, 11; UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 13; UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 15; UNSC Verbatim Record, 7080th meeting, 11 December 2013, UN Doc. S/PV.7080, 7; UNSC Verbatim Record, 7199th meeting, 17 June 2014, UN Doc. S/PV.7199, 5; China ASP11 Statement; Statement by Mr. Ma Xinmin, Counsellor of the Department of Treaty and Law of Ministry of Foreign Affairs of the People's Republic of China, At the Twelfth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, November, 2013, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP12/GenDeba/ICC-ASP12-GenDeba-China-ENG.pdf (accessed on 21/07/2018) ('China ASP12 Statement'); Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, Mr. Ma Xinmin, Deputy Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (New York, 7 December 2017), available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP16/ASP-16- CHI.pdf (accessed 21/07/2018) ('China ASP16 Statement').

[58] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10.

[59] China ASP11 Statement. *See also,* China ASP16 Statement.

> reconciliation process and regional peace and stability, certainly goes against the 2 purposes and principles of the Rome Statute. At the same time, regarding the relation between peace and justice, especially when the two contradict each other, we should not rigidly insist on the absolute priority of one.[60]

In response to this concern, China expressed its hope 'the Court [will] exercise its powers in a prudent manner without prejudice to the efforts of the international community to realize political settlement of international and regional conflicts'[61] and it strongly advocated for the sequencing of peace and justice as a solution to the problem. Its representative said China ' understands that some countries are eager to resolve the question of impunity, but it is not realistic to do so in a hurry',[62] noting that 'the political element is key'.[63] In clarifying its position, China suggested that '[j]ustice, important as it is, can be secured only when durable peace and stability are achieved in Darfur by political means'[64] and that 'we should not fail to see that if the peace process is blocked, justice would be castles in the air.'[65] China also claimed that it advanced this approach for the benefit of criminal justice, explaining that:

> [w]e recall that, in recent years, international judicial action against impunity has been successful only in situations where conflict has ceased and peace has been consolidated. In such circumstances, judicial practices are less likely to experience interference from political factors and are thus more likely to achieve justice. The hasty launch of legal proceedings while conflict is ongoing will inevitably result in interference in the relevant political processes. In such circumstances, no good results will be obtained, even with the best intentions to pursue international justice.[66]

South Africa also expressed the view there needs to be both peace and justice in conflict resolution and when promoting reconciliation. Its representative said '[w]e are firmly committed to the ideal of peace and security, and the values of justice and the fight against impunity', and he highlighted that South Africa pursued the dual objectives simultaneously in transitioning from apartheid.[67] He also noted that South Africa 'is fully committed to...the dual purpose of fighting impunity while promoting the preservation of peace, security',[68] which he said 'must be pursued with equal

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[60] China ASP12 Statement.
[61] China ASP 11 Statement. *See also,* China ASP8 Statement - '[i]t has to take a very cautious approach to its judicial activities, and take into account all complicating factors to avoid negative impact on the stability of conflicting areas and the process of political settlement.'
[62] UNSC Verbatim Record, 5905th meeting, 5 June 2008, UN Doc. S/PV.5905, 15.
[63] UNSC Verbatim Record, 7080th meeting, 11 December 2013, UN Doc. S/PV.7080, 7; UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 5; UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 13.
[64] UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 13.
[65] China ASP8 Statement. *See also,* UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 19; UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 15; UNSC Verbatim Record, 7080th meeting, 11 December 2013, UN Doc. S/PV.7080, 7; UNSC Verbatim Record, 7199th meeting, 17 June 2014, UN Doc. S/PV.7199, 5; UNSC Verbatim Record, 7337th meeting, 12 December 2014, UN Doc. S/PV.7337, 8.
[66] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10.
[67] South Africa ASP12 Statement.
[68] UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 10.

vigour',[69] and, further, that it 'has always advocated a two-track approach to the Darfur situation, one that recognizes not only a judicial track, aimed at ensuring accountability and justice for crimes committed, but also a political track, designed to find lasting peace.'[70] This solution, it said, is to be achieved through a multifaceted approach because 'diplomacy, human rights and international justice do not exist in air-tight, closed-off vacuums; as important tools in the tool box of the statesman, they interact and support each other, and must be deployed in harmony in order to ensure the best results in sensitive situations.'[71]

However, in contrast to China and Russia, South Africa placed a greater emphasis on the need for justice in conflict which reflects its more cosmopolitan disposition. While South Africa noted that 'there will be no lasting peace in Darfur without justice',[72] it also emphasised that the pursuit of justice should not compromise political settlements and delicate peace processes, and that '[i]n our search for justice and accountability, that political track should be kept constantly in mind', particularly because '[i]t is, after all, for the victims that we are expending all these efforts. Relieving their plight should therefore be at the forefront of our concerns.'[73] This position is a key aspect of South Africa's foreign policy approach, inspired by historical experiences. Thabo Mbeki, the former president of South Africa, and Mahmood Mamdani, a renowned African academic, recently argued that 'mass violence is more a political than a criminal mater...political violence has a constituency and is driven by issues, not just perpetrators' and, like at the end of apartheid, 'it is sometimes preferable to suspend the question of criminal responsibility until the underlying political problem has been addressed.' They also argued that '[c]ourts are ill-suited to inaugurating a new political order after civil wars; they can only come into the picture after such a new order is strongly in place,'[74] advocating a sequencing approach like China.

Like South Africa, albeit speaking generally rather than specifically about Darfur, Brazil took the view that justice is an integral part of the peaceful resolution of conflicts; it said that '[w]ithout putting an end to impunity, it is impossible to secure durable peace'[75] and that '[t]he pursuit of international justice and the fight against impunity are key in achieving lasting peace and security.[76]

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[69] UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 9.
[70] UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 10.
[71] South Africa ASP7 Statement.
[72] South Africa ASP6 Statement. *See also,* Security Council Meeting 5 June 2012 (S/PV.6778), 10.
[73] UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 10.
[74] T. Mbeki and M. Mamdani, 'Courts Can't End Civil Wars', *New York Times,* 5 February 2014, available online at https://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html (accessed 14/03/2018).
[75] Statement by H.E. Ambassador Jose Artur Denot Medeiros, Head of the Brazilian Delegation to the VIII Session of the Assembly of States Parties, International Criminal Court, The Hague, 19th November 2009, available online at https://asp.icc- cpi.int/iccdocs/asp docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-Brazil-ENG.pdf (accessed on 22/07/2018).
[76] Brazil ASP6 Statement and Statement by the Delegation of the Republic of Brazil to the VII Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague, 14 November 2008), available online at https://asp.icc-cpi.int/iccdocs/asp docs/library/asp/ICC-ASP-ASP7-GenDebe-Brazil-ENG.pdf (accessed on 21/07/2018) ('Brazil ASP7 Statement').

However, rather than focusing on the potential conflict between the objectives of peace and justice, as other states had done, Brazil emphasised their complementary nature, noting that they 'are common objectives that mutually reinforce each other',[77] and said '[i]nstead of operating with false dichotomies, we should focus on the complementary dimensions of peace and justice'.[78] Moreover, although Brazil recognised that the conflict had been raised by states and there were 'competing perceptions about the work of the Court and its impact on the ground', it emphasised that while:

> [a]t first glance, it might seem like an insurmountable clash of conflicting views in whicone is asked to choose between political or legal demands, peace or justice, sovereignty or accountability. A further reflection...advises us to leave behind the "either/or" approach, and to start working on how to reconcile concepts and principles that complement rather than contradict each other.[79]

The Brazilians also noted that while '[t]he quest for peace and justice is always challenging…[l]et us not fall into the trap of operating with false dichotomies that seem to oppose peace to justice, sovereignty to accountability',[80] which, they said, ' need not lead to irreversible polarization.'[81] The position and tone adopted by Brazil on this issue reflects its cosmopolitan disposition but also its pragmatic nature as well as its self-identified role as a compromise builder and normative leader, as previously noted.

While the BRICS states were initially satisfied with the ICC's approach in terms of the pursuit of justice not undermining the prospects of a political settlement to the Darfur conflict, concerns were eventually raised. Despite initially complementing the Court,[82] Russia eventually took the view 'the activities of the Court are not conducive to attaining the goals of justice and sustainable peace'.[83] Moreover, South Africa's concern the Court's work was threatening the delicate ongoing peace process became a key basis of its post-2015 contestation of the ICC and, ultimately, was one of the key reasons behind its decision to withdraw from the Court, as will be explored in Chapter Nine.

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[77] Statement by Ms. Elizabeth-Sophie Mazzella de Bosco Balsa, Head of Delegation of Brazil to the XII ASP, The Hague, 20 November 2013, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Brasil-ENG.pdf (accessed 21/07/2018) ('Brazil ASP12 Statement') and Statement by H.E. Ambassador Piragibe dos Santos Tarrago, Head of Delegation of Brazil to the XIV Assembly of States Parties, The Hague, 19 November 2015, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP 14/GenDeb/ASP14-GenDeb-Brazil-ENG-FRA.pdf (accessed on 22/07/2018) ('Brazil ASP14 Statement').

[78] Statement by H.E. Ambassador Piragibe dos Santos Tarrago, Head of the Delegation of Brazil to the XV Assembly of States Parties, The Hague, 17 November 2016, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP15/GenDeba/ICC-ASP15-GenDeba-Brazil-ENG.pdf (accessed on 21/07/2018) ('Brazil ASP15 Statement').

[79] Brazil ASP12 Statement.

[80] Brazil ASP16 Statement.

[81] Statement by H.E. Ambassador Antonio de Aguiar Patriota, Head of Delegation of Brazil to the XIII Assembly of States Parties, New York, 11 December 2014, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP13/GenDeba/ICC-ASP13-GenDeba- Brazil-ENG-FRA.PDF (accessed 21/07/2018) ('Brazil ASP13 Statement')

[82] UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 11 - '[i]n our view, the instinct of the current Prosecutor to strike a delicate balance between reconciliation and criminal justice as she carries out her activities is commendable'.

[83] UNSC Verbatim Record, 7963rd meeting, 8 June 2017, UN Doc. S/PV.7963, 12.

The trigger for this shift from support to criticism was seemingly the Prosecutor's request for, and ultimately the Court's decision to issue, an arrest warrant for Sudan's President. This demonstrates a willingness on the part of the BRICS states to robustly contest the ICC where they disagree with it practices and will resist its attempts to reconceptualise pluralist primary institutions of international society and challenge pluralist values, particularly order within international society.

The reliability of the conclusion that the shift to contestation of the Court was at least in part due to concerns about the impact of the Court's work on the peace process is supported by the fact that the states had previously expressly and extensively set out their normative position that the pursuit of criminal justice should not undermine the prospects of achieving as peaceful settlement of the conflict or, in other words, the prioritisation of order over justice in the state-solidarist paradigm.

7.5. The al-Bashir Arrest Warrant: A Mixed Reaction among the BRICS States

One of the defining moments in the Court's intervention in Darfur was the issuing of an arrest warrant for al-Bashir on 4 March 2009,[84] an issue that would evolve to become one the primary bases of the African backlash against the ICC and which found support among some of the BRICS states. In issuing an arrest warrant for al-Bashir, the Prosecutor was sending a strong signal, in line with the ICC's cosmopolitan identity, that no one is above the law or beyond the reaches of justice by virtue of their position as a head of state or senior state official and regardless of whether their state had voluntarily signed up to the Rome Statute. As Moreno-Ocampo noted, 'the Court's decision to issue a warrant for President Al-Bashir's arrest sends a clear message: President Al-Bashir will face justice. Any leader committing this type of crime will face justice. Power does not provide immunity.'[85] Mills and Bloomfield argue that '[t]he ICC's mission is fundamentally defined or informed by the anti-impunity norm. And the ICC is dedicated to enforcing a 'strong' version of this norm - meaning all perpetrators of mass atrocity crimes, including states' highest officials, can be held accountable before competent courts.'[86] As the first head of state to be indicted by the ICC, it indicated a willingness on the part of the Court to contribute to the reconceptualisation of pluralist primary institutions by advancing a limited conception of state sovereignty and marginalising the role of diplomacy in furtherance of pursuing retributive justice and accountability in accordance with the Rome Statute. The ICC was practising its cosmopolitan identity.

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[84] Prosecutor v. Omar Hasan Ahmed Al Bashir ("Omar Al Bashir"), Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hasan Ahmad Al Bashir, (4 March 2009). This arrest warrant did not cover the crime of genocide, Pre-Trial Chamber I having determined that there was not sufficient evidence for al-Bashir to be indicted for this crime. However, this decision was overturned by the Appeals Chambers and a subsequent arrest warrant was issued which included this crime. *See,* Prosecutor v. Omar Hasan Ahmed Al Bashir ("Omar Al Bashir"), Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hasan Ahmad Al Bashir, (12 July 2010).

[85] UNSC Verbatim Record, 6230th meeting, 4 December 2009, UN Doc. S/PV.6230, 14.

[86] K. Mills and A. Bloomfield, 'African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm', (2017) 44(1) *Review of International Studies* 101-127, 102.

Russia and China were highly critical of this practice, concerned about the effect it would have on achieving a political settlement to the conflict. Russia explained that 'we have serious concerns about the possible negative development of events in the Sudan' and 'do not rule out the possibility that hardline rebel groups hampering progress in the Darfur political process will take advantage of the situation in order to step up their campaign against the Government of Sudan'.[87] This is a concern about the ICC's potential in contributing to facilitating regime change. Furthermore, its representative expressed the view that 'the ICC's issuance of a warrant for the arrest of the President of the Sudan, Omar Al-Bashir, does not contribute to a peaceful settlement in Darfur'[88] and it said that many states 'expressed their concern about an indictment's possible negative consequences for the situation in the Sudan and [w]e fully understand their position on this issue.'[89] China similarly criticised the Court' s decision; its representative stated:

> [t]he indictment of the Sudanese leader proposed by the Prosecutor of the International Criminal Court (ICC) is an inappropriate decision taken at an inappropriate time. It will seriously undermine the atmosphere of mutual political trust and cooperation between the United Nations and the Sudanese Government, fuel the arrogance of the rebel groups not willing in the political process and harm the fragile and turbulent security situation in Darfur.[90]

China also expressed 'the view that seeking to resolve the issue of impunity through the indictment of the Sudanese leader by the ICC will only derail the process of resolving the Darfur issue, and even render useless all efforts made so far by all parties for the proper settlement of the issue'.[91] Moreover, it noted '[t]he proposed indictment therefore inevitably came under extensive criticism from many countries, represented by important international organizations such as the African Union'[92]and said '[m]any States are concerned that this move will have a negative impact on peace in the Sudan.'[93] However, the fact it said 'inappropriate time' suggests China was of the view that prosecutions would be desirable in the future. As Jalloh, Akande and du Plessis argue, 'the issue was not so much about the *propriety* as much as it is about the *timing* of any prosecutions',[94] which is consistent with its views on the sequencing of peace and justice. Russia and China's position represents a rejection of what they perceive as the ICC's simplistic and naive approach to criminal justice in which heads of state are targeted without consideration of the wider political impacts of

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[87] UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 3.
[88] UNSC Verbatim Record, 6170th meeting, 24 July 2009,UN Doc. S/PV.6170, 6.
[89] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10.
[90] UNSC Verbatim Record, 5947th meeting, 31 July 2008,UN Doc. S/PV.5947, 6.
[91] UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 6. *See also,*Bosco, *Rough Justice,* 145.
[92] UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 6. *See also,* UNSC Verbatim Record,6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10 - 'The League of Arab States and the African Union have both expressed their serious concern.'
[93] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10.
[94] C. C. Jalloh, D. Akande and M. du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', (2011) 4 *African Journal of Legal Studies* 5-50, 22.

the decision, particularly relating to the resolution of ongoing armed conflicts.

The reliability of the conclusion that Russia and China opposed the indictment of al-Bashir on the principled basis that it would put at risk the prospect of a peaceful settlement to the conflict should be preferred over an alternative explanation that they were only seeking to protect al-Bashir and their political and economic relations with Khartoum. This is advanced on the basis that these states initially allowed the ICC referral to proceed and, in the case of Russia actively supported it, and they have long expressed a view that the pursuit of justice should not be done at the expense of the peaceful settlement of ongoing conflicts, both in relation to the Ad Hoc Tribunals of the 1990s and the ICC. Russia and China's position is entirely consistent with the overall state-solidarist vision of international society that they promote in terms of the importance of maintaining order even at the expense of justice. Moreover, there has been extensive independent commentary which expressed concern about the impact of the al-Bashir indictment on the prospects of peace in Sudan which gives legitimacy and credibility to the concerns raised by China and Russia.[95] It should be noted, however, that concerns about their relations with Khartoum will still have factored into the decision-making process, and it is therefore argued that their positions were informed by both material and normative concerns.

South Africa, on the other hand, was initially far less critical of the Prosecutor's and the Court's approach. It saw it as an opportunity, at least at the beginning, to gain important clarity on the relationship between peace and justice, and between politics and law. Its representative explained to the Security Council:

> [t]his sensitive matter has, more than any other event over the last six months, stimulated debate on the relationship between peace and justice. The debate has raised the challenge of finding a balance between ending impunity for international crimes through judicial accountability, on the one hand, and the realities of bringing an end to conflict through a sensitive peace processes, on the other.[96]

This arguably demonstrates South Africa's stronger commitment to criminal justice and its support for the Court, and a desire to see it progressively embed itself within a state-solidarist governance framework and take account of pluralist values, rather than jumping to immediately criticise the institution. South Africa did, however, release a statement together with Brazil and India through

[95] *See*, J. Flint and A. de Waal, 'To put justice before peace spells disaster for Sudan', *The Guardian,* 6 March 2009, available online at https://www.theguardian.com/commentisfree/2009/mar/06/sudan-war-crimes (accessed 06/01/2019); A. de Waal, 'Sudan and the International Criminal Court: a guide to controversy', *Open Democracy,* 14 July 2008, available online at https://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy (accessed on 06/01/2019) (which outlines the critical views of a number of individuals).

[96] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 15-16. *See also,* South Africa ASP7 Statement.

the IBSA group which noted the issuing of the arrest warrant 'is a cause for concern for Africa' and expressed their support for the AU's position 'the prosecution could undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and development in the Sudan as a whole. '[97] Given that this statement was released at around the same time as its previous comments and that the two are not completely aligned, the IBSA statement being more critical of the Court, reflects South Africa's attempt to position itself simultaneously as a supporter of the Court and also a representative of the Global South and, particularly, a leader on the African continent. President al-Bashir's status as a fugitive of the Court, liable to arrest and surrender by States Parties, would later become one of the central issues which precipitated the rapid deterioration in the relations between the ICC and South Africa which ultimately led it to withdraw from the Rome Statute. As will be argued in Chapter Nine, this shift in position can be attributed to South Africa's ascendency as a rising power and the actions of the Court subsequent to it issuing the arrest warrant, particularly its robust attempts to enforce the arrest warrant despite widespread and well-articulated concerns about the legality of its actions in seeking to have al-Bashir arrested and surrendered to the Court.

7.5.1. Support for a Deferral in Darfur: A Commitment to Peace over Justice

The concerns expressed by Russia and China about the impact of the issuing of an arrest warrant for al-Bashir on the security situation in Darfur and the prospects of achieving a negotiated political settlement of the conflict led them to support the AU's request to the Security Council to defer the ongoing proceedings pursuant its powers prescribed under Article 16 of the Rome Statute.[98] In addition to expressing support for the deferral,[99] Russia criticised the Security Council's failure to act upon it. It noted 'the African Union, stated that it was advisable for the Council to exercise its authority under article 16 of the Rome Statute of ICC to defer the decision of the Court' but '[u]nfortunately, that concern was not fully reflected in the resolution as a result of resistance by a number of Security Council members,'[100] namely the P3.[101] It went on to add that '[t]he position taken by those delegations could have unforeseen and negative consequences' particularly for

[97] India-Brazil-South Africa Dialogue Forum, Third Summit of Heads of State Government, New Delhi Declaration, 15 October 2008, available online at http://mea.gov.in/press-releases.htm7dtl/1618/ (accessed on 22/07/2018).
[98] African Union Peace and Security Council, Communique of the 142nd Meeting of the Peace and Security Council, 21 July 2008, AU Doc. PSC/MIN/Comm (CXLII)Rev.1, para.9. See *also,* Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, adopted at the African Union 12th Ordinary Session, 1 - 3 February 2009, Addis Ababa, Ethiopia, AU Doc. Assembly/AU/Dec.221(XII); du Plessis, Critical Appraisal of Africa's Response to the World's First Permanent International Criminal Court', 99; Mills and Bloomfield, 'African resistance to the International Criminal Court', 110; Jalloh, Akande and du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', 8.
[99] Jalloh, Akande and du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', 22. *See also,* Mills, '"Bashir is Diving Us": Africa and the International Criminal Court', 553.
[100] UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 3.
[101] V. Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan', (2009) 31(3) *Human Rights Quarterly* 655-691, 675-676.

ongoing efforts 'to resolve the conflict in Darfur. The responsibility for those consequences fully rests on their shoulders.'[102] It also said '[w]e regret that the position of African States has not been heard and the mechanism of Article 16 of the Statute has not been engaged.'[103]

China also expressed its support for 'the reasonable request by the African Union and other organizations for the Council to take early action to suspend the indictment of the Sudanese leader by the ICC, in accordance with the relevant provisions'[104] and, as Jalloh, Akande and du Plessis note, China 'openly endorsed the AU request' and 'made the strongest statement in favor of a deferral.'[105] In doing so, its representative explained that '[t]he Security Council bears the political responsibility for the overall peace process in the Sudan. It must approach the issue from the political perspective to ensure that the overall interests of the political process and the peacekeeping deployment in Darfur are not compromised.'[106] China also noted, more generally, concerns had been raised by the AU regarding the ICC's intervention in Darfur.[107] It consistently asserted the AU's 'opinions and concerns deserve the close attention of the Security Council'[108] and it expressed hope that 'the Council will value and heed the views of regional organizations, including the African Union'.[109] It further noted 'the AU summit reiterated its clear opposition to the action of the Court. We hope that all the parties will fully respect the AU's position and strive to cooperate with its efforts to safeguard the overall objective of peace in the Sudan.'[110] Moreover, China advocated a role for the AU in resolving the conflict in Darfur as an important strategic partner and supported continued engagement between the Council and the AU.[111] This serves as further evidence of China's self-appointed role as the champion of the developing world, a position adopted by the BRICS too, as well as its support for regional, state-led solutions to crises over supranationally delivered solutions, which is demonstrative of its state-solidarist positioning. Furthermore, the fact that many African states and the AU opposed the issuing of an arrest warrant for al-Bashir on the grounds that it threatened the prospects of peace in the country is further evidence to support the

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[102] UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 3.
[103]Statement by the delegation of the Russian Federation (Observer State) at the Twelfth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 21 November 2013, available online at https://asp.icc- cpi.int/iccdocs/asp docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Russia-ENG.pdf (accessed on 22/07/2018) ('Russian Federation ASP12 Statement').
[104] UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 6. *See also,* K. Mills, "'Bashir is Diving Us": Africa and the International Criminal Court', (2012) 34(2) *Human Rights Quarterly* 404-447, 553.
[105]Jalloh, Akande and du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', 22.
[106] UNSC Verbatim Record, 5947th meeting, 31 July 2008, UN Doc. S/PV.5947, 6.
[107] UNSC Verbatim Record, 6170th meeting, 24 July 2009, UN Doc. S/PV.6170, 14.
[108] UNSC Verbatim Record, 6170th meeting, 24 July 2009, UN Doc. S/PV.6170, 14.
[109] UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 13. *See also,* UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 15; UNSC Verbatim Record, 7080th meeting, 11 December 2013, UN Doc. S/PV.7080, 7; UNSC Verbatim Record, 7478th meeting, 29 June 2015, UN Doc. S/PV.7478, 8; UNSC Verbatim Record, 7582nd meeting, 15 December 2015, UN Doc. S/PV.7582, 12; UNSC Verbatim Record, 7710th meeting, 9 June 2016, S/PV.7710, 12; UNSC Verbatim Record, 7833rd meeting, 13 December 2016, UN Doc. S/PV.7833, 8; UNSC Verbatim Record, 7963rd meeting, 8 June 2017, UN Doc. S/PV.7963, 11.
[110] UNSC Verbatim Record, 6170th meeting, 24 July 2009, UN Doc. S/PV.6170, 14.
[111] UNSC Verbatim Record, 6230th meeting, 4 December 2009, UN Doc. S/PV.6230, 11.

argument that Russia and China's objection to the Court's intervention was a principled one and not determined by self-interested political concerns. It should also be noted, however, that Russia and China support for the African Union's position was also likely partly informed by a desire to court African states for the purpose of furthering their economic interests on the continent.

Despite initially being somewhat ambivalent about the ICC's decision to issue an arrest warrant for al-Bashir, South Africa joined Russia and China in offering, albeit more tentatively, support to the AU's proposal to defer the ongoing proceedings against al-Bashir.[112] South Africa was also critical of the Security Council for failing to act upon with the deferral request of the AU after it had indicated it would be given proper consideration[113] and it explained that:

> [i]n the light of the steps being taken by the African Union and others to ensure that peace and justice are mutually reinforcing in Darfur rather than contradictory, we continue to hope that this Council will take the time necessary to have a discussion and decide on an article 16 deferment as it relates to the President of the Sudan.[114]

The South African representative noted, however, that '[i]t is our contention that article 16 can best be applied prior to issuing a warrant of arrest, so as to avoid interference with the judicial process. Thus, the Council's consideration of the request by the AU Peace and Security Council becomes urgent.'[115] This demonstrates a concern on the part of the South Africa for the integrity of the criminal proceedings and the need to avoid the politicisation of criminal justice and the work of the ICC, an issue that has consistently been highlighted by South Africa, which is demonstrative of its more cosmopolitan outlook and greater support for the Court.

The position adopted by these three states reflects their concern that justice should not be pursued at the expense of securing a political negotiated settlement to conflict and the creation of a lasting peace, and a willingness to act upon this view. It is not a rejection of criminal justice or the work of the ICC, rather it is an assertion of the need for a more sensitive, pragmatic approach to the implementation of criminal justice in complex and ongoing conflict settings. For example, South Africa stressed the application of Article 16 was not supporting impunity but rather it reflected the

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[112] South Africa supported a proposed amendment to the UNAMID Security Council Resolution on 31 July 2008 in order to advance the deferral request by the AU within the Council. The proposed amendment was not adopted due to opposition from certain Council members. The Security Council took 'note' of the AU request and indicated that it would be considered at a later date, although this never occurred. *See,* United Nations Press Release, 'Security Council decides to extend mandate of African Union-United Nations Hybrid Operation in Darfur by 14 votes in favor, 1 abstention', 31 July 2008, UN Doc. SC/9412; UNSC Res. 1828 (31 July 2008), UN Doc. S/RES/1828(2008); Jalloh, Akande and du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', 22-23; Mills, '"Bashir is Diving Us": Africa and the International Criminal Court', 55.

[113] The UN Security Council merely took note of the AU's request and did not formally act upon it. *See,* du Plessis, Critical Appraisal of Africa's Response to the World's First Permanent International Criminal Court', 138.

[114] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 16.

[115] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 16.

importance of considering justice in the wider context of achieving political settlements and peace; as its representative explained:

> [t]he Security Council must be for fighting impunity, but there is also the other side to it... people who are not in the Council should not see us debating this issue and then interpret it as if we are condoning all these horrible things that we have spoken of. We in no way condone them, and we regret that they take place, but we also have the responsibility to look at the entire matter.
>
> I hope Mr. Moreno-Ocampo never gives up in his work and that he continues as his mandate allows him to. But we also have the other mandate here, and at some point we will have to look at and balance the two. I think some of my colleagues pointed out that, at some point, we need to step back and not wear prosecutor's caps, saying that we want to jail so-and-so. But rather but we need to look back at all the evidence and say: how do we then carry out our mandate?[116]

7.5.2. Security Council Management of the Balance between Peace and Justice

In addition to demonstrating the BRICS' concerns about the threat criminal prosecutions can pose to the achievement of political settlements in ongoing conflicts and their willingness to delay justice for the purpose of achieving peace, their support for the application of the Article 16 procedure represents an endorsement of the role of the Security Council *vis-a-vis* the ICC and, more specifically, the pluralist check that it imposes on the cosmopolitan-solidarist identity of the Court. In order words, it is an endorsement by the BRICS of the need for political oversight of the legal institution, particularly in respect of managing the relationship between peace and justice. For example, South Africa explained that the Article 16 deferral procedure 'allow[s] the Council to strike a balance between the important principles of peace and justice, should the situation on the ground demand it'[117] and it did not see any contradiction in supporting the deferral request and the Court's work simultaneously;[118] it noted that the Court and the Council have very different functions but that they are complementary and mutually reinforcing when confronting conflict situations. It also emphasised the role of the Security Council is explicitly provided for in the Rome Statute:

> [t]he wise drafters of the Rome Statute were keenly aware of that sensitive balance between political and legal considerations during the drafting process, and that is what led to their recommendation that the Security Council be accorded the powers contained in article 16 — powers that allow the Council to strike a balance between the important

[116] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 21.
[117] South Africa ASP7 Statement.
[118] South Africa ASP12 Statement - 'we see no contradiction between South Africa's continued support of the ICC as a judicial body to dispense justice, on the one hand, and the attainment of peace and stability. through political means, including the process provided for in Article 16 of the Statute, on the other hand.'

principles of peace and justice, should the situation on the ground demand it.[119]

It further noted that '[t]he fact that the Rome Statute creates a mechanism to manage sensitive and complex political situations, does not mean that the Court's role as an impartial dispenser of justice or its independence is in any way compromised.'[120] It explained its view that '[t]he establishment of the Court was...premised on an understanding of the reciprocal relationship between peace and justice'[121] and, furthermore, that the ICC does not operate in a vacuum but rather 'in relation to other international institutions that also aim to create international order and security, notably the United Nations and the African Union'.[122] This represents a shift in South Africa's position from the Rome negotiations, given that it had previously been opposed to the Security Council being able to exercise control over the Court. This is arguably the result of its desire to ensure that the Court was not permitted to compromise efforts aimed at securing the peaceful settlement of conflicts, a value that it seemingly placed above its original concern about the potential for the politicisation of the Court through its formal relationship with the Security Council. Furthermore, it may also be evidence of South Africa curtailing its more cosmopolitan vision of the Court in furtherance of its ambition to be taken seriously as a major player in global governance, including its desire to secure a permanent seat on the Security Council, and it may have also been influenced by its potential accession to and then membership of the BRICS group.

Brazil similarly supported a complementary and reciprocal relationship for the Court and the Security Council. Its representative explained '[p]eace and justice mutually reinforce each other, and the same should be true for the two institutions, which pursue these goals'[123] and, moreover, that '[b]oth the Court and the Security Council have a pivotal, albeit different role in pursuing these objectives and the striking the right balance between peace and justice, accountability and reconciliation.'[124] Russia also supported such a role for the Security Council. It noted that the ICC 'does not exist in a vacuum' and that '[i]t is of utmost importance that it becomes an organic part of the complex system of international institutions and mechanisms'.[125] China expressed a similar view in relation to the independent but 'interconnected' and 'complementary' nature of the relationship between the ICC and the Security Council in pursuing the goals of peace and justice.

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[119] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 15-16. *See also*, South Africa ASP7 Statement.
[120] South Africa ASP12 Statement.
[121] Opening Statement by The Hon. Mr A.C. Nel, MP, Deputy Minister of Justice and Constitutional Development, Republic of South Africa, During General Debate: Eleventh Meeting of the Assembly of States Parties of the International Criminal Court held in The Hague, 14-22 November 2012, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP11/GenDeba/ICC-ASP11-GenDeba-SAF-ENG.pdf (accessed on 22/07/2018).
[122] South Africa ASP12 Statement.
[123] Statement by Ambassador Jose Artur Denot Medeiros, Head of Delegation of Brazil to the XI ASP, The Hague, 15 November 2012, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP11/GenDeba/ICC-ASP11-GenDeba-BRA-ENG.pdf(accessed 21/07/2018) ('Brazil ASP11 Statement').
[124]Brazil ASP12 Statement; Brazil ASP13 Statement; Brazil ASP14 Statement.
[125] Russian Federation ASP12 Statement.

It specifically noted '[t]he Council is conferred with primary responsibility for the maintenance of international peace and security'.[126]

In summary, it is clear that the BRICS states all share the view that the Security Council has a role to play in making sure the pursuit of retributive justice does not undermine or compromise the settlement of conflicts through political negotiations, and therefore support its function as a supervisor and gatekeeper of the ICC's work. This demonstrates their support for pluralist limits being placed on cosmopolitan progress in that it is their view there needs to be state-based political control over supranational organisations and that diplomacy is not to be marginalised by the application of cosmopolitan law.

7.5.3. A Proposed Role for the ICC in Balancing the Objectives of Peace and Justice

In addition to supporting a role for the Security Council in managing the relationship between peace and justice on behalf of the ICC, South Africa, Russia and China also supported the controversial idea of the Court itself balancing considerations of peace and justice in discharging its mandate. This was to be done by way of the Prosecutor considering the effect of ICC investigations and prosecutions on ongoing peace processes and conflicts when making prosecutorial decisions. The position is controversial because such an approach is prohibited by the Rome Statute and there are concerns that it would result in the politicisation of the Court's work. It was rejected by the first Prosecutor, Luis Moreno-Ocampo, who said: 'I am a prosecutor; I have to respect the law. I have to follow the evidence without fear, favour or political consideration'[127] and he also wrote: '[t]he prosecutor's duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations.'[128] More recently, Ms Bensouda, the current Prosecutor who was previously Mr Moreno-Ocampo's deputy, reiterated this position, stating 'that "political and extraneous considerations" played no role in the decisions of her office.'[129] Nouwen and Werner note that '[t]he message conveyed by Court's officials is unambiguous: it is up to the Court's organs to stay clear of politics, to subordinate politics to law, and to speak law to power.'[130]

In advancing this position, the Russian representative explained, almost paradoxically, the task of the ICC 'as an independent organ of international criminal justice is to carry out a *strictly judicial*

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[126] China ASP12 Statement.
[127] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 20.
[128] L. Moreno-Ocampo, 'The International Criminal Court: Seeking Global Justice', (2008) 40 *Case Western Reserve Journal of International Law* 215-225, 224.
[129] K. M. Clarke, 'The Legal Politics of the Article 16 *Decision:* The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise', (2014) 7(3) *African Journal of Legal Studies* 297-319, 302.
[130] S. M. H. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', (2011) 21(4) *European Journal of International Law* 941-965, 942.

function and to punish the guilty. However, the actions of the Court in carrying out its mandate to investigate events in Darfur *must not be divorced from overall efforts to normalize the situation*' (emphasis added).[131] It also called on the Prosecutor 'to carefully weigh his steps in his work on Darfur and to calibrate them with the challenges of achieving peace'[132] and said '[w]e take note of the Prosecutor's aspiration to carry out his functions in an independent and unbiased manner. But...[w]ork in the legal sphere must proceed taking into account the joint efforts towards a settlement of the situation in Darfur'.[133] Russian was also explicit in its view the Court should 'act with a view to striking a balance between serving justice and achieving lasting peace and stability' (emphasis added),[134] as opposed to leaving the balancing to the Security Council.

China also emphasised the responsibility of the Court to consider how its actions may affect peace and reconciliation efforts being advanced by political negotiations. China issued an appeal to the ICC 'to create a situation in which its efforts, together with those of other parties of the international community, can interact positively to jointly promote the peace process in the Sudan'.[135] It also explained that 'while doing its judicial work independently and endeavouring to end impunity, [the Court] has to consider the larger picture of world peace and security'[136] and that '[t]he Court, especially the Prosecutor, while deciding whether to open investigation and prosecution in various situations, should keep in mind the goal of pursuing both peace and justice.'[137] On this point, it also said *''the Court* must, first and foremost, observe the guiding principles of the *UN Charter, ensure that it* will not undermine the core value of the Charter in maintaining world peace and security' (emphasis added).[138]

Whereas Russia and China's approach did not appear to acknowledge that the Prosecutor could not take into account interests of peace in exercising prosecutorial discretion, South Africa did. It supported reforms, put forward by the AU, to the OTP's policy on the exercise of prosecutorial powers to allow the Prosecutor to take into account the interests of peace, in addition to the interests of justice,[139] when deciding whether to open, continue and discontinue its investigations and

[131] UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 11.
[132] UNSC Verbatim Record, 6230th meeting, 4 December 2009, UN Doc. S/PV.6230, 9.
[133] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10.
[134] UNSC Verbatim Record, 7478th meeting, 29 June 2015, UN Doc. S/PV.7478, 11. *See also,* UNSC Verbatim Record, 7582nd meeting, 15 December 2015, UN Doc. S/PV.7582, 14.
[135] UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 10.
[136] China ASP8 Statement.
[137] China ASP12 Statement.
[138] China ASP8 Statement. *See also,* China ASP11 Statement.
[139] As was discussed, the Chief Prosecutor is not allowed to consider and take into account whether the pursuit of justice will have an impact on political settlements when making decisions about investigations and prosecutions, such decisions can only be based on legal factors knowns as the "interests of justice".

prosecutions.[140] This finds some support in the academic commentary. For example, Jalloh argues that '[t]he experience that the Court has had with African States since the Sudan referral suggests that it is time to rethink the policy paper.'[141]

The attempts by Russia, China and South Africa to blur the line between the legal function of the ICC and the political function of the Security Council arguably reflects a pluralist concern about the juridification of the international society, and the consequential separation of the realms of law and politics, which they perceive to result in inflexible responses to complex situations. The states therefore have taken the view law and politics cannot, and should not, be separated in an artificial way, and that the ICC should take responsibility for achieving this balance when discharging its mandate but, that at the same time, it should be subject to external political control by states, including through the Security Council. This is another clear attempt to place pluralist limits on cosmopolitan-solidarist progress and to reassert the value of order in the context of achieving justice, which is demonstrative of their state-solidarist position.

7.6. Disagreement about the Role of the Security Council in Enforcing Cooperation

This chapter will now go to examine one of the most significant challenges faced by the Court in the Darfur situation, the non-cooperation of States Parties, particularly in respect of the arrest and surrender of al-Bashir, and the reluctance of the Security Council to enforce cooperation. In the years following the Darfur referral, and particularly following the issuing of arrest warrants for various individuals by the Court, including President al-Bashir, the Prosecutor expressed increasing levels of frustration at the lack of cooperation by states, including Sudan, and the absence of effective support from the Security Council, primarily in relation to the non-execution of the arrest warrants which saw al-Bashir travelling freely all over Africa and the world, including to both States Parties and non-States Parties of the Rome Statute.[142] Specifically, the Prosecutor has said that each briefing to the Security Council 'has been followed by inaction and paralysis within the Council while the plight of victims of crimes committed in Darfur has gone from bad to worse'[143] and that such inaction has 'emboldened Mr. Al-Bashir to continue travelling across international

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[140] Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court', 431. This position finds support in academic commentary. For example, *see* B. C. Olugbuo, 'The African Union, the United Nations Security Council and the Politicisation of Justice
in Africa', (2014) 7(3) *African Journal of Legal Studies* 351-379, 361.

[141] C. C. Jalloh, 'Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa', (2014) 7(1) *African Journal of Legal Affairs* 43-59, 51.

[142] *See,* for example, UNSC Verbatim Record, 5789th meeting, 5 December 2007, UN Doc. S/PV.5789, 3; UNSC Verbatim Record, 6230th meeting, 4 December 2009, UN Doc. S/PV.6230, 14; UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 2; UNSC Verbatim Record, 7080th meeting, 11 December 2013, UN Doc. S/PV.7080, 2-3; UNSC Verbatim Record, 7199th meeting, 17 June 2014, UN Doc. S/PV.7199, 2-3; UNSC Verbatim Record, 7582nd meeting, 15 December 2015, UN Doc. S/PV.7582, 2.

[143] UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 2.

borders'.[144] The Prosecutor also noted that '[w]hat is needed is a dramatic shift in the Council's approach to arresting Darfur suspects'[145] and both Moreno-Ocampo and Bensouda called upon the Council and states to improve their cooperation with the Court, particularly in arresting al- Bashir.[146]

Russia and China's response to the Prosecutor's request for the Security Council's assistance was lukewarm and somewhat dismissive, but their objections were framed in normative terms. They took the view such a 'heavy handed' approach by the Security Council would not be conducive to improving the situation on the ground and instead preferred a state-led approach by Sudan with the ICC providing assistance, ostensibly promoting a positive complementarity approach. This is consistent with a state-solidarist emphasis on the primacy of the state and a scepticism of supranationally-delivered solutions. As Russia explained, 'issues relating to the functions of the Rome Statue should not be resolved in the Council'[147] and, moreover, '[w]e do not understand why appeals to compel States parties to the Rome Statute to shoulder their responsibilities are made in the Council Chamber...[a]ttempts to exert pressure through the Security Council on those who disagree are counterproductive.'[148] It also described what it perceived as the Prosecutor's attempts to lecture and influence the Council as 'inappropriate',[149] which reflects a reticence about truth being spoken to power and supranational organisations challenging the authority of states, particularly the Security Council which, in their view, is the epicentre of global governance. Russia instead emphasised the need to build mutual trust between Sudan and the ICC and to establish dialogue,[150] and while it asked the 'Sudanese authorities to take the necessary measures in that regard', it also explained that ' [a]n important aspect of creating an atmosphere of trust would be for the investigation to focus on crimes committed by rebels.'[151] Russia became increasingly critical of what it perceived to be the ICC's one-sided investigations targeting the Sudanese government and overlooking rebel crimes,[152] an issue that would reoccur in relation to the Court's intervention in Libya. In addition, Russia emphasised the importance of applying the principle of complementarity, an approach the BRICS states had strongly supported during the Rome Conference negotiations, stating '[a]nother important aspect would be full involvement by the

[144] UNSC Verbatim Record, 7710th meeting, 9 June 2016, UN Doc. S/PV.7710, 2.
[145] UNSC Verbatim Record, 7337th meeting, 12 December 2014, UN Doc. S/PV.7337, 3.
[146] *See,* for example, UNSC Verbatim Record, 7478th meeting, 29 June 2015, UN Doc. S/PV.7478, 4; UNSC Verbatim Record, 7582nd meeting, 15 December 2015, UN Doc. S/PV.7582, 2. *See also,* Peskin, 'Caution and Confrontation', 658.
[147] UNSC Verbatim Record, 7199th meeting, 17 June 2014, UN Doc. S/PV.7199, 16. *See also,* UNSC Verbatim Record, 7337th meeting, 12 December 2014, UN Doc. S/PV.7337, 5-6; UNSC Verbatim Record, 7478th meeting, 29 June 2015, UN Doc. S/PV.7478, 12.
[148] UNSC Verbatim Record, 7963rd meeting, 8 June 2017, UN Doc. S/PV.7963, 12. *See also,* UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 11; UNSC Verbatim Record, 7199th meeting, 17 June 2014, UN Doc. S/PV.7199, 16.
[149] UNSC Verbatim Record, 7710th meeting, 9 June 2016, UN Doc. S/PV.7710, 4; UNSC Verbatim Record, 7833rd meeting, 13 December 2016, UN Doc. S/PV.7833, 13.
[150] UNSC Verbatim Record, 5905th meeting, 5June 2008, UN Doc. S/PV.5905, 15-16.
[151] UNSC Verbatim Record, 5789th meeting, 5December 2007, UN Doc. S/PV.5789, 10.
[152] UNSC Verbatim Record, 7710th meeting, 9 June 2016, UN Doc. S/PV.7710, 5; UNSC Verbatim Record, 7833rd meeting, 13 December 2016, UN Doc. S/PV.7833, 13-14.

Sudanese legal system in investigating the crimes committed.'[153]

China adopted a similar position. Its representative criticised the Prosecutor's increasingly robust condemnation of Sudan's non-cooperation, noting that '[t]o ignore the overall political and security situation there, simply stress ending impunity and push solely for mandatory measures is an approach unlikely to result in cooperation and support from the Sudanese'.[154] China instead took a more pragmatic approach, encouraging Sudan to fulfil its responsibilities. Its representative said '[w]e hope that judicial bodies in the Sudan will continue to make efforts' to 'resolve the problem of impunity in the region' and encouraged 'the Government of the Sudan to continue to step up its communications, establish mutual trust and strengthen cooperation with the ICC.'[155] This highlights China's frustration with, and rejection of, what it sees as the Court's simplistic and hubristic view of criminal justice, specifically that it should be enforced upon states without regard to the political circumstances on the ground and how this will affect implementation. China adopts a more realistic position, taking into account the limits of the ICC's authority, and it instead supports a more sensitive, diplomatic approach of encouraging cooperation - the carrot rather than the stick. This is consistent with a state-solidarist view about the primacy of the state in international society and a scepticism of the power of secondary institutions.

While China and Russia's dismissive response to the Prosecutor's concerns has been interpreted solely as a means of protecting al-Bashir and Sudan from the ICC intervention and an example of its undermining the authority of the institution with the aim of progressively weakening it, the view adopted by Bosco,[156] this thesis rejects such a realist and pessimistic conclusion. Russia and China's approach is in fact partly a manifestation of their increasing frustrations with the ICC's work in Sudan, as highlighted throughout this chapter, but also a principled, normative objection to substantive Security Council involvement in the discharge of the Court's mandate. Moreover, it is also a response to their growing concerns about the effect of the narrow pursuit of justice on the ongoing peace and reconciliation efforts, which they had expressed extensively. This normative position is seen in the reasoning they adopt and the extent to which they defend it, particularly viewed in the context of their initial support for the referral and the Court more generally. However, as with all of Russia and China's positions on ICC-Sudan relations, their dismissive approach to the Prosecutor's concerns and their unwillingness to encourage more robust Security Council action will undoubtedly have been partially informed by their relations with Khartoum and their economic interests in the country, but this is not to the exclusion of the normative and pragmatic issues that

[153] UNSC Verbatim Record, 5789th meeting, 5December 2007, UN Doc. S/PV.5789, 10.
[154] UNSC Verbatim Record, 5789th meeting, 5December 2007, UN Doc. S/PV.5789, 11.
[155] UNSC Verbatim Record, 5789th meeting, 5 December 2007, UN Doc. S/PV.5789, 11. *See also,* UNSC Verbatim Record, 5905th meeting, 5 June 2008, UN Doc. S/PV.5905,15.
[156] Bosco, *Rough Justice,* 182.

they have raised in relation to the Court work in Sudan.

Brazil, on the other hand, was much more sympathetic to the ICC's concerns, which again reflects its more cosmopolitan leaning. It noted that 'the execution of the outstanding arrest warrants regretfully continues to be the most visible challenge' for the Court and, adopting a critical position, it explained that '[individuals who perpetrate crimes against mankind *must be sure* of their punishment and the victims *must have no doubt* that criminals will be brought to justice (emphasis added)',[157] which is also an implicit criticism of non-cooperation. Importantly, Brazil highlighted 'the foundation of its legitimacy [lies] in bringing accused persons before justice',[158] implying that the failure of states to execute arrest warrants was damaging the Court's fragile legitimacy and authority which is true given that effectiveness is required for the conferral of legitimacy, as noted in Chapter One. Brazil was also insistent the Court requires the cooperation of international and regional organisations, and particularly the UN; as Brazil noted, '[t]he Court will only be as strong as the support it receives, not only from States Parties but also from the United Nations'[159] and it emphasised that 'there is still room for improvement in the relationship between the ICC and the United Nations, specially its Security Council.'[160] Brazil has been critical of the lack of support provided by the Security Council to the Court following referrals, explaining that greater involvement of the United Nations with the ICC should be accompanied by greater responsibility of the UN in providing the means for the work of the Court'[161] and that '[a] Security Council referral is not an end in itself, but rather the starting point for a thorough investigation by the Court, with rippling effects on its workload and resources.'[162] Brazil was particularly critical of the Security Council's refusal to fund its referrals to the Court.[163]

South Africa shared Brazil's sympathy for the Prosecutor's concerns and insisted that the Security Council assist in facilitating cooperation with the ICC, demonstrative of its more cosmopolitan position, support for the Court and international criminal justice. The South African representative recalled 'the ICC States parties have an obligation under the Statute to cooperate, while the Government of the Sudan has an obligation to comply under resolution 1593'[164] and it further emphasised 'there is a responsibility upon the Security Council to demand the cooperation of

[157] Brazil ASP6 Statement and Brazil ASP7 Statement.
[158] Brazil ASP10 Statement.
[159] Brazil ASP12 Statement.
[160] Brazil ASP13 Statement.
[161] Brazil ASP11 Statement
[162] Brazil ASP11 Statement
[163] *See,* for example, Brazil ASP11 Statement; Brazil ASP12 Statement; Brazil ASP13 Statement; Brazil ASP14 Statement; Brazil ASP15 Statement; Brazil ASP16 Statement; UNGA Official Records, Sixty-seventh session, 9th plenary meeting, 22 August 2013, UN Doc. A/67/PV.9, 3; UNGA Official Records, Sixty-eighth session, 107th plenary meeting, 9 September 2014, UN Doc. A/68/PV.107, 27.
[164] UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 11. *See also,* UNSC Verbatim Record, 6028th meeting, 3 December 2008, UN Doc. S/PV.6028, 16.

States'.[165] Therefore, rather than criticising the Court, South Africa blamed the lack of cooperation on the Security Council. It said '[o]wing to the limited scope of that resolution, no other State is obliged to cooperate with the ICC in relation to the situation in Darfur' and that this 'was specifically designed in order to accommodate the interests of some permanent members of the Council that have misgivings about the ICC'.[166] It was later noted 'the problem of impunity in situations referred to the ICC by the Security Council goes much deeper and is more systemic than just non-cooperation by individual countries' and he said 'the Court is caught in the crossfire of the political dynamics of the Security Council.'[167] This reflects South Africa's longstanding concerns of the politicisation of the ICC through its relationship with the Security Council. He implored that the 'Council should insist on full cooperation with the Court by all States Members of the United Nations, including permanent members of the Council, in situations that it refers to the Court' and further said that '[w]e are convinced that the Prosecutor's call for full cooperation, which South Africa fully supports, will ultimately be realized only when the Council stops seeing referrals as an end in themselves.'[168] South Africa shared the frustrations of Brazil in respect of UN's refusal to fund Security Council referrals to the ICC.[169] This is consistent with the shift in South Africa's position from rejecting a role for the Security Council *vis-a-vis* the Court to very strongly supporting an active role for it in assisting the Court in functioning effectively. This differs from Russia and China's position in that they merely want the ability to control the Court's work whereas South Africa and Brazil see the Security Council's role as facilitative of the delivery of the Court's mandate.

7.7. The Prioritisation of Immunity over Accountability

One of the principal issues concerning cooperation in the Darfur situation was the refusal of some states to arrest al-Bashir on the grounds that, in their view, despite him being subject to an ICC arrest warrant he is still entitled to the immunity from arrest and surrender that attaches to his position as an incumbent head of state. Russia, China and India shared this view. Russia, for example, emphasised that while implementing their legal obligations regarding cooperation with the Court was important, states also had to take into account the need 'to comply with the norms of international law in the matter of the immunity of senior State officials'[170] and it supported

[165] UNSC Verbatim Record, 5789th meeting, 5 December 2007, UN Doc. S/PV.5789, 13-14. *See also,* UNSC Verbatim Record, 5905th meeting, 5 June 2008, UN Doc. S/PV.5905, 14-15.
[166] UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 11.
[167] UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 10.
[168] UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 10. *See also,* UNGA Official Records, Sixty-ninth session, 89th plenary meeting, 8 May 2015, UN Doc. A/69/PV.89, 6.
[169] UNGA Official Records, Sixty-seventh session, 95th plenary meeting, 22 August 2013, UN Doc. A/67/PV.95, 3. *See also,* UNGA Official Records, Sixty-eighth session, 107th meeting, 9 September 2014, UN Doc. A/68/PV.107, 25.
[170] UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 16. *See also,* UNSC Verbatim Record, 6974th meeting, 5 June 2013, UN Doc. S/PV.6974, 11 and UNSC Verbatim Record, 7478th meeting, 29 June 2015, UN Doc. S/PV.7478, 11.

cooperation by states to the extent they abided by such norms.[171] In justifying its position, Russia emphasised that '[t]he immunity of Government officials from criminal prosecution is one of the key norms of customary international law and an extremely important factor for stability in international relations.'[172] Furthermore, Russia expressed its strong view that Security Council Resolution 1953 did not affect al-Bashir's immunity as a sitting head of state and therefore he was still entitled to expect this would be upheld, despite being subject to an arrest warrant. Its representative said:

> we are convinced that in the absence of the explicit reference to that effect in the resolutions of the Security Council the abolishment or suspension of the application of norms of general international law regarding the immunity of acting heads of states may not be presumed. We call on the Court to take this into consideration when working out the modalities of cooperation with States. We consider that ignoring this issue might not once put the Court in a difficult situation.[173]

China adopted the same position. It representative said '[t]he referral of a situation by the Security Council does not automatically abolish the immunity of head of state under rules of general international law' and, moreover, emphasised that therefore while some states have obligations to cooperate with the Court under the Rome Statute, they should not be required to do so in contravention of their concurrent obligations under international law in relation to the granting of immunity to sitting heads of state, as provided for in Article 98 of the Rome Statute.[174] The Chinese representative also explained that while China 'respect[s] the full cooperation rendered by States Parties with the Court.. .we would like to reiterate that the right of non-States Parties should also be fully respected in accordance with international law',[175] namely Sudan and, thus, 'no obligation on cooperation can be imposed on them in this regard.'[176] Importantly, China highlighted the lack of consensus over the liberal prioritisation of accountability and justice over pluralist norms, as advanced by the ICC in the interpretation of immunity rules, and criticised its creeping

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[171] UNSC Verbatim Record, 7080th meeting, 11 December 2013, UN Doc. S/PV.7080, 8.
[172] UNSC Verbatim Record, 8290th meeting, 20 June 2018, UN Doc. S/PV.8290, 17.
[173] Russian Federation ASP12 Statement. *See also,* UNSC Verbatim Record, 8290th meeting, 20 June 2018, UN Doc. S/PV.8290, 17 - 'the mere fact that a situation has been referred to the ICC by the Security Council does not automatically cancel the immunity of official representatives of the Governments involved'; Statement by the delegation of the Russian Federation (Observer State) at the Eleventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 15 November 2012, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP11/GenDeba/ICC-ASP11-GenDeba-RUS-ENG.pdf (accessed 21/07/2018) and Russian Federation ASP13 Statement.
[174] Statement by Ms. Guo Xiaomei, Counselor of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (China Observer Delegation) at the 14th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 18-26 November 2015, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP14/GenDeb/ASP 14-GenDeb--OS- China-ENG.pdf (accessed 21/07/2018). *See also,* China ASP16 Statement; UNSC Verbatim Record, 8290th meeting, 20 June 2018,
UN Doc. S/PV.8290, 9 - 'China has long been of the view that Heads of State enjoy privileges and immunities under international law by virtue of their office and that the referral of a situation by the Security Council to the ICC in no way necessarily undermines or strips the immunity enjoyed by such Heads of State.'
[175] China ASP11 Statement.
[176] China ASP12 Statement.

cosmopolitanism in this respect, noting its bias in interpreting the Rome Statute. India shared this view; it said '[a]ny suggestion that has the effect of creating new obligations for States and regional organizations that are not parties to the Rome Statute will not be legally sound.'[177]

This is evidence of their state-solidarist position and defence of pluralist institutions. Whilst they support the work of the ICC in Darfur, they are of the view that inter-state obligations concerning diplomatic immunity under general international law, which facilitate good international relations between states and reflect the institutions of sovereignty and diplomacy, should be privileged above the effective operation of a legal regime which promotes the cosmopolitan objectives of establishing accountability for international crimes and ending impunity. In circumstances where they were forced to make a binary choice, Russia, China and India chose to preserve the rules relating to head of state immunity. Furthermore, their insistence that Sudan should not be subject to the obligations under the Rome Statute as a non-State Party reflects their pluralist emphasis on the principle of state consent in international law, even where this hinders the effective implementation of international criminal justice.

As is consistent with the arguments made above, Russia and China's position that it would not be lawful to enforce the arrest warrant against al-Bashir and that, on a normative level, diplomatic immunity should be prioritised over justice, would also have undoubtedly be influenced by their political and economic relations and future ambitions in the country. These states will know that inter-state relations will be negatively affected if they are seen to be supporting the arrest of al-Bashir and that if al-Bashir is arrested Sudan would descend into chaos harming their economic interests in the country. However, this does not mean that their principled and legal objections are not authentic as this is clearly not the case. This argument is advanced on the basis that Russia and China have set out their legal and normative objections in detail and that those objections are consistent with their state-solidarist view of how international society should be organised and how it should function. Moreover, other states and the AU have expressed concern about the arrest of al-Bashir, as will be discussed shortly, which demonstrates the legitimacy and therefore the genuineness of such concerns. Finally, there has been much academic commentary arguing that the ICC's position that al-Bashir does not benefit from immunity is incorrect and that the position of Russia and China is right.[178] The objective of preserving political and economic relationships coincides with the principled reasons for opposing al-Bashir's arrest and surrender are not mutually exclusive.

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[177] UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 18. *See also*, UNSC Verbatim Record, 6887th meeting, 13 December 2012, UN Doc. S/PV.6887, 12-13.

[178] *See* Chapter Nine, Section 9.3.1.

China and Russia's growing concern for this issue should be seen in the context of the strident backlash by some African states against the Court which is due to its insistence al-Bashir does not benefit from immunity under international law and that African and other States Parties to the Court are therefore required to arrest him when he enters their territory.[179] The AU shared the view that al-Bashir's immunity remained intact despite the Security Council referral of Sudan to the ICC.[180] China and Russia expressed sympathy and solidarity with African states which had raised concerns about the Court's insistence that its arrest warrants be enforced despite them having obligations to grant diplomatic immunity to particular individuals, such as al-Bashir, in violation of Article 98 of the Rome Statute.[181] As Russia highlighted, 'certain members of the African Union have repeatedly pointed out that requirements of the ICC in a number of cases are at odds with the commitments derived from international legal norms regarding the immunity of State officials'[182] and it criticised the Court, stating:

> on more than one occasion, we have called attention to the fact that the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing the immunity of the Government officials of those States not party the Rome Statute can be repealed, and presuming the contrary is unacceptable. However, once again, the Office of the Prosecutor does not wish to consider that.[183]

It also expressed concern, 'as has been demonstrated in practice in recent years, not all members of the Council are ready to heed that position' and it highlighted its interest 'in the initiative to establish a special ministerial committee of the African Union to address the concerns of African countries with regard to the ICC.'[184] It similarly criticised the fact that 'certain States, as well as the Court itself, have preferred to exert pressure on African countries, instead of taking on board their concerns' and it noted that 'in the light of that, the recent decision by a number of countries to withdraw from the Rome Statute is no surprise.'[185] Russia therefore called 'on the Court and the Assembly to take into account in a most serious way all the concerns shared by the States of the African Union with regard to certain aspects of the work of the ICC.'[186] China was similarly critical of the ICC's approach. It initially said 'there is still room for the Court to enhance its judicial

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[179] *See,* D. Tladi, 'The African Union and the International Criminal Court: The battle for the soul of international law', (2009) 34(1) *South African Yearbook of International Law* 57-69.
[180] *See,* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 OA2, The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir' (13 July 2018).
[181] Statement by the Russian Federation, UNSC Verbatim Record, 7582nd meeting, 15 December 2015, UN Doc. S/PV.7582, 14 and Statement by China, UNSC Verbatim Record, 7710th meeting, 9 June 2016, UN Doc. S/PV.7710, 5. *See also,* China ASP13 Statement.
[182] UNSC Verbatim Record, 7833rd meeting, 13 December 2016, UN Doc. S/PV.7833, 13. *See also,* UNSC Verbatim Record, 7478th meeting, 29 June 2015, UN Doc. S/PV.7478, 11; UNSC Verbatim Record, 7582nd meeting, 15 December 2015, UN Doc. S/PV.7582, 14; UNSC Verbatim Record, 7710th meeting, 9 June 2016, UN Doc. S/PV.7710, 4.
[183] UNSC Verbatim Record, 7963rd meeting, 8 June 2017, UN Doc. S/PV.7963, 12.
[184] UNSC Verbatim Record, 7710th meeting, 9 June 2016, UN Doc. S/PV.7710, 5.
[185] UNSC Verbatim Record, 7833rd meeting, 13 December 2016, UN Doc. S/PV.7833, 13.
[186] Russian Federation ASP13 Statement.

credibility and authority, and there still exists a lack of international consensus upon the interpretation and application of certain provisions of the Rome Statute',[187] particularly the relationship between Articles 27 and 98 but, more latterly, it emphasised rather critically 'instead of strictly following the rules set out in the Rome Statute, the Court's judicial practice 'seems to have put one-sided emphasis on the irrelevance of "official capacity" in Article 27, but ignored or erroneously interpreted and applied the rules of customary international law on the immunity of heads of State' and noted that this has 'triggered extensive controversy.'[188]

In contrast, South Africa did not initially overtly criticise or contest the Court's interpretation of the law relating to immunities like China, Russia and India did, at least up until June 2015. Moreover, its support continued in the face of increasingly robust and vitriolic criticism and contestation of it by some African states, led by the AU,[189] which included seven cases of non-executed arrest warrants by African states in relation to al-Bashir.[190] In response to the decision of the AU that members who are also States Parties to the ICC shall not cooperate with the Court in the arrest and surrender of al-Bashir,[191] South Africa said that 'a total rejection of the indictment would by implication be interpreted as endorsing the much reported gross human rights violations in Darfur' and that it would arrest al-Bashir should he enter its territory.[192] This was recognised by the Chief Prosecutor who said it 'was a strong message of respect for resolution1593 (2005) and of support for accountability.'[193] Mills and Bloomfield note South Africa 'argued strongly against efforts by non-members like Libya, Eritrea and Egypt to critique anti-impunity and the ICC.'[194] This demonstrates South Africa's more cosmopolitan leaning, at least at that time, in that it was prepared to advocate for the accountability of al-Bashir even where his immunity would be disregarded.

South Africa did, however, express support for the AU's role in the resolution of the Darfur conflict,[195] encouraged states to implement the AU's High Level Report,[196] sympathised with the

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[187] China ASP13 Statement.
[188] China ASP16 Statement.
[189] For an overview of AU contestation of the ICC *see,* K. Mills and A. Bloomfield, 'African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm', (2017) 44(1) *Review of International Studies* 101-127.
[190] Kenya, Djibouti, Chad (twice), Malawi, Nigeria and the DRC - *see,* D. Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law. A Perspective from International Law', (2015) 13 (5) *Journal of International Criminal Justice* 1027-1047, 1028-1029.
[191] African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Russian by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009, AU Doc. Assembly/AU/13(XIII)
[192] 'South Africa Legally Rebuts AU Resolution on Arresting Bashir', *Sudan Tribune,* 3 August 2009, available online at http://www.sudantribune. com/spip.php?article31996. *See also,* Mills and Bloomfield, African resistance to the International Criminal Court', 117.
[193] UNSC Verbatim Record, 6336th meeting, 11 June 2010, UN Doc. S/PV.6336, 3.
[194] *See also,* Mills and Bloomfield, 'African resistance to the International Criminal Court', 113.
[195] See, UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 10.
[196] See, UNSC Verbatim Record, 6778th meeting, 5 June 2012, UN Doc. S/PV.6778, 10-11; South Africa ASP7 Statement; South Africa ASP8 Statement.

issues raised by African states about the Rome Statute and it supported efforts to introduce reforms.[197] Moreover, South Africa introduced proposals for reforms of the Rome Statute on behalf of the AU before the Kampala Conference in 2010. This included an amendment to Article 16 of the Statute which sought to allow the UN General Assembly to approve deferrals of ICC investigations and prosecutions, and the amendment to the prosecutorial guidelines to include considerations of peace.[198] This demonstrates an acceptance on the part of South Africa that changes need to be made to the Rome Statute and its view that the Court has to cooperate effectively with regional institutions and defer to local solutions where appropriate, and that the objectives of peace and justice need to be carefully balanced. Whilst South Africa committed to arresting al-Bashir, even in the face of AU objection, these actions demonstrate pluralist concerns.

Mills, however, argues that 'South Africa apparently agreed to make the proposals as a means of heading off even more damaging proposals from the AU' and that it 'also assumed that even if the proposals were sent to the Review Conference, there was little chance that the majority of states parties would accept them'.[199] This ambivalent position is evidence of South Africa's conflicting allegiances; on the one hand its support for the Court and, on the other, a desire to demonstrate African solidarity and leadership. Boehme argues, '[s]imilar to the country's broader foreign policy, South Africa's engagement with the Court has oscillated between its proclaimed support for accountability and its obligation and solidarity with fellow African governments.'[200] It can also be seen, Tladi says, as South Africa 'playing a prominent role in serving as a bridge between the ICC and the AU in the tensions between the two bodies.'[201] Further to this, Tladi notes that '[w]hile South Africa has not been shy, not only at AU events, but also so-called 'ICC friendly' events, to question some practices of the Court, it has also sought to lower the anti-ICC sentiments at AU events.'[202] This conflict of obligations and allegiances would be a key aspect of South Africa's subsequent decision not to arrest al-Bashir when he travelled to South Africa and then to withdraw from the Rome Statute, as will be explored in Chapter Nine.

7.8. China, Russia and India's Non-Cooperation in the Arrest of al-Bashir

In addition to expressing their support for the arguments made by some African states that they are

[197] South Africa ASP8 Statement - 'The African proposals [to be considered at the Review Conference] seeks to address important concerns of African states which are in the interests of the entire Assembly and will not doubt enhance the efficacy of the Statute. '
[198] Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court', 428-431. *See also*, Jalloh, Akande and du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', 22-29.
[199] Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court', 430-431.
[200] F. Boehme, ''We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court', (2017) 11(1) *International Journal of Transitional Justice* 50-70, 64.
[201] Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir', 1030.
[202] Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir', 1030.

not obligated to arrest al-Bashir if he enters their territory, some of the BRICS states have hosted and engaged diplomatically with the Sudanese President. Only shortly after the ICC issued an arrest warrant for al-Bashir, in June 2011 the Sudanese President travelled to China for a state visit.[203] He visited China again in September 2015 during which he attended a military parade at the invitation of Xi Jinping and held a meeting with him in the Great Hall of the People.[204] This event took place despite an official reminder sent by the ICC, by way of a note verbale, of the 'Request to all United Nations Security Council Members that are not states parties to the Rome Statute for the Arrest and Surrender of Mr. Omar Al-Bashir'.[205] When asked about the arrest warrant for al-Bashir, a spokesperson for the Chinese Foreign Ministry explained that '[a]s China is not a member of the ICC relevant issues will be handled "on the basis of the basic principles of international law".'[206] Additionally, various meetings have taken place between the Special Representative of the Chinese government on African Affairs and al-Bashir.[207]

Al-Bashir also travelled to India in October 2015 to attend the third India-Africa Forum Summit in New Delhi at the invitation of the Indian government. This took place despite the ICC again issuing a request for cooperation to arrest al-Bashir and surrender him to the Court,[208] and the Prosecutor providing a written statement to the Hindu Times explaining that '[b]y arresting and surrendering ICC suspects, India can contribute to the important goal of ending impunity for the world's worst crimes' and noting that 'resolution 1593 urged all States, including non-States Parties to the ICC...to cooperate fully with the ICC. This includes arresting Mr. Al-Bashir.'[209] India did not arrest the Sudanese President and when asked about India's position with respect to Al-Bashir's status as a fugitive of the ICC and the Court's request for cooperation in his arrest, a spokesperson said that 'India is fully compliant with its international legal obligations'[210] and that '[w]e are not party to

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[203] Embassy of the People's Republic of China in the Netherlands, 'Chinese President Hu Jintao Holds Talks with Sudanese President Omar al-Bashir', 29 June 2011, available online at http://nl.china-embassy.org/eng/zgyw/t835954.htm (Accessed 15/02/2018).

[204] 'China welcomes Sudan's war crime-accused leader as "old friend"', *Reuters,* 1 September 2015, available online at - https://www.reuters.com/article/us-ww2-anniversary-sudan/china-welcomes-sudans-war-crime-accused-leader-as-old-friend-idUSKCN0R13CN20150901 (accessed 15/02/2018).

[205] Report of the Registry on Omar Al-Bashir's travels to the Islamic Republic of Mauritania, the Federal Democratic Republic of Ethiopia, the People's Republic of China and the Republic of South Sudan in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir ("OmarAl-Bashir"),* 23 October 2015, ICC Doc. ICC-02/05-01/09.

[206] 'China welcomes Sudan's war crime-accused leader as "old friend"'.

[207] Ministry of Foreign Affairs of the People's Republic of China, 'President Omar Hassan Ahmad al-Bashir of Sudan Meets with Special Representative of the Chinese Government on African Affairs Zhong Jianhua', 3 August 2016, available online at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/xybfs_663590/xwlb_663592/t1387138.shtml (accessed 15/02/2018).

[208] Report of the Registry on Omar Al Bashir's travels to the People's Democratic Republic of Algeria, the Republic of India and the Kingdom of Saudi Arabia in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir ("Omar Al-Bashir"),* 27 November 2015, ICC Doc. ICC-02/05-01/09, 5.

[209] 'ICC calls for Bashir's arrest, Delhi says 'no'', *The Hindu,* 11 October 2015, available online at http://www.thehindu.com/news/national/international-criminal-court-icc-calls-for-bashirs-arrest-delhi-says-no/article7747882.ece (accessed 15/02/2018).

[210] 'India to host Sudanese President Omar al-Bashir at the India-Africa Summit despite ICC warrants', *The Economic Times,* 11 October 2015, available online at https://economictimes.indiatimes.com/news/politics-and-nation/india-to-host-sudanese-president-_omar-al-bashir-at-india-africa-summit-despite-icc-warrants/articleshow/49310403.cms (accessed 15/02/2018).

the Rome Statute. We don't have an obligation to comply to it [the ICC order]'.[211]

In November 2017, al-Bashir made his first official visit to Russia at the invitation of President Putin.[212] Putin 'not only invited the controversial leader to Russia, but also sent a Russian plane to Khartoum to ensure his safety and comfort during the journey.'[213] During his visit, al-Bashir met with the Russian President in Sochi[214] and expressed an interest in developing closer relations with the BRICS states.[215] More recently, President Putin accepted an invitation from the Sudanese President to visit Sudan[216] and Bashir visited Russia again in July 2016 to attend the FIFA World Cup, which included a meeting with President Putin and the Foreign Minister, Sergey Lavrov.[217] Bosco argues that '[a]lthough they had acquiesced to the referral, Russia and China showed no interest in isolating Bashir',[218] and the same would apply to India. Whilst this is true, we need to understand why this is the case. It is argued here that China, India and Russia's decisions to engage with al-Bashir and to host him is not an example of the states seeking to actively undermine the institution or to damage the Court, albeit this is perhaps a consequence of their actions, but rather can be principally explained as the states defending and upholding a state-solidarist vision of international society. First, it should be noted that Russia supported the referral of Sudan to the ICC and China acquiesced in that referral through its abstention, and moreover, the states have expressed some support for the ICC's actions in Sudan, at least initially. Furthermore, none of the states are obligated to arrest al-Bashir, as they are not States Parties to the ICC and because Security Council Resolution 1593 only 'urges' states other than Sudan to cooperate with the Court, and they are therefore are required to act in accordance with international law in respecting diplomatic immunity obligations, which means not arresting him. China and India expressly recognised that. However, this does not account for their decisions to extend invitations to and host the Sudanese President, which is a political decision, that they were not obligated to make.

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[211] 'India Prepares to Host Sudan's al-Bashir Despite War Crimes Charges', *Time*, 23 October 2015, available online at http://time.com/4084677/india-sudan-icc/ (accessed 15/02/2018).
[212] Embassy of the Republic of Sudan in Berlin, 'President Al-Bashir Arrives in Russia', 23 November 2017, available online at http://www.sudanembassy.de/index.php/news-archiv-november-2017/1323-president-al-bashir-arrives-in-russia (accessed 15/02/2018).
[213] A. H. Adam, 'What is behind Sudan's 'rapprochement' with Russia?', *Al Jazeera*, 2 December 2017, available online at http://www.aljazeera.com/indepth/opinion/sudan-rapprochement-russia-171130124410870.html (accessed 15/2/2018).
[214] President of Russia, 'Russia-Sudan talks', 23 November 2017, available online at http://en.kremlin.ru/events/president/news/56163 (accessed 15/02/2018).
[215] President of Russia, 'Russia-Sudan talks'.
[216] 'Russia's Putin accepts Bashir invitation to Sudan', *africanews*, 22 March 2018, available at http://www.africanews.com/2018/03/22/russia-s-putin-accepts-bashir-invitation-to-sudan/ (accessed 25/04/2018).
[217] Russian Federation, 'Meeting with President of Sudan Omar al-Bashir', 14 July 2018, available online at http://en.kremlin.ru/events/president/news/page/4 (accessed on 24/07/2018); M. Alamin, 'Sudanese President Wanted by ICC Plans to Attend World Cup Final', *Bloomberg*, 12 July 2018, available online at https://www.bloomberg. com/news/articles/2018-07-12/sudanese-president-wanted-by-icc-plans-to-attend-world-cup-final?utm source=google&utm medium=bd&cmpId=google (accessed on 24/07/2018).
[218] Bosco, *Rough Justice*, 155-156.

Such decisions are arguably informed by two considerations, one normative and one material. First, in the absence of an obligation to arrest the Sudanese President, the carrying on of diplomatic relations with Sudan is consistent with the BRICS states state-solidarist vision of international society in that prioritises the importance of diplomatic engagement at the expense of justice where they clash for the purposes of maintaining order in society. The states have been clear from the outset that judicial intervention alone will not resolve the crisis in Darfur and the simultaneous political negotiations are required which justifies their ongoing political engagement with the Sudanese regime. This was perhaps even more necessary in their view given what they perceived to be were controversial decisions taken by the Prosecutor and the Judges of the Court, including to request and issue an arrest warrant for al-Bashir, which they considered would be detrimental to resolving the situation. As is explained above, China's position in respect of Sudan has to been to reluctantly use the ICC as a mechanism to encourage the political resolution of the conflict, although this was also driven by a material concern to be seem as a responsible power in international society and not to unnecessarily isolate itself diplomatically.

The second factor that will have informed these states decisions to invite and host al-Bashir is a material one, specifically a desire to preserve and develop their political relations with Khartoum as a means of gaining influence in Sudan, and Africa more widely, particularly for the purpose of consolidating and/or expanding their business and economic interests in the country and the region. As rising powers, these states are keen to expand their influence beyond their traditional spheres of influence and to exploit new business opportunities around the world. As explained above, China has long had political relations with Sudan and extensive economic interests in the country and both India and Russia appear to be keen to develop such relation as well which has been describe as the 'new scramble for Africa'.[219] More specifically, while there has long been military cooperation between Sudan and Russia, with Russia having been a major arms supplier to Sudan for a long time, '[i]n a recent development, Sudan invited Russian companies to take part in the development of its oil industry' and Sudan has also offered Russia assistance with its activities in Syria.[220] India has also been growing its economic relations with Sudan over the years.[221] Furthermore, this is evident in the fact that the states engagement with al-Bashir was not limited to resolving the crisis in Darfur but was about courting his friendship.

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[219] Burger, 'The return of Russia to Africa'. *See also,* K. Malhotra, 'Russia in Africa: is it becoming a key player?', *BBC News,* 9 January 2019, available online at https://www.bbc.co.uk/news/world-45035889 (accessed on 24/02/2019).

[220] Burger, 'The return of Russia to Africa'. *See also*, A. Aloulenein, 'Russia's Putin accepts Bashir's invitation to Sudan', *Reuters,* 22 March 2018, available online at https://www.reuters.com/article/us-sudan-russia/russias-putin-accepts-bashir-invitation-to-sudan- idUSKBN1GY2CJ (accessed on 24/02/2019).

[221] R. Beri, 'India-Sudan Relations', *Institute for Defence Studies and Analysis,* available online at https://idsa.in/taxonomy/term/1212 (accessed on 24/02/2019).

It can also be said that although these decisions of these states in respect of inviting and hosting al-Bashir is not an attempt to damage the Court, the more recent actions could be viewed quite righty as a rebuke to what they perceive as a flawed approach to the Sudan situation by the Court. There is, however, no doubt that such actions harm the Court on the basis that it is seen to be ineffective in getting custody of fugitives and being ignored in requests for assistance by powerful states.

7.9. Conclusion

The referral of the situation in Darfur to the ICC by the UN Security Council in 2005 was a very significant moment for the Court, confirming its legitimacy as a secondary institution and proving that it could deliver justice beyond those states that had ratified the Rome Statute, representing the cosmopolitan progress that inspired the founding of the Court. It was also significant that the referral was approved, or at least not subject to objection, by three of the BRICS states; Russia voted in favour of the resolution while both China and Brazil abstained. This showed an approval of the Court and the implementation of international criminal justice. However, the BRICS states' approach to the ICC's intervention in Sudan showed that their support for the Court is conditional upon it acting with deference to pluralist values and primary institutions of international society, and there is evidence of a willingness to contest the Court where it fails to comply. This represents a continuation of the BRICS states' promotion of a state-solidarist vision of global political order.

More specifically, the BRICS' state-solidarist position is evident in their emphasis that the pursuit of justice by the ICC should not undermine the peaceful settlement of conflicts through state-led political negotiation. This represents a normative prioritisation of order over justice, diplomacy over law, and the primacy of sovereign states over supranational institutions in matters of global governance. This normative position is also demonstrated by the fact that South Africa, China and Russia all supported the Security Council in exercising a supervisory function over the ICC and intervening to defer proceedings where the ICC's work threatened peace and stability. More specifically, the states supported the AU's request to defer the ongoing investigation in Sudan on the basis it was hindering a political settlement of the conflict. South Africa, Russia and China also believed that, in addition to the Security Council managing the balance between peace and justice, the Court should also take on such responsibility. The conflation of politics and law within the ICC's mandate represents backlash against juridification which is a characteristic of solidarist progress. Furthermore, in contrast to their support for the Security Council exercising its deferral powers, Russia and China rejected the suggestion the Security Council should assist in supporting state cooperation with the ICC, believing that such a responsibility fell solely upon the ICC. South Africa and Brazil took the opposite view, however, sympathising with the Prosecutor's frustration

with the lack of cooperation and, together with Brazil, insisting on a more prominent role for the Security Council in supporting the ICC, including by way of funding referrals. This reflects their greater support for the institution and the pursuit of criminal justice.

The concern the pursuit of justice would threaten the political settlement of the Sudanese conflict also laid behind the criticism expressed by Russia and China of the ICC's decision to indict the incumbent President, Omar al-Bashir. They expressed concern that such a move would threaten the delicate peace process that was being advanced at the time. Moreover, the view international criminal justice should only be pursued in compliance with a state-solidarist global governance framework is also demonstrated by Russia, China and India's prioritisation of diplomatic rules, which uphold the pluralist institutions of state sovereignty and diplomacy, over the Rome Statute legal regime that seeks to deliver the cosmopolitan values of justice and accountability, where they conflict. As was identified in the chapter, Russia, China and India all insisted that al-Bashir retains his immunity as head of state, despite his indictment by the ICC and being subject to an arrest warrant, and they argued states should not cooperate with the Court in arresting al-Bashir as doing so would violate international diplomatic immunity rules. Beyond expressing rhetorical support for this position, these states engaged with al-Bashir and his regime diplomatically. The Sudanese President also travelled to the countries at their invitation, undermining the authority of the ICC in the process. These actions reflect a deep commitment to the prioritisation of the pluralist values of international politics and diplomacy over, and even at the expense of, the cosmopolitan values of justice and accountability, and a willingness to contest the Court where it challenges such a prioritisation. It should also be noted, however, Russia, China and India's positions on Sudan, including their decisions to engage diplomatically with al-Bashir, are also informed by material concerns, specifically the desire to consolidate and expand their economic and business interests in Sudan as well as in Africa more generally. South Africa differed in its position on al-Bashir's immunity, however. It did not criticise the Court's position, at least prior to 2015, and rejected the decision of the AU that States Parties must not cooperate with the Court in arresting al-Bashir. This reflects South Africa's more cosmopolitan leaning which was also evident in its approach to the Rome Statute negotiations.

Finally, it must be noted that the support expressed by the BRICS states for the AU's position, as well as the concerns that it had raised and its Rome Statute reform proposals, are evidence of the BRICS discharging their role as the self-appointed representatives of the Global South. It also demonstrates their support for regional bodies which is part of their state-solidarist commitment to localised multilateral solutions to internationalised problems as well as the reformist ambitions, specifically a desire to marginalise the control exercised by Western states in global governance.

South Africa's unwillingness to completely align itself with the position of the AU by robustly criticising the Court and refusing to cooperate with it reflects is conflicting allegiances to Africa on the one hand and to the ICC on the other, an issue which is explored in greater detail in Chapter Nine in the context of its withdrawal from the Rome Statute in 2015. Before this, however, the next chapter looks at the BRICS states' views on the ICC's intervention in Libya from 2011 to date and the failed attempt to refer the situation in Syria to the ICC in 2014.

CHAPTER EIGHT

FROM LIBYA TO SYRIA: A DETERIORATION IN THE ICC-BRICS STATES RELATIONSHIP

8.1. Introduction

This chapter continues to examine the BRICS states' views on the Court's practice of international criminal justice by analysing the views expressed and actions taken by the BRICS states in respect of two other major events in the Court's relatively short history, specifically the referral of the situation in Libya to the ICC in 2011, only the second time the Security Council has exercised its power under Article 13(b) of the Rome Statute, and, second, the subsequent failure of the Security Council to refer the situation in Syria to the ICC in 2014, which was the result of Russia and China vetoing the draft resolution proposed by the P-3 and others.

It is argued, consistent with the conclusions reached in the previous chapter, that the views expressed by the BRICS states in respect of the Court's interventions in Libya and on the Syrian crisis, including the proposed but ultimately unsuccessful ICC referral, confirm that they support international criminal justice delivered through the ICC but only to the extent it does not undermine or threaten pluralist values and primary institutions. More specifically, it further demonstrates how the BRICS states continue to advance a more pragmatic approach to transitional justice, which balances the ambitions of peace and justice, by contesting the ICC's narrow retributive approach which, in their view, prioritises accountability criminal at the expense of negotiated conflict resolution or, in other words, prioritises legal, supranationally delivered remedies over and at the expense of political, state-led solutions.

This conclusion is substantiated within the course of this chapter as it charts the shift from the BRICS states supporting the referral of the situation in Libya to the ICC and its early work, to their subsequent criticism of it. As it will be demonstrated, the increasing contestation of the Court was principally a response to their assessment the Court was prioritising accountability at the expense of a political resolution to the civil war, principally by issuing arrest warrants for Colonel Gaddafi and other senior members of his regime, which had made securing a peaceful transition impossible, or at least exceedingly difficult, and had resulted in the downward spiral of Libya into chaos. The BRICS states were also critical of what they perceived as the Court contributing to NATO's efforts of facilitating regime change in Libya and having been instrumentalised by the P-3 which politicised the institution and compromised its impartiality and independence. This is seen both in

the BRICS states' criticism of the issuing of arrest warrants and the Court's one-sided approach to its investigations and prosecutions. The BRICS states' state-solidarist positions are also evident in the support for the application of the complementarity principle on Libya.

The chapter goes on to demonstrate how the concerns raised by the BRICS states in respect of the Court's work in Libya informed their positions, including on the role of the ICC, in the Syrian conflict. As will be shown, the BRICS' emphasised the need for an inclusive, Syrian-led political solution to the crisis and they rejected attempts at external interference and, particularly, what they perceived as attempts at laying the groundwork for forcible regime change. It is argued that concerns about a repeat of forcible regime change in Syria, assisted by the ICC, ultimately resulted in Russia and China vetoing the proposed referral of the situation to the Court. The argument that the BRICS states support international criminal justice but only to the extent it is implemented in accordance with pluralist values and primary institutions is evidenced also by the fact Russia and China emphasised the need for justice and accountability in Syria when rejecting the ICC referral and on the basis they proposed an alternative Security Council resolution, one which was ultimately rejected, which still committed states to pursuing justice in Syria, albeit not through the ICC. The argument is further substantiated at the end of chapter with an examination of Russia and China's approach to the investigation of the use of chemical weapons in Syria. It is shown how Russia and China initially supported the investigations but later contested their implementation, primarily on the basis of a belief they had been politicised and instrumentalised by the P-3 as an alternative means of laying the groundwork for forcible regime change in Syria.

8.2. The Libya Referral: a Consolidation of the ICCs Legitimacy

Following the brutal suppression of anti-government, pro-democracy protests by the Gadaffi regime in early 2011, which involved the shooting of unarmed civilians by regime security forces,[1] the Security Council referred the situation in Libya to the ICC on 26 February 2011 pursuant to Article 13(b) of the Rome Statute, as it did with Darfur six years earlier.[2] The Resolution recorded states' condemnation of 'the gross and systematic violation of human rights, including the repression of peaceful demonstrators' and stated '*[c]onsidering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity', the Security Council, *inter alia,* '*[d]ecides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal

[1] For a brief overview of the events that led up to the adoption of Resolution 1970, *see* A F. Triponel and P. R. Williams, 'The Clash of the Titans: Justice and Realpolitik in Libya', (2013) 28(3) *American University International Law Review* 775-834, 779-800.
[2] UNSC Res. 1973 (26 February 2011), UN Doc. S/RES/1970(2011).

Court'.[3]

The referral of the situation in Libya to the ICC, only the second time in the Court's short history such a referral has been made, was a significant event. Following the Darfur referral, it reinforced the legitimacy of the still relatively young and developing institution, including its status as a mechanism of transitional justice. As South Africa said, the referral of the situation in Libya 'underscores the centrality of the Court in the international architecture designed to protect human rights and security.'[4]

It also reflected continued acceptance by international society of retributive criminal justice as the primary response to gross human rights violations; as the US representative explained, the Libyan referral 'reflected the importance that the international community attaches to ensuring accountability for the widespread and systematic attacks'.[5] This was particularly significant given the speed at which the Security Council made the referral following the eruption of violence. It was made only a matter of days after the beginning of the brutal crackdown against civilian protestors in Benghazi which 'signaled a firm commitment [by the UN Security Council] to act as a resolute backer of the ICC.'[6] Therefore, the Libya referral further contributed to the crystallisation of international criminal justice as a primary institution of international society. Moreover, like the Darfur referral, given that Libya was not a State Party to the Rome Statute, the actions of the Security Council in making the referral again clearly supported the universality of international criminal justice as administered by the ICC and reinforced the evolving understanding that state sovereignty is conditional upon a state discharging its obligations, which are enshrined in international law, to protect the fundamental human rights of its citizens, especially their right to life, and that this is not contingent on the voluntary acceptance of such by states. This is evidence of cosmopolitan progress in international society.

Furthermore, given that the civil war in Libya was still raging at the time of the referral, and taking into account the speed at which the referral was made and the comments of many states at the time, the referral also demonstrated an acceptance that the Court had a role to play in the resolution of the conflict in Libya and would make an important contribution to the protection of civilians. For

[3] UNSC Res. 1973 (26 February 2011), UN Doc. S/RES/1970(2011), 1-2.

[4] Opening Statement by Mr AC Nel, MP, Deputy Minister of Justice and Constitutional Development of the Republic of South Africa, During the General Debate at the Ninth Meeting of the Assembly of States Parties of the International Criminal Court, United Nations, New York, 14 December 2011', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP10/Statements/ICC-ASP10-GenDeba-SouthAfrica-ENG.pdf (accessed on 22/07/2018) ('South Africa ASP9 Statement'). *See also,* D. Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics,* (OUP, 2014), 180.

[5] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 5.

[6] V. Peskin and M. P. Boduszynski, 'The Rise and Fall of the ICC Libya and the Politics of International Surrogate Enforcement', (2016) 10 *International Journal of Transitional Justice* 272-291, 275-276.

example, the South African representative said that '[w]e are confident that the measures contained in this resolution will contribute to the long-term objective of bringing peace and stability to this sisterly nation'[7] and the US representative noted that '[t]he Security Council's unanimous decision to refer the situation underscored the importance of the role of justice and accountability in the resolution of conflicts and maintenance of international peace and security.'[8] This is also evident in the fact Resolution 1970 is framed in terms of the Responsibility to Protect, the first time this had occurred. As the French delegation explained:

> [w]hen a Government attacks its own citizens, rather than protecting them, and when the crimes committed are an affront to the conscience of humankind and affect the stability of an entire region, the international community has the responsibility to intervene to protect civilians. That is what we did in Libya with resolution 1970 (2011). The imperative of ensuring justice, underscored in the resolution, continues to be valid today.[9]

Moreover, as Stahn notes, the Libya referral 'marked the first incident in the practice of the Security Council in which an ICC referral was expressly associated with the R2P concept' and it confirmed '[t]he jurisdiction of the ICC was therefore not solely an ex post facto mechanism, but at least partially an instrument to constrain ongoing violence and secure accountability in the context of hostilities.'[10]

The Prosecutor, Luis-Moreno Ocampo, embraced this role for the Court, noting in his first address to the Security Council following the referral that '[j]udicial activity will deter crimes',[11] which is consistent with the Court's ancillary objective to make a contribution to the peaceful resolution of armed conflicts. This can also be seen in speed with which Moreno-Ocampo opened an investigation into the crimes committed in Libya following the referral. In contrast to Darfur where Ocampo took over two years to open an investigation, the Libyan investigation was opened within a matter of days, on 2 March 2011.[12] Whilst this was in part due to the availability of evidence demonstrating the commission of ICC crimes to the relevant evidential standard, including videos taken on the ground of atrocities being committed and oral testimony,[13] the rapid progress was also undoubtedly an attempt by the Office of the Prosecutor to enter into the fray of the ongoing conflict with a view to contributing to its cessation.[14] However, as will be examined in due course, this

[7] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491, 3.
[8] UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 4-5.
[9] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 7.
[10] C. Stahn, 'Libya, the International Criminal Court and Complementarity. A Test for 'Shared Responsibility'', (2012) 10(2) *Journal of International Criminal Justice* 325-349, 326.
[11] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 4.
[12] L. Vinjamuri, 'The International Criminal Court and the Paradox of Authority', (2016) 79(1) *Law and Contemporary Problems* 275-287, 286.
[13] Stahn, 'Libya, the International Criminal Court and Complementarity', 329.
[14] M. du Plessis and A. Louw, 'Justice and the Libyan crisis: the ICC's role under Security Council Resolution 1970', *Institute for*

framing of the ICC's involvement as part of a conflict resolution response to the crisis placed high expectations on the Court that it was always unlikely to be able to satisfy and it would ultimately drag the institution into the messy politics of collective security, thus compromising its image as an independent and impartial judicial mechanism. As Stahn has noted, '[s]ome argue that the referral to the ICC constitutes in fact a 'poisonous chalice', since it involves the Court in power politics and impartiality dilemmas.'[15]

8.3. The BRICS States' Support for the Libyan Referral

The importance of Resolution 1970 was heightened by the fact that it was adopted unanimously,[16] unlike the Darfur referral on which China and Brazil abstained; as Peskin and Boduszynski noted, '[t]he referral reflected an extraordinary convergence of international backing for global justice. After spending much of its first decade in the wilderness with little support from powerful states, the ICC was now seemingly embraced by the UNSC'.[17] Most significantly, at the time of the referral all of the BRICS states were members of the Security Council and all of them voted in favour of Resolution 1970. This demonstrates the commitment of the BRICS to international criminal justice and their belief in the worth and legitimacy of the ICC, the signs of which began with the Darfur referral. This is argued on the basis these states knew the consequences and seriousness of making such a referral, there having been a previous referral of Sudan, but they nevertheless voted in favour of it. This is clearly an act supporting the ICC's intervention in Libya. Russia noted, it 'has supported the Resolution 1970 in the Security Council. Crimes committed in Libya, especially those against the civilian population, should not be left unpunished.'[18] Bosco notes the willingness of China and Russia to refer cases represents 'important moves towards acceptance of the court'.[19] Moreover, the referral evidences an acceptance amongst the BRICS that sovereignty is limited and conditional upon the protection of human rights which is a tacit endorsement of the cosmopolitan evolution of international society.

However, it should be noted the BRICS states' support for the ICC's intervention in Libya was somewhat circumscribed, evident in their comments following the adoption of Resolution 1970. This shows that their support was somewhat hesitant which is unsurprising given the issues that had

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Security Studies Briefing Paper, 31 May 2011, available online at https://www.africaportal.org/documents/4875/LibyaICCBrief.pdf (accessed on 2/07/2018), 3.

[15] Stahn, 'Libya, the International Criminal Court and Complementarity', 326.

[16] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491, 2.

[17] Peskin and Boduszynski, 'The Rise and Fall of the ICC Libya and the Politics of International Surrogate Enforcement', 273.

[18] Statement by the delegation of the Russian Federation (Observer State) at the Twelfth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 21 November 2013', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Russia-ENG.pdf (accessed on 22/07/2018) ('Russian Federation ASP12 Statement').

[19] Bosco, *Rough Justice,* 183-184.

begun to emerge with respect to the Sudan investigation at that time, as discussed in the previous chapter. Kersten therefore warned that 'it would be dangerous to overstate international support for the referral or the extent to which it was a 'victory' for international criminal justice' given 'the litany of celebratory statements obscured the deeply political and politically controversial contours of the referral' which included the hesitant position of Security Council states.[20] First, in contrast to the statements made by the P-3, which referred to the ICC by name and strongly emphasised the importance of establishing accountability for crimes seemingly committed by the Libyan regime under the leadership of Colonel Gadaffi,[21] China, Russia and South Africa failed to mention the criminal justice aspect of Resolution 1970 or the need to establish accountability for crimes, nor did they refer to the ICC.[22]

Second, it is important to note that the BRICS states' decisions to vote for the resolution were undoubtedly influenced by the support given to the proposed actions by regional organisations and geographically relevant states. This reflects a state-solidarist deference to regional, state-led solutions and a scepticism about ceding unmitigated authority to supranational organisations. South Africa explained that the proposed resolution complemented the decision taken by the African Union's Peace and Security Council,[23] Russia referred to 'cooperation with international and regional partners'[24] and China expressly confirmed that it took into consideration the 'views of the Arab and African countries' in deciding to vote in favour of the resolution.[25] Similarly, the Indian representative referred to the opinions of 'our colleagues from Africa and the Middle East' and also explained that his country 'would have preferred a calibrated and gradual approach' but had 'gone along with the consensus in the Council.'[26] The Brazilian representative also explained that his country had 'paid due regard to the views expressed by the League of Arab States and the African Union, as well as to the requests made by the Permanent Mission of Libya to the United Nations' in voting in favour of Resolution 1970. Other scholars have noted while China, India and Russia were initially reticent about the proposed resolution, once interested states and organisations declared their support, opposition was no longer tenable. Kersten notes while these states were initially wary, 'when the Arab League issued a statement condemning the Gaddafi regime, the balance appeared to tip: a strong resolution and referral to the ICC became a political possibility.'[27]

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[20] M. Kersten, 'Between justice and politics: The ICC's intervention in Libya' in C. De Vos, S. Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (CUP, 2015), 459.

[21] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UNDoc. S/PV.6491, 2-3, 5.

[22] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UNDoc. S/PV.6491, 3-4.

[23] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UNDoc. S/PV.6491, 3.

[24] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UNDoc. S/PV.6491, 4.

[25] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491, 4. *See also,* C. J. Fung, 'Global South solidarity? China, regional organisations and intervention in the Libyan and Syrian civil wars', (2016) 37(1) *Third World Quarterly* 33-50, 38.

[26] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491, 2. *See also,* A. Bloomfield, 'India and the Libyan Crisis: Flirting with the Responsibility to Protect, Retreating to the Sovereignty Norm', (2015) 36(1) *Contemporary Security Policy* 2755, 39.

[27] Kersten, 'Between justice and politics: The ICC's intervention in Libya', 459.

It was also likely to have been important for these states that Libya's representative on the Security Council supported the adoption of Resolution 1970, including the ICC referral,[28] unlike with Darfur where the Sudanese representative to the Council resolutely condemned the proposed referral of the situation, describing the Council as having 'ridden roughshod over the African position' and using 'the policy of double standards'.[29]

It is therefore accepted that the BRICS states votes in favour of the resolution were likely partially informed by a desire to appear as responsible powers in society that did not thwart a course of action proposed as a response to a rapidly unfolding humanitarian crisis that had overwhelming support. Furthermore, as will be discussed in more detail in due course, the BRICS states voted in favour of the resolution as they believed it would contribute to the cessation of hostilities and help to prevent further human rights abuses and the deterioration of the security situation into all out civil war. As such, there was also a pragmatic element to the decision. As explained throughout this thesis, state foreign policy decision-making can be informed simultaneously by both normative, pragmatic and material factors, they are not mutually exclusive bases for decision-making.

China caveated its support for the resolution, referring to 'the special situation in Libya at this time'[30] which suggests it did not intend to set a precedent with its vote. In contrast, while noting the support expressed by regional organisations, Brazil said that it hoped the measures adopted would 'promote respect for international law' and declared its long -standing support for the Rome Statute, which is consistent with its previous statements about the Court.[31] Brazil was also critical of the nature of the referral which it thought compromised the integrity of the Rome Statute, concerns that it raised previously in relation to the Darfur referral. More specifically, its representative stated '[w]e oppose the exemption from jurisdiction of nationals of those countries not parties to the Rome Statute', which was provided for in operative paragraph 6 of the Resolution, noting that 'initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the International Criminal Court are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court.'[32] The exceptionalism perpetuated in this referral further undermines the universality of the law the ICC is attempting to achieve and it demonstrates the manner in which powerful states can exercise control over the working of the

[28] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491, 7. *See also,* Triponel and Williams, 'The Clash of the Titans', 801; R. Adler-Nissen and V. Pouliot, 'Power in practice: Negotiating the international intervention in Libya', (2014) 20(4) *European Journal of International Relations* 889-911, 900.
[29] UNSC Verbatim Record, 5158th meeting record, 31 March 2005, UN Doc. S/PV.5158, 12.
[30] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491, 4.
[31] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491, 6-7.
[32] UNSC Verbatim Record, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491, 6-7. *See also,* Brazil, 'X Assembly of States Parties to the Rome Statute of the International Criminal Court, Statement by H.E. Ambassador Maria Luiza Ribeiro Viotti, Permanent Representative of Brazil to the United Nations, December 2011', available online at https://asp.icc-cpi. int/iccdocs/asp docs/ASP 10/Statements/ICC-ASP 10-GenDeba-Brazil-ENG.pdf (accessed on 21/07/2018).

Court. This reinforces the pluralist limits of the cosmopolitan- solidarist progress made at Rome.

Moreover, despite the historic nature of the Libyan referral, it replicated a number of the other flaws contained in the Darfur referral, perhaps due to the speed with which it was negotiated.[33] The flaws were also the product of a need to build consensus among recalcitrant states. First, despite the disagreement among states regarding the status of al-Bashir's immunity as a head of state subject to an ICC arrest warrant, an issue which arose in the context of the Darfur referral, partly due to the fact the Security Council did not take a position on it or provide any guidance in Resolution 1953, the Libyan referral made the same omission with respect to Gadaffi. This was likely due to a divergence of opinion among states on the issue and as such it was necessary to leave it out of the resolution in order to secure a consensus, including the support of the P-5. Second, Resolution 1970 confirmed that 'none of the expenses incurred in connection with the referral... shall be borne by the United Nations'.[34] This had been criticised by Brazil and South Africa in relation to the Darfur referral, although this was not shared by Russia. This demonstrates the different views about how the institution should be treated and should operate within the governance architecture of international society Finally, despite the cooperation issues that had arisen in the context of the Court's intervention in Darfur, the Libya referral still only 'urged' non-States Parties to cooperate with the Court, it did not mandate it,[35] which reflects the continued support for the pluralist, consent-based limits of the ICC's jurisdiction.

8.4. The BRICS States' Hesitant Support for the ICC's Intervention in Libya

While the BRICS states generally supported the ICC's intervention in Libya, at least initially, the support expressed was quite tentative with states simultaneously emphasising the need for a political solution to the conflict and that the Court should contribute to that objective. States also warned the Court about the limits of its jurisdiction. This arguably reveals an uncertainty on the part of the BRICS states about the narrow approach to justice pursued by the ICC and the impact that it will have on the political process, as they had previously observed in Sudan, as well as a concern about the Court exceeding its treaty powers. The views expressed by the BRICS states will now be examined.

In terms of expressing support for the Court, India's position was rather ambivalent. While it said that '[a]ll those responsible for committing crimes covered under the Rome Statute should be held

[33] Stahn, 'Libya, the International Criminal Court and Complementarity', 328. *See also,* Adler-Nissen and Pouliot, 'Power in practice: Negotiating the international intervention in Libya', 898-899 and C. J. Fung, 'Global South solidarity? China, regional organisations and intervention in the Libyan and Syrian civil wars', (2016) 37(1) *Third World Quarterly* 33-50, 38.
[34] UNSC Res. 1973 (26 February 2011), UN Doc. S/RES/1970(2011), para.8.
[35] UNSC Res. 1973 (26 February 2011), UN Doc. S/RES/1970(2011), para.5.

accountable irrespective of which side to the conflict they may belong to'[36] and that '[t]he States concerned must also bring to justice those responsible for violations of that right [to life]',[37] such references were rather infrequent. There was also a lack of reference to the Court as an institution and India's representative continually emphasised that his country is not a signatory to the Rome Statute. He also stressed, however, that neither are five of the fifteen members of the Security Council, a nod to India's long-standing discomfort with the relationship between the Court and the Council given that non-States Parties sitting on the Security Council could subject other non-States Parties to the ICC's jurisdiction which, in its view, entrenches the unfair and outdated political hierarchy in international society.[38] China's position was equally ambivalent. While China's representative said his country 'attach[es] great importance to combating impunity and achieving justice',[39] there was no substantial expression of support for the ICC. The main response of China to discussions about the ICC's work was: 'China's position on issues concerning the International Criminal Court remains unchanged.'[40]

In perhaps more supportive terms, the Russian representative said that his country 'support[s] the efforts by the International Criminal Court to carry out a fair and impartial investigation into the actions of all parties to the conflict in Libya and to bring to justice individuals involved in possible crimes against humanity and serious violations of international humanitarian law in Libya',[41] and he said that 'we must also focus on the pressing problems in the human rights sphere. We must carry out a thorough investigation of all facts related to human rights violations during the conflict in Libya.'[42] In what was undoubtedly the most enthusiastic show of support for the Court, South Africa said that '[w]e supported the referral of the situation in Libya to the International Criminal Court because of our long-standing commitment to the fight against impunity for serious crimes'[43] and it expressed its support for the continued efforts of the Court, and particularly those of the

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[36] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 7.
[37] UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 15.
[38] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 7; UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 15.
[39] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 9.
[40] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 11; UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 11; UNSC Verbatim Record, 6855th meeting, 7 November 2012, 6; UNSC Verbatim Record, 6962nd meeting, 8 May 2013, UN Doc. S/PV.6962, 6; UNSC Verbatim Record, 7059th meeting, 14 November 2013, UN Doc. S/PV.7059, 15; UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, 11; UNSC Verbatim Record, 7441st meeting, 12 May 2015, UN Doc. S/PV.7441, 5; UNSC Verbatim Record, 7698th meeting, 26 May 2016, UN Doc. S/PV.7698, 5; UNSC Verbatim Record, 7806th meeting, 9 November 2016, UN Doc. S/PV.7806, 11; UNSC Verbatim Record, 7934th meeting, 8 May 2017, UN Doc. S/PV.7934, 14; UNSC Verbatim Record, 8091st meeting, 8 November 2017, UN Doc. S/PV.8091, 14.
[41] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 9. *See also,* UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 7; UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 5; UNSC Verbatim Record, 6962nd meeting, 8 May 2013, UN Doc. S/PV.6962, 5; UNSC Verbatim Record, 7059th meeting, 14 November 2013, UN Doc. S/PV.7059, 5; UNSC Verbatim Record, 7173rd meeting, 13 May 2014, UN Doc. S/PV.7173, 10; UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, 6.
[42] UNSC Verbatim Record, 6620th meeting, 16 September 2011, UN Doc. S/PV.6620, 3.
[43] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 10; UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 8.

Prosecutor, 'to bring justice to the victims of atrocities committed in Libya'.[44] Its representative assured 'the Prosecutor that South Africa will continue to cooperate with the activities of the ICC'[45] and encouraged him 'to leave no stone unturned in the search for further evidence to strengthen the cases against those who may have committed atrocities'[46] Brazil confirmed in 2011 that it 'renews its support for the Court and for the work of Mr. Moreno Ocampo's office.'[47] This reflects the more cosmopolitan position adopted by South Africa and Brazil as compared to those of China, India and Russia, which have a more pluralist leaning within the state-solidarist position.

The BRICS states' support for the ICC was, however, caveated in pluralist terms, demonstrating their state-solidarist approach to international criminal justice, a desire to see cosmopolitan values delivered with sufficient deference to pluralist values and primary institutions. For example, India asserted a consent-based view of international law; its representative noted that India 'support[s] the rights and obligations of the States that are *members of the ICC* (emphasis added)[48] and it further conveyed a reminder that 'all actions by the ICC Prosecutor should fall strictly within the ambit of resolution 1970 (2011), in particular paragraph 6, which concerns the States that are not parties to the Rome Statute', emphasising the limits of the Court's jurisdiction.[49] There was also clearly a greater emphasis made by states on the need for a political resolution to the conflict and on reconciliation rather than accountability, and states highlighted their view, consistent with the positions adopted in relation to the Court's intervention in Darfur, that criminal justice should serve the ends of promoting the political settlement of the conflict. This is a pragmatic approach to justice which rejects the view adopted by the ICC that retributive justice is an end it itself and that the contribution of justice to peace is merely ancillary, a by-product. In endorsing a politics-led approach, India said:

> [t]he time has come for the new authorities in Libya to exert their sovereignty and independence and undertake an inclusive political process aimed at achieving national reconciliation, peace, security and stability in the country. The international community, including the Security Council and the ICC, should fully assist the Libyan authorities in that process. That inclusive approach to national reconciliation, anchored in State sovereignty, is the only way to overcome the multitude of problems that Libya faces in the present ostensible post-conflict scenario.[50]

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[44] UNSC Verbatim Record, 6647th meeting, 3 November 2011, UN Doc. S/PV.6647, 10. *See also,* UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 11; UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 8.
[45] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 11.
[46] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 11.
[47] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 9.
[48] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 6; UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 15.
[49] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 7; UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 6; UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 14.
[50] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 6.

India continued to emphasise the importance of such an approach, particularly as the conflict began to escalate[51] and it confirmed its instrumental view of criminal justice. Its representative said that '[w]e voted in favour of resolution 1970 (2011) because several members of the Council, including our colleagues from Africa and the Middle East, believed that the referral of the situation in Libya to the ICC would have the effect of causing the immediate cessation of violence and the restoration of calm and stability.'[52] Brazil also highlighted the dual function of the ICC; its representative expressed 'hope that the ICC investigations can have an impact on the desired goals - a cease to violence and the restoration of calm' and, furthermore, '[i]n the post-conflict stage, the ICC's role will continue to be essential in helping to ensure accountability and justice, which are so important to achieving durable peace.'[53] South Africa similarly supported the ICC's intervention in Libya on the dual grounds that it would contribute both to creating accountability for crimes and ending the conflict, its representative noting that '[o]ur support for referral to the ICC was based, *inter alia,* on South Africa's support of the international community's fight against impunity and the concern that we had voiced over the escalation of violence in Libya'.[54] He also said ' [o]ur support for the referral was based on our belief that the fight against impunity and the promotion of justice are objectives that must be pursued in our collective efforts to find enduring peace.'[55] South Africa also advocated for the importance of a political transition and encouraged the parties to submit to the AU's roadmap for peace.[56]

China also advanced an instrumental view of international criminal justice and emphasised the need for a political settlement. Its representative noted 'China has always believed that the pursuit of justice should be premised on the core values of safeguarding peace and security and maintaining international peace and harmony'[57] and, furthermore, he articulated his country's expectation that 'the International Criminal Court...play a positive and constructive role in promptly restoring peace, security and order in Libya'.[58] China also regularly emphasised the importance of political transition, as opposed to accountability, during Security Council sessions on the ICC's work in Libya, although it did later explain its view that a successful political transition providing peace and stability 'is the precondition for and the foundation upon which to achieve justice in Libya.'[59]

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[51] UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 14; UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 15.
[52] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 7.
[53] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 8. *See also,* UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 9.
[54] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 11.
[55] UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 6.
[56] UNSC Verbatim Record, 6595th meeting, 28 July 2011, UN Doc. S/PV.6595, 4.
[57] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 9.
[58] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 9. *See also,* UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 6; UNSC Verbatim Record, 6962nd meeting, 8 May 2013, UN Doc. S/PV.6962, 6.
[59] UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, 11; UNSC Verbatim Record, 7441st meeting, 12 May 2015, UN Doc. S/PV.7441, 5; UNSC Verbatim Record, 7698th meeting, 26 May 2016, UN Doc. S/PV.7698, 4-5; UNSC Verbatim Record, 7806th meeting, 9 November 2016, UN Doc. S/PV.7806, 11; UNSC Verbatim Record, 7934th meeting, 8 May 2017, UN Doc.

He also conveyed China's hope that 'international judicial organs will...facilitate Libya's reconstruction and political transition.'[60]

Despite the support initially expressed for the ICC by the BRICS states, this gradually morphed into criticism as a result of what states perceived as the Court's failure to live up to expectations in delivering justice and peace in Libya. For example, India lamented the fact that despite the ICC's intervention, '[unfortunately, the situation in Libya has continued to deteriorate, and widespread violence continues.'[61] South Africa became frustrated with the lack of concrete achievements. Its representative noted that despite the referral, commencement of the investigation and issuing of arrest warrants having taken place within a very short period of time, '[t]o date, however, actual justice remains elusive. Indeed, while there was a flurry of justice-related activities in the early days, it appears that the wheels of justice began to grind more slowly with the end of the conflict' and further emphasised that '[f]or us, the need for justice does not end with the cessation of hostilities. If that were so, justice would not be an end in itself but only a means to an end.'[62] Russia expressed the most robust criticism of the Court. It representative said that 'the process of withdrawal from the Rome Statute by a number of States deepens our doubts regarding the usefulness of involving the ICC in any new cases.'[63] Further, and more specific, criticisms of the ICC's practices are outlined below. This lends to support to the argument articulated above that the BRICS states did initially believe in the referral of Libya to the ICC on normative and pragmatic grounds as it shows how the support waned in response to specific issues as they unfolded. It is not the case there was an unexpected and unexplainable change in the position of the states from support to contestation which would have been consistent with an interpretation that the support offered by the BRICS states initially was disingenuous.

8.5. Support for the Application of Complementarity

As was previously discussed in this thesis, the complementarity provision provides States Parties have the primary responsibility for conducting investigations and prosecutions of alleged crimes that fall within the ICC's jurisdiction. The Court can only take over in a particular situation, asserting its jurisdiction over that of the state, where the state is 'unwilling or unable genuinely to carry out the investigation or prosecution'.[64] This provision reflects the continued primacy of the state in international society and the consequential deference to be paid by the Court to primary

S/PV.7934, 14-14; UNSC Verbatim Record, 8091st meeting, 8 November 2017, UN Doc. S/PV.8091, 14.

[60] UNSC Verbatim Record, 7173rd meeting, 13 May 2014, UN Doc. S/PV.7173, 9.

[61] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 7.

[62] UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 6.

[63] UNSC Verbatim Record, 7806th meeting, 9 November 2016, UN Doc. S/PV.7806, 10.

[64] Article 17(1)(a) Rome Statute.

authority of the state to deal with issues that arise in its territory, including the prosecution of international crimes, as an aspect of sovereignty. As was discussed previously, complementarity reflects the balancing of pluralist and cosmopolitan conceptions of international society, between the authority of the state and the authority of supranationalised organisations, such as the ICC.

The BRICS demonstrated support for the principle and application of complementarity generally and in the Libya situation, which is evidence of their state-solidarist position. Russia spoke frequently on the issue of complementarity during the relevant Security Council sessions and repeated its position that 'prosecuting the most serious crimes under international law is first and foremost the responsibility of the particular State concerned. The jurisdiction of the ICC complements, but does not replace, national jurisdiction'.[65] Moreover, its representative similarly noted that '[w]e are of the view that instituting proceedings against people who have committed the most serious crimes under international law is undoubtedly a matter for the State in question.'[66] However, Russia also recognised quite correctly that '[g]overnments are not always in a position to tackle this on their own. One particular obstacle to doing so could be the absence in a country of a viable judicial system functioning in line with international standards'[67] and it took this view of Libya. Russia therefore argued the prosecutions of Saif al-Gaddafi and Al-Senussi should be conducted by the ICC[68] and it explained that '[w]e seriously doubt that in such circumstances the country's authorities can ensure fair legal proceedings that meet high international standards in the case of Saif Al-Islam Al-Qadhafi and Abdullah Al-Senussi'[69] and that, '[i]n our view, the impacts of the crisis in Libya are a serious obstacle to justice being effectively served'.[70] This demonstrates a strong commitment to genuine justice by Russia.

However, despite its initial deference to the authority of the Court in matters of complementarity, Russia eventually became highly critical of what it perceived to be the inappropriate deference paid to Libya's request to conduct the prosecutions of Saif Gadaffi and Al Senussi by the OTP, in other words the Court's 'hands off approach. It also complained about the inconsistency between the PTC's admissibility decisions. The Russian representative noted that '[t]he Court declared the Al-Qadhafi case admissible, noting that the Libyan cases were unable to guarantee due judicial process, yet only four months later it came to the completely opposite conclusion in the Al-Senussi case, stating that Libya wished to and was able to conduct that judicial investigation' and requested the

[65] UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 6.
[66] UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 5. *See also,* UNSC Verbatim Record, 6962nd meeting, 8 May 2013, UN Doc. S/PV.6962, 6.
[67] UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 6.
[68] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 7.
[69] UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 5-6.
[70] UNSC verbatim Record, 6962nd meeting, 8 May 2013, UN Doc. S/PV.6962, 6. *See also,* UNSC Verbatim Record, 7059th meeting, 14 November 2013, UN Doc. S/PV.7059, 5.

Court provide 'a more detailed explanation of the adoption of diametrically opposed decisions'[71] and, moreover, that '[w]e expect the Court to show more consistency in the interpretation of such a key principle of the Rome Statute as the principle of complementarity.'[72] This demonstrates a commitment by Russia, at least in rhetorical terms, to the ICC's processes and the importance of fair trial guarantees, as well as a further endorsement of the legitimacy of the ICC given that it supported in ongoing intervention in Libya and preferred its trials to domestic ones.

Other states expressed their support for the application of the complementarity provision. South Africa noted that 'as a focal point on complementarity, [it] encourages domestic prosecution as the first option for ensuring justice. In particular, as a court of last resort, the ICC should intervene only where a national system is genuinely unable or unwilling to prosecute.'[73] Its representative further noted his country was pleased the new Libyan government had 'expressed its intention to conduct investigations' as, it said, '[t]hat will be important for complementarity, which is important for the Court'.[74] China said it 'welcomes the efforts made by the Government of Libya to achieve justice through the judiciary'[75] and its representative also noted ' [w]e are of the view that the international judicial organs should fully respect the judicial sovereignty of the countries concerned and abide by the norms of international relations' and, furthermore, that '[i]n exercising jurisdiction, they must comply with the principle of complementarity and cannot replace the role played by national judicial systems.'[76] Speaking generally, China also explained that:

> the Court should perform its functions in strict conformity with the principle of complementarity. It is the sovereign state that assumes the primary responsibility to punish serious crimes and end impunity, so as to bring justice to reality. The Court is designed to subsidize, rather that substitute national jurisdictions. Consequently, choice by relevant states or regions for specific means to realize justice should be fully respected in practice.

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[71] UNSC Verbatim Record, 7059th meeting, 14 November 2013, UN Doc. S/PV.7059, 5.

[72] Russian Federation ASP12 Statement. *See also,* UNSC Verbatim Record, 7173rd meeting, 13 May 2014, UN Doc. S/PV.7173, 10; UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, 6-7.

[73] UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV. 6855, 6-7. *See also,* Opening Statement by Mr J.H. Jeffrey, MP, Deputy Minister of Justice and Constitutional Development, Republic of South Africa, General Debate: Twelfth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 20-28 November 2013', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP12/GenDeba/ICC-ASP12-GenDeba-SouthAfrika-ENG.pdf (accessed on 22/07/2018).

[74] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 10. *See also,* UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 8.

[75] UNSC Verbatim Record, 7059th meeting, 14 November 2013, UN Doc. S/PV.7059, 15.

[76] UNSC Verbatim Record, 7173rd meeting, 13 May 2014, UN Doc. S/PV.7173, 9. *See also,* generally, Statement of China at 11th Session of the Assembly of States Parties', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP11/GenDeba/ICC-ASP11-GenDeba-CHN-ENG.pdf (accessed 23/07/2018) ('China ASP11 Statement'). *See also,* Statement by Mr. Ma Xinmin, Counsellor of the Department of Treaty and Law of Ministry of Foreign Affairs of the People's Republic of China At the Twelfth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, November, 2013), available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP12/GenDeba/ICC-ASP12-GenDeba-China-ENG.pdf (accessed on 21/07/2018) ('China ASP12 Statement'); Statement by Ms. Guo Xiaomei, Counselor of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (China Observer Delegation) at the 14th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 18-26 November 2015, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP14/GenDeb/ASP14-GenDeb--OS-China-ENG.pdf (accessed 21/07/2018) ('China ASP14 Statement').

> Their judicial transitions and practical needs should be well taken into consideration. In this sense, China supports the strengthening of effective national jurisdictions on serious international crimes through capacity building.[77]

This demonstrates China's support for international criminal justice but also its commitment to state-based solutions which is further evidence of its state-solidarist vision of international society. It is also important to note China's emphasis on the need for the Court to respect the different ways in which states may realise 'justice', which represents a criticism of the narrow cosmopolitan approach to justice imposed by the ICC and an assertion of plurality of transitional justice approaches that exist and the need for these to be respected.

8.6. Subsequent Contestation of the ICC's Intervention in Libya

Following the BRICS states' criticisms of NATO's military intervention in Libya in 2011, which they thought amounted to an overstepping of the mandate provided in Security Council Resolution 1973 and facilitated the removal of the Gadaffi regime which led to the collapse of the Libyan state,[78] the BRICS states turned their attention to the intervention by the ICC. The BRICS were largely critical of the ICC's intervention in Libya and particularly the decision of the Prosecutor to seek, and the Court's decision to issue, arrest warrants for senior figures in the Gadaffi regime, namely Colonel Gaddafi, Saif al Gaddafi and Al Senussi, on the basis they hindered the peaceful settlement of the conflict through diplomacy and, more seriously, contributed to the P-3's aim of bringing about forcible regime change. This undermined states' trust and confidence in the new institution, particularly in light of the chaos that engulfed Libya, to such an extent that, as will be demonstrated in the next section of this chapter, it led to criminal justice and the ICC being marginalised in the Syrian conflict.[79] The reliability of the conclusion reached that the deterioration in the relationship between the BRICS states and the ICC is the result of what they perceived to be mistakes the Court made in Libya is based upon the extent to which such criticisms are articulated

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[77] China ASP11 Statement. *See also,* China ASP12 Statement; China ASP14 Statement.

[78] *See,* for example, Statement by the Russian Federation, UNSC Verbatim Record, 6620th meeting, 16 September 2011, UN Doc. S/PV.6620, 3; I. Gorst and N. Buckley, 'Medvedev and Putin clash over Libya', *Financial Times,* 21 March 2011, available at https://www.ft.com/content/2e62b08e-53d2-11e0-a01c-00144feab49a (accessed on 31/04/2018); Statement by China, UNSC Verbatim Record, 6531st meeting, 10 May 2011, UN Doc. S/PV.6531, 20; Statement by South Africa, UNGA Official Record, Sixty-seventh session, 7th plenary meeting, 25 September 2012, UN Doc. A/67/PV.7, 14; Statement by South Africa, UNSC Verbatim Record, 6595th meeting, 28 July 2011, UN Doc. S/PV.6595, 4; Zuma lashes NATO for 'abusing' UN resolutions on Libya', *Mail and Guardian,* 14th June 2011, available at https://mg.co.za/article/2011-06-14-zuma-lashes-nato-for-abusing-un-resolutions-on-libya (accessed on 14/04/2018). *See also,* R. Allison, 'Russia and Syria: explaining alignment with a regime in crisis', (2013) 89(4) *International Affairs* 795-823, 797; O. Stuenkel, 'The BRICS and the Future of R2P. Was Syria or Libya the Exception?', (2014) 6 *Global Responsibility to Protect* 3-28, 17; A Beresford, 'A responsibility to protect Africa from the West? South Africa and the NATO intervention in Libya', (2015) 52(3) *International Politics* 288-304, 292; J. Ralph and A. Gallagher, 'Legitimacy faultlines in international society: The responsibility to protect and prosecute after Libya', (2015) 41(3) *Review of International Studies* 553-574, 562-563; M. Vanhullebusch, 'Regime Change, the Security Council and China', (2015) 14(4) *Chinese Journal of International Law* 665-707, 677-678; A Bloomfield, 'India and the Libyan Crisis: Flirting with the Responsibility to Protect, Retreating to the Sovereignty Norm', (2015) 36(1) *Contemporary Security Policy* 27-55, 27.

[79] *See,* Peskin and Boduszynski, 'The Rise and Fall of the', 273.

and the legitimacy of the many of the criticisms raised.

8.6.1. The ICC Hindering the Peaceful Settlement of the Conflict

There was criticism expressed by some of the BRICS states that the ICC's intervention in Libya and, more specifically, its pursuit of retributive justice, was hindering the political settlement of the conflict. While South Africa supported the referral of Libya to the ICC, it was highly critical of its decision to issue arrest warrants for the so-called 'Tripoli Three' on the basis it hindered the implementation of the 'AU Roadmap' that it had played a leading role in establishing, lamenting that 'the AU efforts were never given a chance'.[80] The Roadmap provided the basis for a political settlement to resolve the conflict in Libya and laid the groundwork for a political transition, South Africa noting that it 'reiterates Libyan leader Colonel Muammar Al -Qadhafi's commitment to an inclusive dialogue process' which is 'based on the agreement of Colonel Al-Qadhafi not to participate in the negotiations on the future of Libya.'[81] Jacob Zuma, the then South African President, played a leading role as part of the AU committee negotiating the agreement and meeting with Gadaffi on numerous occasions to finalise the deal, reacted with 'extreme disappointment' to the new of the arrest warrants being issued 'because he was concerned that it would derail the AU's efforts to mediate a negotiated settlement',[82] particularly given they came only a day after a major breakthrough in which Gadaffi had agreed to stay out of future peace talks.[83] This was because the arrest warrant would discourage Gaddafi from continuing to participate in the political settlement, knowing that capitulation would likely result in him being transferred to The Hague, either immediately or eventually, and so he would be forced to continue fighting for control of Libya.[84] The AU also took the view that the arrest warrants would complicate conflict resolution efforts and decided that African States Parties should not cooperate with the Court in executing the arrest warrants, as it did with respect to al-Bashir.[85]

South Africa therefore continued to reject calls for 'Gadaffi to go', arguing that 'such statements do not bring us any closer to a political solution'.[86] It further asserted that '[i]t is only through a

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[80] UNGA Official Records, Sixty-eighth Session, 18th plenary meeting, 28 September 2013, UN Doc. A/68/PV.18, 23.
[81] UNSC verbatim Record, 6595* meeting, 28 July 2011, UN Doc. S/PV.6595, 4.
[82] Beresford, 'A responsibility to protect African from the West?', 298-299; A Louw, '*Perspectives on Africa's response to the ICC's arrest warrants on the Libya situation ', Institute for Security Studies Situation Report,* 22 July 2011, available online at https://www.files.ethz.ch/isn/136864/22July11Libya.pdf (accessed on 23/07/2018), 1; A. De Waal, 'African roles in the Libyan conflict of 2011', (2013) 89(2) *International Affairs* 365-379, 372-375.
[83] Ralph and Gallagher, 'Legitimacy faultlines in international society', 562-563.
[84] *See,* M. Kersten, *Justice in Conflict. The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace,* (2016, OUP), 118; Peskin and Boduszynski, 'The Rise and Fall of the ICC', 279; K. Mills, 'R2P and the ICC: At Odds or In Sync?', (2015) 26(1) *Criminal Law Forum* 73-99, 82-83; Odeyemi, 'R2P intervention, BRICS countries, and the no-fly zone measure in Libya', 9.
[85] African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Adopted at the 17th Ordinary Session, Assembly of the Union, 30 June - 1 July 2011, Malabo, Equatorial Guinea, AU Doc. EX.CL./670(XIX).
[86] UNSC verbatim Record, 6595th meeting, 28 July 2011, UN Doc. S/PV.6595, 5.

Libyan-led and owned political process that a decision on the future of Libya, including that of Colonel Al-Qadhafi, can be based' and it further explained that it was concerned about the implementation of Resolution 1970, stressing that '[t]aking sides in any internal conflict situ ation in an effort to institute regime change in Libya sets a dangerous precedent', an implicit reference to the ICC's targeting of Gadaffi and the other senior members of his regime.[87] This approach by South Africa is consistent with its foreign policy approach to conflict resolution which advocates for inclusive political settlements, involving all parties, as also seen in its approach it Darfur, which is a product of its history of peaceful, inclusive transition from apartheid.[88] The Court's failure, in its view, to make the pursuit of criminal justice compatible with achieving an inclusive political settlement of a conflict or, in other words, to take a pragmatic approach that paid greater deference to pluralist values, was one of the primary reasons for South Africa withdrawing for the Rome Statute, as will be discussed in detail in Chapter Nine.

China also took the view ' [p]eaceful dialogue and negotiations are the best way forward towards a political solution to this crisis', endorsing the AU's Roadmap, and following the issuing of the arrest warrants, it emphasised that 'an inclusive political process should be launched as soon as possible'.[89] Moreover, it expressed its 'hope the Court exercise[s] its powers in a prudent manner without prejudice to the efforts of the international community to realize political settlement of international or reginal conflicts'.[90] This is arguably an implicit reference to the issuing of arrest warrants given this is one of the main ways in which the Court can affect political developments and the proximity of the statement to the issuing of the arrest warrants in Libya. Furthermore, China conveyed its support for the concerns raised by the AU about the ICC's prosecutions of the Uhuru Kenyatta and William Ruto, the President and Deputy President of Kenya, which had recently commenced at the ICC. The AU expressed concern about the threat indicting Kenyatta and Ruto may pose 'to the ongoing efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability'.[91] The Chinese representative subsequently said that 'the Court's dealing with Kenyan national leaders' appearing before the Court invites widespread controversy' and he expressed 'hope the Court will respect the legitimate concerns of African states'.[92]

[87] UNSC verbatim Record, 6595th meeting, 28 July 2011, UN Doc. S/PV.6595, 5.
[88] *See,* Beresford, 'A responsibility to protect African from the West?', 296-297.
[89] UNSC verbatim Record, 6620th meeting, 16 September 2011, UN Doc. S/PV.6620, 4-5.
[90] China ASP11 Statement.
[91] African Union, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Adopted at the 21st Ordinary Session, Assembly of the Union, 26 - 27 May 2013, Addis Abba, Ethiopia, AU Doc. Assembly/AU/13(XXI).
[92] China ASP12 Statement.

8.6.2. The ICC's Contribution to Regime Change in Libya

While the ICC had no direct involvement in the toppling of Gaddafi, it came to be associated with the regime change that occurred, much to its detriment. This occurred in various ways. First, the proximity of the Security Council Resolution that referred Libya to the ICC to the subsequent one that sanctioned military intervention created the impression that the ICC was used as a pretext for military action. Mills has noted that '[i]nvoking the ICC might also be a prelude to further action by the Security Council - it could serve as a justification for military action'[93] and Triponel and Williams argue that 'the ICC set the groundwork for the moral approval of the use of force'.[94] Moreover, it made the ICC look like a tool of the Council and that the P-3 had instrumentalised criminal justice and the ICC for political purposes, and implicated it in future regime change.[95]

The perception of the ICC's involvement in regime change was strengthened by subsequent events. Only shortly after Resolution 1973 was adopted and NATO military action commenced, the ICC issued the arrest warrants for Colonel Gadaffi, Saif Gadaffi and Al Senussi. As McMillan and Mickler explain, by indicting political leaders, the ICC can 'contribute...towards processes of regime change'.[96] Given the timing of the arrest warrants in Libya, they undoubtedly contributed to the de-legitimisation of the Gaddafi regime, as well as Gadaffi himself as the head of state, thereby emboldening rebel forces towards their objective of overthrowing him and his regime.[97] This created the impression the ICC was supporting NATO's objective of regime change and had been instrumentalised by the P-3 for their own purposes, thereby politicising the Court and calling into question its independence, which is the foundation of its legitimacy.[98] Stahn notes that '[d]ue to its close alignment to the parallel NATO action', the ICC action was 'perceived as a prolonged arm of intervention.'[99] This perception was likely compounded by the ICC's apparent reluctance to investigate potential NATO crimes, which is discussed in detail below.

The BRICS states' concerns about the ICC's contribution to facilitating regime change in Libya can be seen in their robust advocating for the ICC to conduct impartial investigations of all sides of the conflict and their subsequent criticism of its failure to do so. The concern being that the targeting

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[93] Mills, 'R2P and the ICC: At Odds or In Sync?', 81.
[94] Triponel and Williams, 'The Clash of the Titans', 815.
[95] K. Ainley, 'The Responsibility to Protect and the International Criminal Court: counteracting the crisis', (2015) 91(1) *International Affairs* 37-54, 60; Adler-Nissen and Pouliot, 'Power in practice: Negotiating the international intervention in Libya', 900.
[96] N. McMillan and D. Mickler, 'From Sudan to Syria: Locating 'Regime Change' in R2P and the ICC', (2013) 5(3) *Global Responsibility to Protect* 283-316, 298. *See also,* W. M. Reisman, 'Why Regime Change is (Almost Always) a Bad Idea', (2004) 98 *American Journal of International Law* 516-525, 517.
[97] Kersten, *Justice in Conflict,* 121, 135. *See also,* Triponel and Williams, 'The Clash of the Titans', 816-817.
[98] McMillan and Mickler, 'From Sudan to Syria: Locating 'Regime Change' in R2P and the ICC', 310; Vinjamuri, 'The International Criminal Court and the Paradox of Authority', 248.
[99] Stahn, 'Libya, the International Criminal Court and Complementarity', 331-332.

of the Gadaffi regime by way of criminal investigations and prosecutions would contribute to the de-legitimisation of the regime, providing a pretext for regime change and hindering the political settlement of the conflict. States continued to advance this view after the fall of the regime as a general warning and reassertion of the need for absolute impartiality by the Court. This can be seen in the various statements of the BRICS states. After the referral had taken place, India emphasised the need for a non-political approach by the Court, consistent with its long-standing concern about the politicisation of international criminal justice, and said that:

> [t]he Prosecutor should carry out a thorough and impartial investigation and not be influenced by any non-judicial considerations. All those responsible for committing crimes covered under the Rome Statute should be held accountable, irrespective of which side of the conflict they may belong to and even if they have changed sides. Political considerations should not exonerate anyone from prosecution for crimes committed.[100]

Brazil similarly emphasised the need for impartial investigations and prosecutions[101] which it considered 'will be crucial in the post-conflict stage in order to ensure accountability and justice', further nothing ' [t]hose are essential elements for reconciliation and the establishment of durable peace, which should be the Council's ultimate goal for Libya.'[102] China similarly asserted that 'all states and parties related to conflicts should be treated on equal basis' and that '[a]ny double standard, selective enforcement of law or selective justice is a violation and betrayal of justice itself.'[103] South Africa, like India and Brazil, emphasised '[c]rimes may have been committed by Government and opposition forces alike' and therefore 'all crimes, regard less of the perpetrators, should be considered.'[104] Moreover, South Africa expressed its clear view that it does 'not support any effort or action that creates a perception of the Court being used for political expediency or as a tool for the furtherance of political objectives' and it called for 'the investigation of crimes across the board, not focused only on the pro-Qadhafi forces, since that would perpetuate the perception of a victor's justice.'[105] This should be seen in the context of its earlier warning that with Security Council referrals 'the danger is always lurking that political, rather than humanitarian, considerations may prevail, which in turn may politicise the role of the Court as an impartial judicial institution' or create the perception of such and, moreover, '[t]o prevent such unfortunate and unnecessary perceptions, the Office of the Prosecutor must ensure that atrocities committed by

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[100] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 7; UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 6; UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 14; UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 15.

[101] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 8.

[102] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 10.

[103] China ASP12 Statement.

[104] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 11. *See also,* UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 10; UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 7.

[105] UNSC Verbatim Record, 6772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 8-9. *See also,* Beresford, 'A responsibility to protect African from the West?', 298-299

whatsoever side in a conflict are investigated and, if necessary, prosecuted.'[106]

South Africa also expressed its view that the provision contained in operative paragraph 6 of Resolution 1970 which limited the Court's jurisdiction to Libyan nationals, shall not operate to prevent the Court investigating and, if necessary, prosecuting individuals involved in the NATO intervention, and its representative conveyed his state's 'sincere hope that, in considering the evidence, the Office of the Prosecutor will also consider any crimes that may have been committed in the purported implementation of resolution 1973 (2011).'[107] This was a rejection by South Africa that the Court should align itself, or be seen to be aligning itself, with NATO, which would compromise its independence. During its interventions, Russia also continuously stressed the need for all sides of the conflict to be investigated and prosecuted, including crimes it thought had been committed by NATO forces during its intervention. For example, it was said that 'the Court should carefully consider the actions of all parties in the Libyan conflict. We recall that, pursuant to resolution 1970 (2011), the Council transferred the entire Libyan situation to the Court — not just the situation pertaining to the actions of the Al-Qadhafi regime' and '[i]t is our belief that all who are guilty of the most serious crimes under international law committed during the conflict in Libya will be punished.'[108] Furthermore, Russia's representative noted '[t]here was sufficient information to show that crimes were committed both by persons from the Al-Qadhafi regime and by rebels' and that '[q]uestions also remain with regard to possible crimes committed by senior officials of States involved in the NATO-led operation. All cases of disproportionate or indiscriminate use of force during the conflict...should be investigated.'[109] The ability to conduct impartial investigations and prosecutions was, Russia emphasised, '[c]rucial to strengthening the authority of the Court'.[110]

From the beginning of 2013, Russia became increasingly critical of the Court's work in Libya, primarily due to what it perceived as the failure of the OTP to investigate impartially all parties to the conflict, as it had repeatedly requested since the referral, and from 2015 onwards, the criticism became increasingly strong with expressions of continued support for the Court ceasing. The Russian representative initially just noted his country's 'regret that during the past six months the

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[106] South Africa ASP9 Statement.
[107] UNSC Verbatim Record, 6528th meeting, 4 May 2011, UN Doc. S/PV.6528, 11. *See also,* UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 10-11.
[108] UNSC Verbatim Record, 6647th meeting, 2 November 2011, UN Doc. S/PV.6647, 6. *See also,* Statement by the Delegation of the Russian Federation (Observer State) at the Eleventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 15 November 2012', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP11/GenDeba/ICC-ASP11-GenDeba-RUS-ENG.pdf (accessed 23/07/2018) ('Russian Federation ASP11 Statement'); Statement of the Russian Federation delivered by Ms. Diana Eloeva First Secretary of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation, 13th Assembly of States Parties to the Rome Statute of the International Criminal Court', 12 December 2014, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP13/GenDeba/ICC-ASP13-GenDeba-Russian-ENG.pdf (accessed 21/07/2018).
[109] UNSC Verbatim Record, 2772nd meeting, 16 May 2012, UN Doc. S/PV.6772, 5-6. *See also,* UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 6; UNSC Verbatim Record, 7059th meeting, 14 November 2013, UN Doc. S/PV.7059, 5; UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, 7; Russian Federation ASP11 Statement.
[110] UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, 7.

ICC has also been unable to make any progress with the investigation of the alleged crimes committed by officials of the States that participated in the operations in Libya under NATO's leadership'[111] but this gradually deteriorated into sharper criticism. For example, Russia complained that '[i]n spite of appeals for an objective legal analysis of the activities of all parties to the conflict and post-conflict violence, investigations continue to concentrate only on suspects from the entourage of the former Libyan leader' and, further, that '[a]fter almost two years, there has been no notable progress in prosecuting rebels'.[112] Russia explicitly argued that the ICC's partial approach was evidence of its support for the P-3's agenda, noting that 'ICC legal support for the foreign military intervention was implemented, and it seemed that the Court believed that the mission had been accomplished.'[113] It also highlighted that 'the Prosecutor of the ICC has in effect withdrawn herself from that investigation [of NATO]',[114] she 'continues to distance herself from consideration of this issue, for unknown reasons',[115] and '[t]he Prosecutor has not considered the victims of NATO air strikes.[116] The Russian representative concluded 'the experience of the ICC on the Libyan situation cannot be considered successful, neither in terms of implementing justice and preventing new crimes, nor in terms of supporting national reconciliation. It just enhances our doubt as to whether any new matters should be referred to the ICC.[117] More recently, Russia said that it 'is determined to do whatever is necessary to enable the members of the Council to avoid repeating the unsuccessful experiment of referring Security Council issues to the ICC,'[118] which represents a marked increase in its hostility towards the Court.

As has been demonstrated through the above analysis, the BRICS states initially endorsed a role for the ICC within the Libyan conflict, hoping it would bring to justice those who had committed crimes, help to facilitate the cessation of violence and lay the groundwork for long-term peace. However, they became increasingly concerned about what they perceived to be the ICC taking sides in the ongoing conflict, targeting the Gaddafi regime through the issuing of arrest warrants for the 'Tripoli three' and not pursuing rebel and NATO crimes, which they believed was hindering the political settlement of conflict. There was also concern that the targeting of the Gaddafi regime,

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[111] UNSC Verbatim Record, 6855th meeting, 7 November 2012, UN Doc. S/PV.6855, 6.
[112] UNSC Verbatim Record, 6962nd meeting, 8 May 2013, UN Doc. S/PV.6962, 5. *See also,* UNSC Verbatim Record, 7059th meeting, 14 November 2013, UN Doc. S/PV.7059, 5; UNSC Verbatim Record, 7173rd meeting, 13 May 2014, UN Doc. S/PV.7173, 10; UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, p.7; UNSC Verbatim Record, 8250th meeting, 9 May 2018, UN Doc. S/PV.8250,.6.
[113] UNSC Verbatim Record, 7698th meeting, 26 May 2016, UN Doc. S/PV.7698, 9.
[114] UNSC Verbatim Record, 7173rd meeting, 13 May 2014, UN Doc. S/PV.7173, 10.
[115] UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, 7.
[116] UNSC Verbatim Record, 7698th meeting, 26 May 2016, UN Doc. S/PV.7698, 9. *See also,* UNSC Verbatim Record, 7806th meeting, 9 November 2016, UN Doc. S/PV. 7806, 10; UNSC Verbatim Record, 7943th meeting, 8 May 2017, UN Doc. S/PV.7934, 14; UNSC Verbatim Record, 8091st meeting, 8 November 2017, UN Doc. S/PV.8091, 11-12.
[117] UNSC Verbatim Record, 7698th meeting, 26 May 2016, UN Doc. S/PV.7698, 9. *See also,* UNSC Verbatim Record, 7306th meeting, 11 November 2014, UN Doc. S/PV.7306, 7; UNSC Verbatim Record, 7441st meeting, 12 May 2015, UN Doc. S/PV.7441, 10; UNSC Verbatim Record, 7698th meeting, 26 May 2016, UN Doc. S/PV.7698, 9.
[118] UNSC Verbatim Record, 8250th meeting, 9 May 2018, UN Doc. S/PV.8250, 7.

which contributed to facilitating regime change, was being undertaken in accordance with the West's political objectives in Libya, namely to overthrow Gaddafi, and that the ICC had therefore become instrumentalised by the West calling into question its independence and impartiality as a judicial mechanism. The reliability of this interpretation is based upon the fact that all of the BRICS states expressed similar views and that they are objectively legitimate concerns. Furthermore, the states were consistent in expressing their criticisms. It is argued the implementation of criminal justice by the ICC in Libya undermined the BRICS states' confidence in the institution and this has had a knock affect in Syria, as will now be discussed.

8.7. The Regime Change 'Hangover' and the Marginalisation of the ICC in Syria

The BRICS states' perception of the events in Libya clearly informed their approach to the Syrian crisis. Their views that the P-3 knowingly and wilfully overstepped the Security Council mandate contained in Resolution 1973 and used the protection of civilians as a subterfuge for engaging in forcible regime change, contrary to well established principles of international law, resulted in the BRICS states reasserting the pluralists primary institutions of sovereignty and diplomacy, with the consequence it prevented decisive action being taken to stop the rapidly unfolding crisis in Syria at an early stage and continues to prevent a response by the international community today. Moreover, the perception that the ICC was part of the liberal intervention, creating a pretext for military action and laying the groundwork for regime change which further hindered the finding of a political settlement of the conflict and destabilised the country, resulted in the ICC, and criminal justice more generally, being rejected as a possible response to the Syrian crisis. The ICC was guilty by association but also because of its actions in Libya.[119]

Russia and China, who both vetoed the Security Council Resolution which would have referred Syria to the ICC, feared that it would lay the groundwork for military action by the P-3, leading to the removal of the Assad regime, and would not contribute to the resolution of the conflict. Therefore, while Russia and China expressed the importance of delivering justice in Syria, they believed that the ICC was not the appropriate mechanism to deliver it at that time, given their past experiences. This is further evidence of the argument that the BRICS states support the concept of international criminal justice but contest its implementation, particularly *via* the ICC, where it undermines peace, order and stability, challenges significantly pluralist primary institutions of international society such as sovereignty and diplomacy, and is subject to Western political influence. The issue is not with criminal justice as an institution but how it is implemented.

[119] McMillan and Mickler, 'From Sudan to Syria: Locating 'Regime Change' in R2P and the ICC', 314-315.

This conclusion is reached on the basis that both China and Russia expressed their concerns clearly and consistently. It is accepted, however, that states can act in duplicitous ways, justifying actions on one basis in public but actually doing it for an entirely different reason. An alternative conclusion that can be reached here is that Russia and China vetoed the Security Council Resolution referring Syria to the ICC to support a political ally, Assad, and, in respect of Russia, that it wanted to shield its soldiers and government officials from the ICC's jurisdiction knowing that it would intervene militarily in the country at a later stage. This is not a plausible interpretation in respect of China on the basis that it does not have a significant political or economic relationship with the Syrian regime and it did not appear to have any interest in intervening militarily in the country, which is proved by its lack of intervention to date. It is more plausible in respect of Russia given its relationship with Damascus and it is conceivable that Russia was prepared to intervene militarily in Syria in support of Assad. But this is something that we cannot know and any conclusion that this was the case is speculation only. However, it is argued that even if Russia had such action in mind, its position as well as that of China was principally informed by concerns about the impact that an ICC referral would have on the Syria situation, given what they had observed in Libya. The concerns they raised are entirely legitimate and are in line with their state-solidarist vision of international society. It is accepted, however, that Russia's position could have been informed by both principled and self-interested concerns. The authenticity of the concerns expressed by other BRICS states should not be doubted on the basis that, like China, they had to direct interest in Syria, other than to prevent it becoming another Libya and checking the West's penchant for military intervention.

8.7.1. Support for an Inclusive Political Settlement to the Syrian Crisis

In response to the gross human rights violations that were being perpetrated by the Syrian regime and the rapid deterioration of the security situation in the country, the West adopted the position that Assad must go and that he could not be part of Syria's future political landscape.[120] The suggestion the West should determine the political future of Syria, one without Assad, was resolutely rejected by the BRICS states. They instead repeatedly emphasised the need for an inclusive, Syrian-led political settlement, free from external, Western interference and which respected the principle of state sovereignty contained in the UN Charter, the exact opposite of what had occurred in Libya. The BRICS grouping issued a statement which explained that:

> [g]lobal interests would best be served by dealing with the crisis through peaceful means that encourage broad national dialogues that reflect the legitimate aspirations of all sections of Syrian society and respect Syrian independence, territorial integrity and sovereignty.

[120] J. Ralph, J. Holland and K. Zhekova, 'Before the vote: UK foreign policy discourse on Syria 2011-13', (2017) 43(5) *Review of International Studies* 875-897, 881.

> Our objective is to facilitate a Syrian-led inclusive political process, and we welcome the joint efforts of the United Nations and the Arab League to this end.[121]

The BRICS states also made individual statements on the matter. India 'called for a peaceful and inclusive political process to address the grievances of all sections of Syrian society' and it emphasised that a political process for the resolution of the present crisis should be led by the Syrians themselves.'[122] South Africa said that '[i]t is important that the Syrian people be allowed to decide their own fate, including their future leadership' and that 'no foreign or external parties should interfere in Syria as its people engage in the critical decision-making process on the future of their country. Any solution must preserve the unity, sovereignty and territorial integrity of Syria.'[123] Brazil noted it 'firmly believes that meaningful and inclusive national dialogue, leading to effective political reform, is the only way out of the current crisis in Syria'[124] and Russia said that it 'has firmly and consistently...emphasized the need for a political solution to the problems confronting the country through an inclusive political dialogue conducted by the Syrians themselves.'[125] China similarly explained that:

> [w]e believe that a Syria-led, inclusive political process aimed at promoting reform through dialogue and consultation is the right way to resolve the current crisis in Syria. The international community should respect the sovereignty, independence and territorial integrity of Syria, and address the Syrian issue cautiously so as to prevent further turbulence and repercussions on regional peace.[126]

The states further agreed that the international community had a role to play in the resolution of the crisis but that that role was to support the Syrian people in determining their own future, not to forcibly impose it upon them. As China asserted, '[t]he international community should provide

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[121] Fourth BRICS Summit - Delhi Declaration, *New Delhi,* 29 March 2012, available online at http://www.brics.utoronto.ca/docs/120329-delhi-declaration.html (accessed 16/07/2018), 3. *See also,* Fifth BRICS Summit - eThekwini Declaration and Action Plan, *eThekwini, South Africa,* 27 March 2013, available online at http://www.mea.gov.in/bilateral-documents.htm?dtl/21482 (accessed 16/07/2018), 7; Sixth BRICS Summit: Fortaleza Declaration, *Fortaleza, Brazil,* 15 July 2014, available online at http://www.brics.utoronto.ca/docs/140715-leaders.html (accessed 16/07/2018), 6; Seventh BRICS Summit: 2015 Ufa Declaration', *Ufa, Russia,* 9 July 2015, available online at http://www.brics.utoronto.ca/docs/150709-ufa-declaration en.html (accessed 16/07/2018), 7; Eighth BRICS Summit: Goa Declaration, *Goa, India,* 16 October 2016, available online at http://www.brics.utoronto.ca/docs/161016-goa.html (accessed 16/07/2018); BRICS Leaders Xiamen Declaration, *Xiamen, China,* 4 September 2017, available online at http://www.brics.utoronto.ca/docs/170904-xiamen.html (accessed 16/07/2018), 6.

[122] UNSC Verbatim Record, 6711th meeting, 4 February 2012, UN Doc. S/PV.6711, 8. *See also,* UNGA Official Records, Sixty-seventh session, 7th plenary meeting, 25 September 2012, UN Doc. A/67/PV.7, 12; UNSC Verbatim Record, 6710th meeting, 31 January 2012, UN Doc. S/PV.6710, 27-28; UNSC Verbatim Record, 6751st meeting, 14 April 2012, UN Doc. S/PV.6751, 6; UNSC Verbatim Record, 6756th meeting, 21 April 2012, UN Doc. S/PV.6756, 9; UNSC Verbatim Record, 6826th meeting, 30 August 2012, UN Doc. S/PV.6826, 28; UNSC Verbatim Record, 6841st meeting, 26 September 2012, UN Doc. S/PV.6841, 24.

[123] UNSC Verbatim Record, 6711th meeting, 4 February 2012, UN Doc. S/PV.6711, 11. *See also,* UNSC Verbatim Record, 6524th meeting, 27 April 2011, UN Doc. S/PV.6524, 6; UNSC Verbatim Record, 6751st meeting, 14 April 2012, UN Doc. S/PV.6751,8; UNGA Official Records, Sixty-eighth session, 5th plenary meeting, 24 September 2013, UN Doc. A/68/PV.5, 50.

[124] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 12.

[125] UNSC Verbatim Record, 6751st meeting, 14 April 2012, UN Doc. S/PV.6751, 3.

[126] UNGA Official Records, Sixty-sixth Session, 25th plenary meeting, 26 September 2011, UN Doc. A/66/PV.25, 43. *See also,* UNGA Official Records, Sixty-seventh Session, 14th plenary meeting, 27 September 2012, UN Doc. A/67/PV. 14, 27.

constructive assistance to help achieve these goals. At the same time, the sovereignty, independence and territorial integrity of Syria should be fully respected.'[127] There was also an emphasis on the role of the Arab League, which is consistent with the BRICS' support for regional organisations and regional solutions to problems, rather than supranationally delivered solutions. For example, South Africa explained that it 'believes that the efforts of the League of Arab States, as the organization with knowledge of and proximity to the situation in Syria, should be supported and given the necessary political space to find a solution to the Syrian crisis'[128] and India said 'regional and subregional organizations have an important role to play in resolving the crisis in the region, including in Syria.'[129]

Most significantly, the BRICS states expressed the clear position that there should be no military intervention in Syria and that efforts to pursue regime change would be completely unacceptable, particularly under the guise of humanitarian concerns. The BRICS grouping issued a statement stressing that 'there is no military solution to the conflict' and highlighting 'the need to avoid its further militarization.'[130] The states also noted that military intervention would serve only to fuel the conflict further and would hinder the implementation of a political settlement…Russia asserted '[a] real threat to regional security, in our view, could arise from outside interference in Syria's domestic situation, including attempts to promote ready-made solutions or to take sides'[131] and it further emphasised '[m]aking hasty demands for regime change...and even for foreign military intervention are all risky recipes for geopolitical engineering that can only result in the spread of conflict.'[132] China said '[w]e firmly oppose the use of force to resolve the Syrian issue, as well as practices, such as forcibly pushing for regime change, that violate the purposes and principles of the United Nations Charter and the basic norms that govern international relations'[133] and asserted '[i]t is inadmissible to make arbitrary interpretations of Security Council mandates in the name of protecting civilians. It is even less so to carry out regime change under the same pretext.'[134] South Africa warned that 'it is not in the interests of international peace and security for the international community, including the Security Council, to use the plight of the Arab peoples to pursue self interest and execute regime change'[135] and, furthermore, it expressed 'hope that humanitarian and

[127] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 5.
[128] UNSC Verbatim Record, 6711th meeting, 4 February 2012, UN Doc. S/PV.6711, 11.
[129] UNSC Verbatim Record, 6524th meeting, 27 April 2011, UN Doc. S/PV.6524, 8.
[130] Sixth BRICS Summit: Fortaleza Declaration, 5.
[131] UNSC Verbatim Record, 6524th meeting, 27 April 2011, UN Doc. S/PV.6524, 7.
[132] UNSC Verbatim Record, 6734th meeting, 12 March 2012, UN Doc. S/PV. 6734, 9-10. *See also,* UNGA Official Records, Sixty-seventh session, 16th plenary meeting, 28 September 2012, UN Doc. A/67/PV.16, 21; UNGA Official Records, Sixty-eighth Session, 15th plenary meeting, 27 September 2013, UN Doc. A/68/PV. 15, 34; R. Allison, 'Russia and Syria: explaining alignment with a regime in crisis', (2013) 89(4) *International Affairs* 795-823, 815.
[133] UNSC Verbatim Record, 6719th meeting, 31 January 2012, UN Doc. S/PV.6710, 25.
[134] UNSC Verbatim Record, 6917th meeting, 12 February 2013, UN Doc. S/PV.6917, 25.
[135] UNSC Verbatim Record, 6734th meeting, 12 March 2012, UN Doc. S/PV.6734, 23.

protection-of-civilians pretexts will not be used to effect regime change in Syria'.[136] Similarly, India said that the Syrian-led political process should not be complicated with attempts at regime change[137] and that '[t]here is no military solution to that conflict. We must intensify efforts to end the conflict and seek a political settlement.'[138]

It could be argued that Russia's defence of Syria's sovereignty and its concern about the possibility of Western-led military intervention in the country was more about its ambitions in the country rather than preventing it descending into chaos like Libya. Russia perhaps foresaw an opportunity to become involved in the Syrian conflict in support of Assad, instead of a Western coalition, which would assist it in projecting an image of Russia as a re-established world power and provide it with a strategic foothold in the Middle East from which it could advance its status and foreign policy ambitions. This could only happen if Russia made sure the West did not intervene first. While it has to be conceded that such thinking will have to some extent informed Russia's position in relation to Syria, albeit this is something that we cannot know definitively, it is a safe conclusion that Russia would have been concerned about the impact of foreign military intervention in the country given the chaos that engulfed Libya following NATO's intervention. It is an entirely legitimate concern and one that is shared by numerous states, not only Russia. Moreover, Russia's defence of Syrian sovereignty is entirely consistent with a general, hawkish defence of sovereignty as part of its state-solidarist vision of international society, which has been highlighted throughout this thesis and particularly in Chapter Three. It could be suggested that one should not trust Russia's defence of state sovereignty to be genuine in light of its tendency to interfere in the internal affairs of other states, an example being Russia's interventions in Georgia and Ukraine including its annexation of Crimea in 2014. While such a concern is understandable, it cannot automatically follow that because Russia has arguably violated the sovereignty of other states that it does not believe in sovereignty and would wish to defend it on a normative basis. In this case, Russia's defence of Syria sovereignty is also made on a pragmatic basis that any violation, especially by way of military intervention, will lead to chaos in the country is a legitimate concern to hold. The United Kingdom Parliament even decided not to sanction British military intervention in Syria in 2013 with many references being made to the effects of intervention on a country, citing the Iraq, Afghanistan and Libya interventions as pertinent examples, during the House of Commons debate.[139] Furthermore, Russia would no doubt say that its interventions were a justifiable violation of sovereignty, although this would be doubted by the international community. The same concerns cannot be raised in respect of the other

[136] UNSC Verbatim Record, 6826th meeting, 30 August 2012, UN Doc. S/PV.6826, 26.
[137] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 6.
[138] UNGA Official Records, Sixty-eighth Session, 18th plenary meeting, 28 September 2013, UN Doc. A/68/PV.18, 23.
[139] *See*, J. Strong, 'Interpreting the Syria vote: parliament and British foreign policy', (2015) 91(5) *International Affairs* 1123-1139, 1128

BRICS states' views on military intervention in Syria given that it appeared they did not have the same ambitions of military intervention in Syria like Russia. The conclusion can therefore be drawn that whilst Russia's position on ICC intervention in Syria will have to some extent been informed by its political relations with Syria and ambitions in the country, this is not to the exclusion of its clear concerns about the detrimental impact of an ICC intervention on the country in light of what had recently occurred in Libya; its decision-making can, as has been argued throughout this thesis, be simultaneously informed by both normative and material concerns.

In light of these views, the BRICS were cautious about supporting Security Council resolutions which potentially provided a basis for future Western-led military intervention, including where they considered the wording of resolutions took sides against the Syrian government. Russia and China vetoed a number of resolutions for these reasons.[140] For example, Russia and China vetoed a draft resolution which, *inter alia,* called upon the Syrian government to protect civilians, called for those individuals guilty of crimes to be held accountable and encouraged the imposition of targeted sanctions by states.[141] In explaining its vote, Russia said that the threat of an ultimatum and sanctions contained in the proposed draft resolution 'contravenes the principle of a peaceful settlement of the crisis on the basis of a full Syrian national dialogue' and that in light of the 'well known events in North Africa' the refusal to include wording on the non-acceptability of foreign military intervention 'can only put us on our guard.'[142] Furthermore, Russia's representative said that '[g]iven the basis of statements by some Western politicians on President Al-Assad's loss of legitimacy, such an approach could trigger a full-fledged conflict in Syria and destabilization in the region as a whole.'[143] Russia proposed an alternative resolution which included, at its heart, 'the logic of respect for the national sovereignty and territorial integrity of Syria as well as the principle of non-intervention, including military, in its affairs'.[144] China explained that:

> the Security Council has before it two draft resolutions. One, which China supports, advocates respect for the sovereignty of Syria and resolving the crisis there through political dialogue. With regard to the other draft resolution, which the Council considered today, like quite a few other Council members, China believes that, under the current circumstances, sanctions or the threat thereof does not help to resolve the question of Syria and, instead, may further complicate the situation... China therefore voted against it.[145]

Some concern was also expressed by the other BRICS states, who abstained on that resolution. India criticised the resolution on the basis that '[i]t does not condemn the violence perpetrated by

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[140] Allison, 'Russia and Syria: explaining alignment with a regime in crisis', 799.
[141] UNSC Draft Res 612 (4 October 2011), UN Doc. S/2011/612.
[142] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 3-4.
[143] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 3-4.
[144] UNSC Verbatim Record, 6627th meeting, 4 October 2011,UN Doc. S/PV.6627, 3.
[145] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 5.

the Syrian opposition, nor does it place any responsibility on the opposition',[146] which is consistent with the extensive concerns expressed by the BRICS states about the ICC's lack of impartiality in its intervention in Libya, and Brazil, albeit somewhat less critically, explained that given 'Syria's centrality to stability in the region, it is all the more important that the Council be able to act with caution'.[147] South Africa, in what appeared to be the most robust response of the BRICS states other than that provided by Russia and demonstrating clearly the lingering hangover of the Libyan intervention, said that it:

> was concerned about the sponsors' intention to impose punitive measures that would have prejudged the resolution's implementation. We believe that these were designed as a prelude to further actions. We are concerned that this draft resolution not be part of a hidden agenda aimed at once again instituting regime change, which has been an objective clearly stated by some. We are thus concerned about the fact that the sponsors of this draft resolution rejected language that clearly excluded the possibility of military intervention in the resolution of the Syrian crisis. We maintain that the Security Council should proceed with caution on Syria lest we exacerbate an already volatile situation.[148]

The cautiousness, particularly a reluctance to allow the P-3 to use the Council as a means to delegitimise the Assad regime for what the BRICS states perceived to be a basis for affecting regime change, continued to pervade the discussion on Syria. For example, Russia said that '[w]e reject any sanctions, any attempts to employ the Council's instruments to fuel conflict or to justify any eventual foreign military interference' and '[t]he Council cannot impose parameters for an internal political settlement. The Charter gives it no such authority.'[149] Furthermore, after vetoing another resolution, Russia said it did not adequately reflect the true state of affairs in Syria and sent a biased signal to the Syrian sides'[150] and in justifying its decision to veto a different resolution, the Chinese representative explained that the 'the draft resolution is seriously flawed, and its unbalanced content seeks to put pressure on only one party. Experience has shown that such a practice would not help resolve the Syrian issue, but would only derail the matter from the political track.'[151] While the other BRICS states voted in favour of the subsequent resolutions that Russia and China vetoed, their concern about Western intervention is still evident in their need to deal with it expressly. For example, India noted of one particular draft resolution that it expressly rules out any measures under Article 42 of the Charter and calls for a serious political dialogue'[152] and South Africa said '[w]e are also satisfied that the final draft resolution (S/2012/77) was not aimed at imposing regime

[146] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 6.
[147] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 11-12.
[148] UNSC Verbatim Record, 6627th meeting, 4 October 2011, UN Doc. S/PV.6627, 11.
[149] UNSC Verbatim Record, 6710th meeting, 31 January 2012, UN Doc. S/PV.6710, 24.
[150] UNSC Verbatim Record, 6711th meeting, 4 February 2012, UN Doc. S/PV.6711, 9.
[151] UNSC Verbatim Record, 6756th meeting, 19 July 2012, UN Doc. S/PV.6756, 13.
[152] UNSC Verbatim Record, 6711th meeting, 4 February 2012, UN Doc. S/PV. 6711, 8.

change on Syria, which would be against the purposes and principles of the United Nations Charter.'[153]

8.7.2. Russia and China's Rejection of a Role for the ICC in Syria

The approach adopted by the BRICS states in relation to the situation in Syria, which has its origins in the Libyan intervention, ultimately resulted in Russia and China vetoing the proposed referral of Syria to the ICC in May 2014. The fact that the situations in Sudan and Libya were referred to the Court and Syria was not, confirms the position that 'cosmopolitan justice that the ICC can deliver will depend on the willingness of states to act in support of this goal'.[154] The willingness of Russian and China was not present in this situation because of concerns about how the Court had acted in the past and had been instrumentalised by the Western powers.

Russia and China believed the referral would be used as a means to delegitimise the Assad regime, as had been done to Gadaffi in Libya, and provide the groundwork for future attempts at regime change. Russia said, after casting its veto, '[t]he draft resolution rejected today reveals an attempt to use the ICC to further inflame political passions and lay the ultimate groundwork for eventual outside military intervention' and he also reminded the Council that '[p]ursuing regime change by force in Syria at all costs will prolong the crisis and undermine the Geneva negotiations.'[155] In addition, Russia expressed its view that a referral to the ICC would not serve a purpose, its representative noting that 'the last time the Security Council referred a case to the International Criminal Court (ICC) — the Libyan dossier, through resolution 1970 (2011) — it did not help resolve the crisis, but instead added fuel to the flames of conflict.'[156] Its representative also highlighted the futility of the Court's work, stating that '[a]fter the cessation of hostilities, the ICC did not exactly rise to the occasion, to put it mildly. It did not contribute to a return of normalcy or justice in Libya' and he pointed out the ICC's Western bias, noting that '[t]he deaths of civilians as a result of NATO bombardments was somehow left outside its scope.'[157] The latter point reflects an ongoing concern about the ICC's Western bias.

China similarly expressed its concern that a referral to the ICC was not appropriate as it would not serve to facilitate the resolution of the conflict and a political settlement. It said that 'efforts to seek a political settlement to the question of Syria are encountering difficulties' and that '[i]n the current

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[153] UNSC Verbatim Record, 6711th meeting, 4 February 2012, UN Doc. S/PV. 6711, 11.
[154] A. E. Eckert, 'The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide' in S. C. Roach, *Governance, Order, and the International Criminal Court. Between Realpolitik and a Cosmopolitan Court,* (OUP, 2009), 223.
[155] UNSC Verbatim Record, 7180th meeting,22 May 2014,UN Doc.S/PV.7180, 13.
[156] UNSC Verbatim Record, 7180th meeting,22 May 2014,UN Doc.S/PV.7180, 13.
[157] UNSC Verbatim Record, 7180th meeting,22 May 2014,UN Doc.S/PV.7180, 13.

circumstances, to forcibly refer the situation in Syria to the ICC is not conducive either to building trust among all parties in Syria or to an early resumption of the negotiations in Geneva. It will only jeopardize the efforts made by the international community to push for a political settlement.'[158] This further demonstrates China's pragmatic approach that justice should serve the ends of peace, and it should not be deployed where it is unable to do so or, more importantly, would undermine that objective. This concern was also highlighted by Sweden. In 2013, it refused to sign a letter penned by Switzerland and signed by fifty other countries urging the Security Council to refer Syria to the ICC on the basis that, as noted by the Swedish Foreign Minister, '[i]t would put Assad in a headlock and make him less flexible, because we'd be telling him 'your only option is to fight to the death',[159] which is essentially what had occurred in Libya. This is an interesting recognition by a liberal Western state about the limits of the cosmopolitan approach to justice which involves the dogmatic pursuit of sitting head of state prosecutions.

It is argued that the evidence demonstrates that Russia and China's decisions to veto the referral were driven strongly by normative considerations. They were, however, also partly driven by material considerations, namely a desire to be seen as responsible rising powers in international society. This was to be achieved by protecting against another forcible regime change by way of exercising their vetoes in the Security Council, particularly in the face of significant pressure from Western states. Moreover, it is argued that as Russia's involvement in the Syrian civil conflict did not begin until after the ICC referral vote,[160] Russia would not have needed to use its veto to shield its forces from potential scrutiny by the ICC. However, it is conceded, as noted above, that Russia may have anticipated intervening militarily in Syria in due course and therefore decided to veto the referral to avoid it being potentially scrutinised by the ICC in the future. While the same concern does not apply in respect of China, there being no evidence that it would become militarily involved in Syria, it could be said that China used its veto not for principled reasons but rather in slavish support of Russia. Whilst we have to concede that this is a possibility, it does not appear that this is the case. There is no reason to believe China would support Russia in its foreign policy objectives unless there was also some benefit to China. China does not appear to have any material stake in Syria and therefore we should conclude that it is more likely that China's objection to the referral was on principled grounds and this just coincided with Russia's potentially partially self-interested positioning on the issue. Looked at in context, however, Russia and China have expressed principled concerns about the Court's actions both in respect of its interventions in Sudan and, more particularly, Libya. They also expressed their concerns and reservations about the potential for

[158] UNSC Verbatim Record, 7180th meeting,22 May 2014,UN Doc.S/PV.7180, 14.

[159] K. Engle, 'A Genealogy of the Criminal Turn in Human Rights' in K. Engle, Z. Miller and D. M. Davis, 'Introduction' in K. Engle, Z. Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda,* (CUP, 2016), 43.

[160] 'Russia joins the war in Syria: five key points' *BBC News,* 1 October 2015, available online at https://www.bbc.co.uk/news/world-middle-east-34416519 (accessed on 27/06/2018).

forcible regime change in Syria from the very beginning of the civil war, as did the other BRICS states.

This argument is supported by the fact Russia and China condemned violations of humanitarian law and human rights abuses, and expressly recognised the need for justice and accountability for crimes. Russia said '[w]e are convinced that justice in Syria will eventually prevail. Those guilty of perpetrating grave crimes will be punished, but if that is to happen, peace is needed first and foremost'[161] and China said it 'is firmly opposed to all violations of international humanitarian law or serious violations of human rights committed by all parties to the conflict in Syria'.[162] Its representative also explained 'that any action to seek recourse to the International Criminal Court...to prosecute the perpetrators of serious violations should be conducted on the basis of respect for State judicial sovereignty and the principle of complementarity' and, furthermore, that 'China always has reservations concerning the referral by the Security Council of particular country situations to the ICC.'[163] This demonstrates a recognition of the importance and value of criminal justice and an acceptance of the ICC as a secondary institution but only to the extent it complies with a pluralist vision of international society, namely it respects sovereignty and does not undermine stability and order. It must be recognised, however, that just because the states say this, it does not necessarily mean that it is true. In this case, however, it appears a reasonable conclusion to reach that the statements are genuine. This is on the basis that Russia and China have expressed support for, and supported, the implementation of international criminal justice throughout recent history. Furthermore, while Russia and China vetoed a draft resolution proposed by various states including the P-3 which, *inter alia,* re-emphasised the need for those guilty of committing gross human rights violations and violations of international humanitarian law to be brought to justice,[164] the alternative Russian resolution, supported by China, included the same wording on the need to end impunity as that included in the P-3 draft.[165] This demonstrates the issue is not with criminal justice or the ICC as primary and secondary institutions of international society, but rather with how they are deployed and operate, which is further evidence of their state-solidarist position. It could be argued, however, that even though the Russian resolution referred to ending impunity, it does not follow that this would actually happen and that it would be a commitment that Russia and China would ensure is implemented. This is something that we cannot know, however, and thus it takes us no further forward in our analysis. Lastly, it must be emphasised that it is not hypocritical

[161] UNSC Verbatim Record, 7180th meeting, 22 May 2014, UN Doc. S/PV.7180, 13.
[162] UNSC Verbatim Record, 7180th meeting, 22 May 2014, UN Doc. S/PV.7180, 14.
[163] UNSC Verbatim Record, 7180th meeting, 22 May 2014, UN Doc. S/PV.7180, 13.
[164] UNSC Draft Res. 846 (8 October 2016), UN Doc. S/2016/846; UNSC Verbatim Record, 7785th meeting, 8 October 2016, UN Doc. S/PV.7785, 6.
[165] UNSC Draft Res. 847 (8 October 2016), UN Doc. S/2016/847; UNSC Verbatim Record, 7785th meeting, 8 October 2016, UN Doc. S/PV.7785,12.

of Russia and China to veto the ICC referral but then say that they support criminal justice and want to end impunity; the two are entirely separate. Russia and China's issue is with the way in which the ICC has been operating and implementing criminal justice, as can be seen from their criticisms of the ICC's intervention in Sudan and Libya, not with international criminal justice as an institution and an objective to be pursued.

8.8. The Use of Chemical Weapons in Syria and the Marginalisation of Criminal Justice

In addition to the Security Council's inability to refer the situation in Syria to the ICC, the marginalisation of criminal justice is also seen in the lack of accountability for the persistent and prevalent use of chemical weapons during the civil war. More specifically, the Security Council has failed to develop a long term strategy to investigate such potential war crimes as a precursor to criminal trials that may take place in the future. While Russia and China initially supported efforts to establish an investigatory body to lay the foundations of retributive justice in Syria, they subsequently blocked attempts to extend the Joint Investigative Mechanisms' mandate and, more recently, refused to acquiesce in establishing a new body to attribute accountability for the use of chemical weapons in Douma in 2018. The reasons given for their positions were similar to those adopted to justify their vetoing of the ICC referral in 2014: the mechanism was politicised in favour of the West's regime change agenda and would provide a pretext for P-3 led military intervention. This provides further evidence to support the argument that Russia and China, and the BRICS more broadly, support justice and accountability but contest the manner in which it is implemented, particularly where it is instrumentalised by the West to advance their political objectives and undermines the prospects of a peaceful settlement to the conflict. The alternative explanation is that Russia and China refused to permit the investigation into the use of chemical weapons continue in order to protect Assad and, in the case of Russia, to avoid scrutiny its involvement in the war. While this is a plausible argument in respect of Russia, given its involvement in the conflict and its close relationship with the Syrian regime, the principled concerns were still a major ground for the states' opposition to the investigations continuing, as will be demonstrated below.

In August 2015, Russia and China voted in favour of a Security Council resolution which established an OPCW-United Nations Joint Investigatory Mechanism (JIM) based on the Council's determination to identify those responsible for the use of chemical weapons and its belief that such individuals must be held accountable.[166] While China and Russia both expressed their support for the mechanism's work, such support was couched in state-solidarist terms in that it emphasised the need to respect sovereignty and advance a political settlement of the civil war, and warned against

[166] UNSC Res. 2235 (7 August 2015), UN Doc. S/RES/2235(2015).

politicisation. The Chinese representative explained that '[w]e support the objective, just and professional investigation of that incident and bringing the perpetrators to justice when there is hard evidence' and also added that '[i]n that process, the independence, sovereignty and territorial integrity of Syria must be respected'.[167] Russia similarly explained that it believed that 'the Mechanism will work impartially, objectively and professionally' and further emphasised that 'any effort in the Syrian issue must be in line with the logic of assisting the search for a political solution to the conflict and should not further antagonize the parties.'[168] Again, this is evidence of an instrumental view of criminal justice in that it must serve the ultimate ends of bringing about peace. Russia and China were clearly committed to the investigation process and ending impunity at this point as they would have known that the passing of the resolution was going to lead to a process of investigation which was out of their control and which would produce findings.

While Russia and China agreed to extend the JIM's mandate, first in October 2016[169] and then again in November 2016,[170] demonstrating a continued commitment to accountability, it was clear the concerns they had about politicisation were, in their opinion, being realised. Russia said 'it will be important to avoid the politicization of the issue that has so far seriously hindered the work of the Mechanism' and further warned '[e]veryone should understand that this is not a toy for yet again enabling someone to criticize the Syrian Government'.[171] China re-emphasised the need for the JIM 'to perform its functions in line with its mandate and in an objective, impartial and professional manner' and it expressed hope that 'while respecting the sovereignty of the countries concerned, [i]t will fully investigate and establish the facts regarding the use of chemicals as weapons.'[172]

In 2017, Russia and China became increasingly concerned about the work of the JIM and the conclusion it reached about the responsibility of the Assad regime for the use of chemical weapons. Russia said 'the JIM's conclusions are not based on convincing facts on which any sort of charges could be founded' and, furthermore, that attempts by the West to impose sanctions on the Assad regime on this basis is simply 'based on the Western capitals' anti-regime doctrine.'[173] It also expressed serious concern that '[w]e are seeing a clear trend of bringing powerful political pressure to bear on the Mechanism and pre-programming the results of the investigation. The Mechanism is being forced to set aside the principles of objectivity, independence and impartiality',[174] and such

[167] UNSC Verbatim Record, 7501st meeting, 7 August 2015, UN Doc. S/PV.7501, 4.
[168] UNSC Verbatim Record, 7501st meeting, 7 August 2015, UN Doc. S/PV.7501, 4.
[169] UNSC Res. 2314 (31 October 2015), UN Doc. S/RES/2314(2016).
[170] UNSC Res. 2319 (17 November 2016), UN Doc. S/RES/2319(2016).
[171] UNSC Verbatim Record, 7798th meeting, 31 October 2016, UN Doc. S/PV.7798, 3.
[172] UNSC Verbatim Record, 7798th meeting, 31 October 2016, UN Doc. S/PV.7798, 5. *See also,* UNSC Verbatim Record, 7815th meeting, 17 November 2016, UN Doc. S/PV.7815, 4-5.
[173] UNSC Verbatim Record, 7893rd meeting, 28 February 2017, UN Doc. S/PV.7893, 7.
[174] UNSC Verbatim Record, 7893rd meeting, 28 February 2017, UN Doc. S/PV.7893, 7.

'unilateral pressure' is the product of an 'obsession with regime change' on the part of the West.[175] Russia's concern is understandable in light of what happened in Libya. China was arguably less critical. It noted the differences of opinion in respect of the JIM's findings but expressed continued support for its work 'in carrying out comprehensive, objective and fair investigations into all — I repeat all — uses of chemicals as weapons'[176] and reiterated that '[i]t is essential to hold accountable all relevant perpetrators and responsible parties in cases involving chemical weapons.'[177]

This issue came to a head in late 2017 when Russia refused to permit the extension of the JIM's mandate and forced its closure. First, on 24 October 2017, Russia, supported by China, vetoed a draft resolution proposed by numerous states, including the P-3, to extend the mandate of the JIM for one year.[178] Russia subsequently vetoed another resolution which sort to extend the JIM's mandate for the same period of time[179] and it also vetoed a resolution which sought an extension for only 30 days.[180] China abstained on both of those resolutions.[181] Russia justified its decision to veto the resolution proposed on 24 October on the basis it had not yet had sight of the JIM's most recent report on the 4 April incident in Khan Shaykhun and was not prepared to extend the body's mandate in advance of viewing it.[182] It subsequently argued that the proposed resolution 'did not deal with a single one of the flaws in the bodies investigating the Syrian chemical weapons dossier', which it had previously raised, and while it asserted that 'perpetrators of such crimes must be held accountable', it explained that 'it became clear that there were fundamental flaws in the Mechanism's activities that would not permit us to formally consider the question of extending its operation.'[183] Russia described the JIM as 'a pseudo-investigation' which 'cannot tolerate any criticism' and 'had the nerve to issue a guilty verdict against an entire State, the Syrian Arab Republic' using 'testimony cooked up by who knows what witnesses'.[184] China, in contrast, was much more moderate in its views. Its representative explained that the proposed resolution 'contained some positive provisions, such as condemning chemical weapon attacks in Syria, calling

[175] UNSC Verbatim Record, 7915th meeting, 5 April 2017, UN Doc. S/PV.7915, 17. *See also,* UNSC Verbatim Record, 7919th meeting, 7 April 2017, UN Doc. S/PV.7919, 11 - '[t]hose who put forward this initiative are in no way interested in an impartial investigation by a competent international body'; UNSC Verbatim Record, 7922nd meeting, 12 April 2017, UN Doc. S/PV.7922, 6-8.
[176] UNSC Verbatim Record, 7893rd meeting, 28 February 2017, UN Doc. S/PV.7893, 9.
[177] UNSC Verbatim Record, 7915th meeting, 5 April 2017, UN Doc. S/PV.7915, 7. *See also,* UNSC Verbatim Record, 7922nd meeting, 12 April 2017, UN Doc. S/PV.7922, 6.
[178] UNSC Draft Res.884 (24 October 2017), UN Doc. S/2017/884; UNSC Verbatim Record, 8073rd meeting, 24 October 2017, UN Doc. S/PV.8073, 3.
[179] UNSC Draft Res.962 (16 November 2017), UN Doc. S/2017/962; UNSC Verbatim Record, 8105th meeting, 16 November 2017, UN Doc. S/PV.8105, 3.
[180] UNSC Draft Res. 970 (17 November 2017), UN Doc. S/2017/970; UNSC Verbatim Record, 8107th meeting, 17 November 2017, UN Doc. S/PV.8107, 2.
[181] UNSC Verbatim Record, 8107th meeting, 17 November 2017, UN Doc. S/PV.8107, 3; UNSC Verbatim Record, 8107th meeting, 17 November 2017, UN Doc. S/PV.8107, 2.
[182] UNSC Verbatim Record, 8073rd meeting, 24 October 2017, UN Doc. S/PV.8073, 3-5.
[183] UNSC Verbatim Record, 8105th meeting, 16 November 2017, UN Doc. 8105, 16.
[184] UNSC Verbatim Record, 8105th meeting, 16 November 2017, UN Doc. 8105,17. *See also,* UNSC Verbatim Record, 8107th meeting, 17 November 2017, UN Doc. S/PV.8107, 7-8.

for investigations into the incidents' but 'with regard to specific measures to improve the working methods, the draft did not fully address the legitimate concerns of some Council members.'[185] Russia and China submitted an alternative resolution for consideration which, China said:

> condemns the chemical weapons attacks in Syria, demands investigations, and expresses concern over the use of chemical weapons by non-State actors, including terrorist organizations... [but] also seeks to improve the JIM's working methods and mandate and to strengthen its on-site investigation and evidence collection, and proposes specific measures to improve the JIM's work and to ensure the reliability and credibility of the conclusions of its investigations.[186]

It is evident from the above that China and Russia support accountability for the use of chemical weapons but contest the manner in which the P-3 seek to implement it, and refuse to support efforts on that basis. This approach has been further demonstrated, most recently, by China and Russia vetoing a P-3 endorsed Security Council resolution which would have established an independent mechanism, under the auspices of the OPCW, to attribute responsibility for the suspected use of chemical weapons in Douma on 7 April 2018.[187] Russia rejected the suggestions of the P-3 that the new mechanism they had proposed was independent and impartial, and instead believed that the resolution was 'nothing more than an attempt to resurrect, unchanged' the JIM which 'became a puppet in the hands of anti-Damascus forces, and... covered itself with shame when it issued a guilty verdict for a sovereign State without credible evidence.'[188] China, once again adopting a more moderate tone, noted that, 'on some specific measures, it does not take full consideration of some of the major concerns of certain Security Council members on improving the mechanism's working methods and ensuring an objective and impartial investigation.'[189]

An alternative interpretation of Russia's position is that far from having an issue with the manner in which the investigation was being conducted, it was simply seeking to have it shut down because of its developing political relations with Damascus and the need to keep Assad on its side in order to advance its foreign policy ambitions in Syria, and because it was concerned that its forces may be subject to investigation given its involvement in the conflict at that time. This is a plausible explanation that one has to accept as a possibility. Such accusations were levelled at Russia by other members of the Security Council during debates. For example, the United Kingdom representative said '[t]he reason is clear [for Russia veto]: it is because Russia would rather cross the WMD line

[185] UNSC Verbatim Record, 8105th meeting, 16 November 2017, UN Doc. 8105, 11.
[186] UNSC Verbatim Record, 8105th meeting, 16 November 2017, UN Doc. 8105, 20.
[187] UNSC Draft Res. 321 (10 April 2018), UN Doc. S/2018/321; UNSC Verbatim Record, 8228th meeting, 10 April 2018, UN Doc. S/PV.8228, 5.
[188] UNSC Verbatim Record, 8228thmeeting, 10 April 2018, UN Doc. S/PV.8228, 4.
[189] UNSC Verbatim Record, 8228thmeeting, 10 April 2018, UN Doc. S/PV.8228, 6.

than risk sanction of its ally Syria.'[190] The representative of the United Nations similarly explained that 'Russia has again chosen the Al-Assad regime over the unity of the Security Council. We have said before that Russia will stop at nothing to shield the Al-Assad regime, and now we have our answer.'[191] However, we have to note that there is no direct evidence of Russia using its veto purely in support of its ally, it is purely conjecture based upon circumstantial evidence and inferential reasoning. In terms of China's position, it could be argued that China was merely providing some support to Russia in voting the way that it did. However, as has previously been noted, China is unlikely to blindly support Russia; China may provide support to Russia but only when its interests are aligned or where it has genuine reasons for its position. In this case, China does not have an interest in Syria like Russia does and so it is a safe conclusion that China's criticism of the investigations are genuine and its voting record is on that basis. This interpretation is further supported by the fact that China was more reasonable in its criticisms and was willing to abstain on certain resolutions rather than vetoing them as Russia did.

The veracity of the conclusion that Russia stopped the investigations into the use of chemical weapons continuing purely in support of its ally, Syria, is called into question by the fact that Russia proposed an alternative resolution which would have established a new investigatory mechanism.[192] This resolution, which was supported by China but not adopted due to a lack of votes,[193] differed from the P-3 draft in two principal ways. First, it established the standard of proof to be applied by the mechanism as 'beyond reasonable doubt',[194] the standard applied in criminal proceedings, which the UK representative said was 'inappropriate for the type of investigation'.[195] She further suggested, mockingly, 'if the Russians want a criminal investigation, they could always suggest that we refer the matter to the International Criminal Court.'[196] Second, the Russian resolution rendered the ultimate decision on the attribution of responsibility for the chemical weapons attack in Douma a matter for the Security Council, rather than the independent mechanism.[197] This shows continued distrust in supranational mechanisms and legal processes more generally, and a reassertion of political control *via* the Security Council over law and supranational governance. It is a pushback by Russia, and to a lesser extent China given that it abstained on the resolutions rather than voting against them, against cosmopolitan progress and a reassertion of a state-solidarist

[190] UNSC Verbatim Record, 8228th meeting, 10 April 2018, UN Doc. S/PV.8228,5.
[191] UNSC Verbatim Record, 8228th meeting, 10 April 2018, UN Doc. S/PV.8228, 9.
[192] UNSC Draft Res.175 (10 April 2018), UN Doc. S/2018/175.
[193] UNSC Verbatim Record, 8228th meeting, 10 April 2018, UN Doc. S/PV.8228, 9.
[194] UNSC Draft Res. 175 (10 April 2018), UN Doc. S/2018/175, para.6.
[195] UNSC Verbatim Record, 8228thmeeting, 10 April 2018, UN Doc. S/PV.8228, 9.
[196] UNSC Verbatim Record, 8228thmeeting, 10 April 2018, UN Doc. S/PV.8228, 9.
[197] UNSC Verbatim Record, 8228thmeeting, 10 April 2018, UN Doc. S/PV.8228, 9. UNSC Draft Res. 175 (10 April 2018), UN Doc. S/2018/175, para.6 - 'regarding the establishment and operation of the UNIMI to identify beyond reasonable doubt facts which may lead to the attribution *by the Security Council* of the involvement in the use of chemicals as weapons, including chlorine or any other toxic chemical, in the Syrian Arab Republic' (emphasis added)

conception of international society in which pluralist institutions such as states sovereignty and multilateralism are given a more central role in the regulation of international affairs. As the UK representative to the Council noted in voting against Russia's proposed resolution to establish a new body: 'the text is unacceptable because it seeks to assert that sovereign States are above international law and international norms.'[198] The reassertion of political control over accountability is driven by a concern the P-3 are influencing the independent investigation in order to attribute responsibility for the use of chemical weapons to the Assad regime as a means of delegitimising it and giving a pretext for regime change, including by way of military intervention. An alternative explanation is that Russia put forward the new resolution, not for the purpose of actually bringing about accountability in Syria, but because it gave the impression that it wanted to do so and thus gave it the appearance of a responsible rising powers, while at the same time it knew the resolution would be vetoed and therefore the mechanism would never be established or even if it was passed, the mechanism would not be able to establish and attribute blame to the high standard of 'beyond reasonable doubt' and, in any event, the findings would be controlled by the Security Council in which Russia has power. While this is plausible, it would have been a very risky strategy for the Russian Federation given that it could have been out manoeuvred in the Council with the result that findings that may have been unfavourable to the Syrian regime, and potentially Russia given its involvement in the conflict, were discussed within the Council and published.

8.9. Conclusion

The referral of the situation in Libya to the ICC in 2011 was another very significant event in the Court's short history, confirming its legitimacy as an institution and its role as a transitional justice mechanism to be deployed in ongoing conflict situations, a role which was embraced by the Prosecutor who quickly opened an investigation and issued arrest warrants in an attempt to play a role in the resolution of the Libyan conflict. The significance of the referral was bolstered by the fact the Security Council Resolution was adopted unanimously, including by all five of the BRICS states. This demonstrated a commitment by the BRICS to the ICC as an institution and to criminal justice, a commitment which had been tentatively signalled with the referral of the situation in Darfur to the ICC some six years earlier. However, it should be noted that the support expressed for the referral of Libya to ICC among the BRICS was lukewarm, an indication of their uncertainty about the Court, particularly its working practices and narrow approach to justice, which they had had an opportunity to see through its intervention in Sudan. It was noted that a number of the states confirmed that their support for the referral was based on the fact that support had been given by geographically proximate states and regional organisations, such as the League of Arab states,

[198] UNSC Verbatim Record, 8228th meeting, 10 April 2018, UN Doc. S/PV.8228, 9.

which reflects a state-solidarist commitment to regional, multilateral approaches, but also a desire to be seen as responsible powers capable of shouldering the burden of global governance, which is a collective aspiration of the BRICS states.

The tentative nature of the BRICS support for the ICC's intervention in Libya continued post-referral. While some support was expressed for justice and accountability in Libya, and the work of the ICC, the states emphasised the importance of a politically negotiated solution to the conflict and that the Court should focus on contributing to that end. This reflects the state-solidarist view that justice is subservient to order, a view espoused by the BRICS states in relation to the ICC's intervention in Darfur and also previously in relation to the work of the *ad hoc* tribunals. India was also keen to remind the Council it was not a member of the Court, and nor were three of five permanent members, and emphasised that the Court should respect the limits of its jurisdiction. The state solidarism of the BRICS states was also evident in their emphasis on the application of complementarity by the Court; Russia, China and South Africa noted that states have the primary responsibility for conducting prosecutions and China highlighted the need for the ICC to respect judicial sovereignty.

Despite initially expressing support for the ICC's work, the BRICS became increasingly critical of its intervention in Libya, however. South Africa noted actual justice remains elusive and Russia explained that given its experience of the ICC in Libya, it did not see the value of using the mechanism in the future. The primary contentious issue was the perception that the ICC supported NATO's objective of regime change in Libya and had actively contributed to it including by way of issuing arrest warrants and its one-sided investigations, and that this had made the political resolution of the conflict impossible. The consequence of this, particularly in light of the chaos that erupted following the death of Colonel Gaddafi at the hands of the rebels, was that Russia and China vetoed the proposed Security Council resolution which would have referred Syria to the ICC.

When the Syrian civil war started, following the brutal crackdown against of civilian protesters by the Assad regime, the BRICS states emphasised that the resolution of the conflict could only occur through an inclusive, politically negotiated settlement led by the Syrian people. They consistently and firmly rejected external interference in the process, other than to support the will of the people, and warned against forcible military intervention, particularly to facilitate regime change. It was evident that the BRICS states' experience of the Libyan conflict had conditioned their response to the Syrian crisis, and this was expressly acknowledged on a number of occasions. The BRICS were very cautious in approaching proposed Security Council resolutions supported by the P-3, fearing they were being used as a means of delegitimising the Assad regime, paving the way for

intervention and regime change. Russia and China vetoed numerous resolutions on this basis. Ultimately, such concerns resulted in Russia and China vetoing the proposed referral of Syria to the ICC, which marginalised a role for the Court and also criminal justice more generally in the Syrian conflict. This represented a reversal of the cosmopolitan progress and the legitimacy that has been conferred upon the Court with the referrals of Sudan and Libya.

Russia and China did, however, express the need for justice and accountability in Syria. This serves as evidence for the argument made throughout this thesis that the BRICS states support international criminal justice as an institution but contest the way it is implemented by the ICC, specifically where it undermines pluralist values and primary institutions of international society. Its contribution to regime change in Libya violated the institution of sovereignty and states thus sort to defend this vigorously in Syria, and throughout the Libya and Syria cases there was a clear concern that the ICC was prioritising the pursuit of accountability at the expense of the political settlements of conflicts and the achievement of a lasting peace or, in English School terms, it was prioritising justice over, and at the expense of, order which the BRICS states could not tolerate. Moreover, recognising the failure of criminal justice and supranational responses to conflict resolution, the BRICS states emphasised the need for multilateral, state-led diplomatic solutions to peace and security issues.

The argument that Russia and China support the institution of international criminal justice but contest its implementation is further evidenced by their approach to the investigation of the use of chemical weapons in Syria. It was demonstrated how Russia and China initially supported the establishment of the JIM but then subsequently became critical of it and refused to extend its mandate on the basis that, in their view, it had become politicised and instrumentalised by the West in favour of their regime change agenda. Moreover, they refused to support the creation of another independent investigative mechanism as, in their view, it merely replicated the issues that they had raised with the JIM. However, as was explained, Russia and China proposed amendments to the P3 proposals in attempt to address their concerns about the working practices of the mechanisms which demonstrates continued support for justice and accountability. The Russian proposal for the new investigative mechanism, which was supported by China, did however grant the Security Council the authority to establish accountability, rather than the mechanism, which shows a desire on their part for political control over the process and a rejection of supranational legalism.

It has to be accepted, however, as identified in this chapter, that Russia's opposition to the ICC's intervention in Syria, which ultimately culminated in it vetoing the proposal referral of Syria to the ICC, and Russia's refusal to support continuing investigations into the use of chemical weapons in

the country, was partly informed by its military ambitions in Syria and, more latterly, a concern that its military activities and those of its ally, the Syria government, would be subject to scrutiny by the international stage and may have resulted in attempted prosecutions of crimes that had been committed. This does not, however, exclude Russia's decision-making also being informed by its concerns about the impact of Western interference and military intervention on Syria, a view that was shared by the other BRICS states who disclosed no interest in direct intervention in the country. As has been consistently argued, state decision-making can be informed by both material and normative concerns simultaneously.

The Syria case thus represents pluralist check on the triumphalism of the cosmopolitan approach to justice which had been developing over the past seventy years. It provided a stark reminder of its limits and that there are alternative approaches that are being advanced, which place a greater focus on political settlements and peace over accountability or, in other words, an approach to transitional justice which is pragmatic, pays greater deference to pluralist values, such as order, and is delivered within a state-solidarist governance framework which gives a more central role to the primary institutions of sovereignty and diplomacy. The next chapter examines in greater detail South Africa's decision to withdraw from the ICC, highlighting some of the key frustrations with the ICC's narrow, cosmopolitan approach to transitional justice and a reassertion by South Africa of the need for criminal justice to be pursued in accordance with a state-solidarist conception of international society which pays sufficient deference to pluralist values and primary institutions.

CHAPTER NINE

THE AL-BASHIR INCIDENT AND SOUTH AFRICA'S WITHDRAWAL FROM THE ROME STATUTE

9.1 Introduction

Following on from the examination of the three situation case studies in the previous two chapters - Sudan, Libya and Syria - this chapter examines one of the most significant and controversial events in the Court's short history, namely the withdrawal of South Africa from the Rome Statute, which occurred in October 2016. Despite being one of the leading founders of the Court and expressing strong support for its work at the beginning, including supporting the Court's interventions in Sudan and Libya, as highlighted in the course of this thesis, South Africa eventually took the drastic decision to withdraw. The decision was taken following the furore that erupted after South Africa failed to arrest Omar al-Bashir, the incumbent President of Sudan who is subject to an ICC arrest warrant, when he travelled to the country in June 2015. It was principally a response to the Court's handling of that situation, particularly its insistence that South Africa was under an obligation to arrest al-Bashir, a position with which it vehemently disagreed on the principal basis it would require it to violate the diplomatic immunity obligations that it owes to Sudan under general international law. As Mills and Bloomfield noted, '[d]espite initially being a strong ICC-supporter, the question of whether to action the al-Bashir arrest warrant proved troubling for South Africa'.[1] The decision was, however, also the product of various long-standing concerns that South Africa held about the ICC's intervention in Sudan specifically, but which it had also expressed previously in relation to other situations with which the Court was involved, as has been shown in the previous two chapters. More specifically, South Africa rejected the Court's expansive interpretation of the law and criticised its politicisation. It was also frustrated with the Court's hindering of a political settlement in Sudan and the Court's failure to listen to the concerns being raised by states about its conduct. The al-Bashir incident was therefore, in essence, the straw that broke the camel's back for South Africa. The issues relate both to the work of the Court and its relationship with the Security Council.

It is therefore argued that South Africa's actions should not be seen as a rejection of international criminal justice as a primary institution, nor the existence of a permanent international criminal court. Rather, South Africa is contesting the way in which criminal justice is implemented by the

[1] K. Mills and A. Bloomfield, 'African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm', (2017) 44(1) *Review of International Studies* 101-127, 117.

ICC, including its anti-impunity norm, with the objective of encouraging reform of the institution. This position was explicitly confirmed by Cyril Ramaphosa, a leading figure in the African National Congress (ANC), South Africa's current ruling party, and now South Africa's president, when he said that '[f]or the South African government, this is not about theory. It's about practice borne out of experience that we have gathered on the ground' and '[t]he withdrawal should be assumed as a critique in which the institution should function, rather than a rejection of its underlying values'.[2] More specifically, it is argued that South Africa is contesting the ICC where its actions fail to play sufficient deference to the pluralist institutions of international society, which it believes should be the basis of global political order. It can therefore be said that South Africa's position is principally driven by normative concerns. This is consistent with the positions adopted by the other BRICS states. However, the decision should also be seen in the context of South Africa's oscillating support for the AU, a product of its multifaceted identity and foreign policy, and its newly acquired identity as a rising power in international society as a member of the BRICS grouping, which has arguably emboldened the reformist tendencies of its ruling party. As will be shown, South Africa's decision to withdraw can also be partially attributed to material concerns, specifically a desire to maintain its position as a leader on the African continent and within the AU, and to be seen as a major player in the international arena capable of leading on the reform of the global governance architecture of international society.

In order to unpack and substantiate the argument articulated above, the chapter is structured as follows. First, it provides an analysis of the events leading up to South Africa's decision to withdraw from the Rome Statute and the trigger for that event, namely the failure of the South African government to arrest the Sudanese President when he entered the country to attend an African Union summit in June 2015 and the furore that followed it. This is followed by an examination of the reasons put forward by South Africa for its decision to withdraw from the Court and a discussion about how its views and actions are informed by its history, including its newly acquired status as a rising power and member of the BRICS grouping. Finally, the chapter reflects upon what the future may hold for South Africa's relationship with the ICC.

9.2. Al-Bashir's Escape from South Africa and the Fallout

The saga began in June 2015 when President al-Bashir travelled to Johannesburg to attend an AU Summit. Despite the ICC reminding South Africa that as a State Party to the Rome Statute it was

[2] P. Herman, 'Ramaphosa: SA not against ICC, but its methods', *news24*, 9 November 2016, available online at https://www.news24.com/SouthAfrica/News/ramaphosa-sa-not-against-icc-but-its-methods-20161109 (accessed on 31/03/2018).

obligated to arrest him if he entered its territory and surrender him to the Court,[3] al-Bashir left South Africa on the morning of 15 June from the remote Waterkloof Air Force Base, his name allegedly not appearing on the passenger manifold.[4] This was despite the fact that in addition to the ICC's warning, the South African High Court had issued an order prohibiting the Sudanese President leaving South Africa pending its final judgment as to whether the South African government was indeed obligated to arrest him.[5] The implication was that South Africa had allowed, if not actively assisted, in his dramatic escape, as has been reported in the media.[6]

The incident was followed by strident criticism of the South African government, from both within and outside the country, for failing to arrest al-Bashir, disregarding the High Court's decision and failing to discharge its treaty obligations under the Rome Statute.[7] There was also a series of both international and domestic legal proceedings during which the South African government defended its decision not to arrest al-Bashir. In the domestic proceedings, the case was considered finally by the Supreme Court of Appeal.[8] It endorsed the decision of the lower court which found against the government[9] and confirmed:

> [t]he conduct of the Respondents [South African government] in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations

[3] The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (6 July 2017), para.123 ('Decision on South Africa's Non-Cooperation, 6 July 2017').

[4] *The Minister of Justice and Constitutional Development* v *The Southern African Litigation Centre* (867/15) [2015] ZASCA 17 (15 March 2016) ('Supreme Court of Appeal Judgment'), para.7.

[5] Supreme Court of Appeal Judgment, para.5.

[6] *See,* for example, 'Zuma, ministers hatched plot to allow Al-Bashir's escape - report', *news24,* 19 June 2015, available online at https://www.news24.com/SouthAfrica/News/Zuma-ministers-hatched-plot-to-allow-Al-Bashirs-escape-report-20150619 (accessed on 26/04/2018); G. Jacobs, 'Zuma and his ministers plotted Omar al-Bashir's escape from South Africa', *The South African,* 20 June 2015, available online at - https://www.thesouthafrican.com/zuma-and-his-ministers-plotted-omar-al-bashirs-escape-from-south-africa/ (accessed on 26/04/2018); A. Monteiro, 'South African Government Denies Meeting to Plan Al-Bashir Escape', *Bloomberg,* 22 June 2015, available online at https://www.bloomberg.com/news/articles/2015-06-22/south-africa-government-denies-meeting-to-plan-al-bashir-escape (accessed on 26/04/2018). *See also,* F. Boehme, ''We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court', (2017) 11(1) *International Journal of Transitional Justice* 50-70, 65.

[7] *See,* for example, J. Sandler Clarke, 'South Africa's failure to arrest Omar al-Bashir 'is betrayal of Mandela's ideals'', *The Guardian,* 24 June 2015, available online at https://www.theguardian.com/global-development-professionals-network/2015/iun/24/south-africas-fai lure - arre st- al-bashir-not- in-keeping-mandelas-ideals (accessed on 26/04/2018); 'SA betrayed Darfur victims - Amnesty International', *news24,* 16 June 2015, available online at https://www.news24.com/SouthAfrica/News/SA-betrayed-Darfur-victims-Amnesty-International-20150616 (accessed on 26/04/2018); J. Malala, 'By letting Omar al-Bashir escape, South Africa has sided with tyrants', *The Guardian,* 16 June 2015, available online at https://www.theguardian.com/world/2015/iun/16/omar-al-bashir-escape-south-africa-african-union (accessed on 26/04/2018).

[8] Supreme Court of Appeal Judgment. The South African government had initially appealed the matter further to the Constitutional Court of South Africa but later withdraw the appeal following its decision to withdraw from the ICC. The South African Minister of Justice and Correctional Services, Mr Masutha, confirmed that South Africa's withdrawal from the Rome Statute of the ICC 'removes the necessity at least in so far as this aspect is concern of continuing with the appeal' - J. Maromo, 'Al-Bashir: Government will no longer go to ConCourt', *IOL,* 21 October 2016, available online at https://www.iol.co.za/news/al-bashir-government-will-no-longer-go-to- concourt-2082424 (accessed on 26/04/2018).

[9] In the High Court of South African (Gauteng Division, Pretoria) in the matter between The Southern Africa Litigation Centre and the Minister of Justice and Constitutional Development, Case No. 27740/2015 (Judgement), 24 June 2015.

> in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.[10]

In reaching this conclusion, the court considered that:

> when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.[11]

Proceedings also took place before the ICC to examine South Africa's non-cooperation, during which South Africa again sought to justify its decision not to arrest the Sudanese President.[12] The ICC rejected South Africa's arguments and in a Decision of 6 July 2017 confirmed that 'by not arresting Omar Al-Bashir while he was on its territory between 13 and 15 June 2015, South Africa failed to comply with the Court's request for the arrest and surrender of Omar Al-Bashir'[13] and 'its obligations under the Statute'.[14] In the course of the cooperation proceedings, South Africa took the drastic and unexpected decision to withdraw from the Rome Statute.[15] This was a quite remarkable turnaround given South Africa had played a leading role during the Rome Conference negotiations leading to the establishment of the ICC, had swiftly ratified the Rome Statute and consistently encouraged other states to do the same, and had, until recently, continued to speak in support of the Court in the face of contestation by other African states and the AU, as was discussed in the previous chapters. The reasons for South Africa's decision to withdraw will now be examined and, as will be demonstrated, they reveal its strong defence of state-solidarism in the face of the Court's creeping cosmopolitanism in its practice of international criminal justice.

9.3. South Africa's Non-Cooperation and Withdrawal: A Defence of State-Solidarism

South Africa's decision not to arrest al-Bashir and then to withdraw from the Rome Statute was the result of a number of related factors, pertaining both to the Court's actions and South Africa's role

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[10] Supreme Court of Appeal Judgment, 4.

[11] Supreme Court of Appeal Judgment, 68.

[12] The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Submission from the Government of the Republic of South Africa from the purposes of proceedings under Article 87(7) of the Rome Statute (17 March 2017) ('Submissions of South Africa for ICC Non-Cooperation Proceedings').

[13] The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (6 July 2017), para.123 ('Decision on South Africa's Non-Cooperation, 6 July 2017').

[14] Decision on South Africa's Non-Cooperation, 6 July 2017, 53.

[15] Notification of South Africa of Withdrawal from the Rome Statute of the International Criminal Court, 19 October 2016, UN Doc. C.N.786.2016.TREATIES-XVIII. 10 (Depository Notification). ('Notification of Withdrawal of South Africa').

and identity as a regional leader in Africa, a peacemaker on the continent and, more latterly, a rising power. These included a concern that the Court's intervention in Darfur was having a detrimental impact on the ongoing peace process, an issue that it had previously raised, albeit not in such critical terms. It was also increasingly incensed by the Court's continuing insistence South Africa, as well as other African States Parties, were obligated by the Rome Statute to arrest al-Bashir with, in its view, complete disregard for states' concurrent and competing obligations under international law to grant diplomatic immunity to sitting heads of state. It was also frustrated by the Court's refusal to engage with the issues that had been raised continuously by African States over a number of years. As the South African representative said to the Assembly of States Parties meeting in 2016, shortly following its decision to withdraw from the Court, '[t]he decision was made after very careful consideration all of relevant issues, including South Africa's obligations to the ICC, its recent interaction with the Court, its obligations towards the African Union and the role that South Africa plays to resolve conflicts and make peace on the African continent'.[16] It is emphasised in light of the above, and as will be discussed further below, that South Africa's decision not to arrest al-Bashir and then to withdraw from the Rome Statute was not about shielding the Sudanese President from the ICC for the purpose of promoting impunity or in self-interest, as has been claimed. There is no evidence that South Africa has become a state which seeks to protect tyrants. The situation is far more complex and nuanced, and requires an understanding of the country's history and foreign policy, which will now be examined in detail. The reliability of the interpretation put forward in that chapter as compared to the view that South Africa is merely seeking to protect tyrants in further supported by the detailed nature of South Africa's criticisms of the Court and the fact that concerns that it has raised are shared by other states as well as by academic commentators. This is a significant contribution to the existing literature on the basis that the ICC literature and international relations scholarship in general has overlooked considering non-Western agency in contesting and constructing global order, including institutions such as international criminal justice,[17] and has neglected to examine how local political and historical factors inform states' foreign policy in respect of international institutions.

9.3.1. The ICC's Expansive Interpretation of the Law

One of the reasons South Africa refused to arrest al-Bashir and subsequently withdrew from the Rome Statute was that it disagreed with, and objected to, the Court's interpretation of the relevant law which it held required South Africa to arrest al-Bashir and surrender him to the Court. South

[16] Opening Statement by Mr T. M. Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa to the General Debate at the Fifteenth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 16-24 November 2016', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP15/GenDeba/ICC-ASP15-GenDeba-SouthAfrica- ENG.pdf (accessed on 23/07/2018) ('South Africa ASP15 Statement'), 2.
[17] A. Acharya, *Constructing Global Order. Agency and Change in World Politics,* (CUP, 2018), 5-6.

Africa thought the ICC's interpretation of the law was too expansive and misapplied important aspects of public international law which confirmed the Sudanese President's immunity, and that in doing so the Court was advancing a cosmopolitan agenda at the expense of a state-solidarist conception of international society. South Africa therefore argued that 'it did not fail to comply with its obligations under the Rome Statute by not arresting and surrendering Omar Al Bashir'[18] and it 'remains under the obligation to respect the immunities of Heads of State, including Omar Al Bashir'.[19] This was the position that was also adopted by the AU.[20] The veracity of this interpretation of South Africa's position is demonstrated by the detailed and comprehensive nature of its criticisms of the ICC's interpretation of the law and by the fact that South Africa's interpretation of the law is supported by academic commentary.

More specifically, South Africa argued that the Court failed to correctly apply Article 98(1) of the Rome Statute. This provision precludes the Court from requesting the assistance of a State Party, such as South Africa, in for example apprehending and surrendering fugitives of the Court, if to do so would require that State Party to act in violation of international law obligations it owes to another state which is not party to the Rome Statute (a 'Third State'). South Africa argued that because it owes diplomatic immunity obligations to Sudan under international law, specifically not to arrest al-Bashir as its head of state when he is on South African territory, it should not have been required to arrest him when he visited for the AU summit, as to do so would require it to violate the diplomatic obligations that it owes to Sudan as a Third State.[21]

South Africa rejected the ICC's position that no violation of diplomatic immunity obligations would in fact occur because there is an exception to diplomatic immunity in circumstances where a person is being prosecuted before an international tribunal. It argued that no such exception exists before national authorities when arrest warrants are being enforced[22] and second, Article 27 of the Rome Statute does not remove a head of state's immunity at the national level where his or her state is not a party to the Rome Statute,[23] as to do so would impose obligations on Third States in violation of the Vienna Convention on the Law of Treaties.[24] South Africa's position is supported by academic writings. Dugard and Mattreaux argue that the 'ICC does not have the power to order or expect of

[18] South Africa Submissions for the ICC Cooperation Proceedings, para.52.
[19] South Africa Submissions for the ICC Cooperation Proceedings, para.52.
[20] *See,* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 OA2, The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir' (13 July 2018).
[21] This was the reasoning advanced by the AU in deciding that its members should not cooperate with the ICC in the arrest and surrender of al-Bashir. *See,* C. C. Jalloh, D. Akande and M. du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', (2011) 4(1) *African Journal of Legal Studies* 5-50, 25.
[22] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para.71.
[23] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para.72.
[24] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para.69.

a state party to disregard or ignore immunities attaching to an official of a third state'[25] and O'Keefe has explained in respect of the ICC's finding of non-cooperation on the part of Jordan in refusing to arrest al-Bashir, the legal issues in that case being the same as those in the South Africa situation, that 'President Al-Bashir was and is the head of state of Sudan, a state not party to the Statute. Jordan was consequently obliged under customary international law to accord him inviolability and immunity.'[26]

South Africa also contested the alternative basis on which the Court claimed al-Bashir did not benefit from immunity and that therefore, in the Court's view, there was no impediment to South Africa arresting him. South Africa argued that the Court was wrong to find that Security Council Resolution 1593 removed al-Bashir's immunity on the basis the Security Council has no power to waive his immunity and, even if it did have that power, it did not exercise it either explicitly or implicitly on this occasion.[27] As it explained in its submissions to the ICC in respect of the non-cooperation proceedings, 'the Head of State immunities remain intact as there has been neither an express waiver nor subsequent State practice to warrant the conclusion that such immunities have been waived',[28] and that in these circumstances the Court is not permitted to request the cooperation of South Africa as this would be in violation of Article 98(1) Rome Statute. This position, which was made previously by other African states and supported by Russia and China, had been defended in the academic commentary.[29] South Africa also noted that while Resolution 1953 mandates Sudan's cooperation with the Court, it only 'urges' other states to cooperate, and thus the ICC's position that the Resolution trumps states' obligations to grant al-Bashir immunity is misconceived.[30] Additionally, South Africa argued that the ICC should not have required it to arrest Bashir because he had immunity under the Host State Agreement which confers immunity on delegates attending the AU Summit in South Africa.[31]

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[25] Minister of Justice and Constitutional Development v Southern African Litigation Centre in the Constitutional Court of South Africa, Case No. CCT 75/16, Written Submissions of the First Amici Curiae: John Dugard and Guenael Mettraux (13 October 2016), para.31 ('Submissions of the First Amici Curiae: John Dugard and Guenael Mettraux').

[26] The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09-326, Request by Professor Roger O'Keefe for leave to submit observations on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"' (12 March 2018) ('Request by Professor Roger O'Keefe for leave to submit observations'), para.4. For concurring opinions, *see* A. G. Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', (2013) 12(3) *Chinese Journal of International Law* 467-508, 487-500; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', (2009) 7(2) Journal of International Criminal Justice 315-333, 323; D. Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law. A Perspective from International Law', (2015) 13(3) *Journal of International Criminal Justice* 1027-1047, 1041-1045.

[27] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para.85-89.

[28] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para.93.

[29] Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 475-477. *See also,* Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law', 1041-1045; Submissions of the First Amici Curiae: John Dugard and Guenael Mettraux, paras.22-23; Request by Professor Roger O'Keefe for leave to submit observations, para.6; D. Jacobs, 'The Frog that Wanted to be an Ox: The ICC's Approach to Immunities and Cooperation' in C. Stahn (ed), *The Law and Practice of the International Criminal Court,* (OUP, 2015), 295.'

[30] South Africa Submissions for the ICC Cooperation Proceedings, paras.95-99.

[31] South Africa Submissions for the ICC Cooperation Proceedings, paras.75-80.

South Africa also highlighted, and became increasing frustrated by, the Court's inconsistent and unclear interpretation of its legal position. It lamented 'there is no clarity on the nature and scope of the provisions of Article 98...and its relationship with Article 27, which is reflected by the inconsistencies in the findings of the Pre-Trial Chambers' previous decisions relating to the failure of States Parties to arrest al-Bashir.[32] South Africa highlighted that two of the Court's previous cooperation decisions 'are vastly different from one another and both are flawed in significant respects'[33] and following the ICC's Decision in respect of South Africa's non-cooperation, it said 'the Pre-Trial Chamber ruling raised new issues and further clouded...South Africa's concerns regarding its obligations vis-a-vis the Court, specifically in respect of the relationship between Articles 27 and 98 of the Rome Statute.'[34] The criticism raised by South Africa has also been made in the academic commentary. Schabas said of one of the ICC's previous offending cooperation decisions, '[i]t reads like a lawyer's brief, in that it is entirely one-sided...[it] does not address the difficulties or the arguments that go against its position'.[35] Similarly, Tladi has argued that the 'Pre-Trial Chamber's decision, in its eagerness to enforce cooperation, failed to adequately address the legal question about cooperation, in particular the exception in Article 98 of the Rome Statute'.[36] Moreover, there has been criticism of the Court's expansive interpretation of the law. Kiyani, for example, argues that 'the ICC's jurisdictional claims over al-Bashir are tenuous at best...the Court's position can only be sustained by relying on controversial and peripheral restatements of public international law'.[37]

In light of the ICC's insistence that its interpretation of the law was correct, South Africa was of the view that it would continue to face competing obligations: on the one hand to arrest al-Bashir as required, the Court says, by the Rome Statute and, on the hand, to respect al-Bashir's immunity under customary international law and treaties, as it believed it was obligated to do. As it explained in its notification of withdrawal that was submitted to the UN Secretary General:

> [i]n 2015, South Africa found itself in the unenviable position where it was faced with

[32] Notification of Withdrawal of South Africa, 2.
[33] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para.51.
[34] Opening Statement by Adv. Tshililo Michael Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa, General Debate: Sixteenth Session of the Assembly of States Parties of the International Criminal Court, New York, 4 -14 December 2017, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP16/ASP-16-ZA.pdf (accessed 23/07/2018) ('South Africa ASP16 Statement').
[35] W. Schabas, 'Obama, Medvedev and Hu Jintao may be Prosecuted by the International Criminal Court , Pre Trial Chamber Concludes', available online at http://humanrightsdoctorate.blogspot.co.uk/2011/12/obama-medvedev-and-hu-iintao-may-be.html (accessed on 23/07/2018).
[36] D. Tladi, 'When the Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic', (2014) 7(3) *African Journal of Legal Studies* 381-398, 392. For a more detailed critical analysis of the ICC's cooperation decisions in relation to the Darfur situation, *see* D. Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98', (2013) 11(1) *Journal of International Criminal Justice* 199-221.
[37] Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', 469. *See also,* Jacobs, 'The Frog that Wanted to be an Ox: The ICC's Approach to Immunities and Cooperation', 281-304.

> conflicting international law obligations...to arrest President Al Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement, and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965 as well as the obligation under customary international law which recognises the immunity of sitting heads of state.[38]

South Africa was thus, in its opinion, required to choose between competing obligations and it opted to uphold al-Bashir' s immunity with the consequence that it had to withdraw from the Rome Statute. As du Plessis and Mattreaux argue, when South Africa found itself having to make a stark choice 'the South African government effectively opted out [of the Rome Statute]'.[39] Grant and Hamilton have similarly explained that by June 2015 South Africa has prioritised immunity over ending impunity 'evidenced by the government's complicity in Bashir's visit to South Africa to attend the AU Summit.'[40]

It is important to note, however, that South Africa's decision to withdraw from the Court was not borne out of a desire to support impunity from a normative perspective, rather it was contesting the Court's legal position. South Africa rejected what is perceives as ideological dogmatism on the part of the Court in its interpretation and application of the law. More specifically, South Africa rejected the Court's creeping cosmopolitan in respect of the way in which it is has, in South Africa's view, pursued the objective of accountability, in determining that states are obligated to arrest al-Bashir, by adopting an expansive interpretation of the relevant legal rules including incorrectly disregarding well-established international law rules concerning diplomatic immunity. In other words, South Africa contests the ICC's pursuit of justice at the expense of order in its interpretation of the law, therefore defending a state-solidarist conception of international society, on the basis diplomatic immunity provisions are, as was previously explained, a manifestation of the pluralist primary institutions of sovereignty and diplomacy, and upholds the value of order in international society. It is argued, however, that South Africa would not have wished to have been in a position where it was forced to make a binary choice and to have to withdraw from the Rome Statute. This is reflected in its description of its position as 'unenviable' and 'invidious', and its attempts to reform the Rome Statute, which were refused.

The view that the ICC's legal position in respect of al-Bashir is driven by cosmopolitan dogmatism, as advanced by South Africa and reinforced by its decision to withdraw from the Rome Statute, has implications for the Court's legitimacy. This is because there is an expectation that courts will apply

[38] Notification of Withdrawal of South Africa, 2.
[39] M. du Plessis and G. Mattreaux, 'South Africa's Failed Withdrawal from the Rome Statute', (2017) 15(2) *Journal of International Criminal Justice* 361-370, 365.
[40] J. A. Grant and S. Hamilton, 'Norm dynamics and international organisations: South Africa in the African Union and the International Criminal Court', (2016) 54(2) *Commonwealth and Comparative Politics* 161-185, 174.

the law accurately and not attempt to advance a normative agenda. This is demonstrated by provision of robust analysis in judgments in order to substantiate the conclusions reached, which involves engaging thoroughly with all the legal arguments raised by the parties. As Tladi argues, '[t]he result of the failure to address the legal question undermines the legitimacy of the Court and creates the risk that the Court will be seen as a political tool who judgments are grounded in political expediency rather than in law.'[41]

As a result of concerns about the ICC's interpretation of the law and its ability to provide an objective assessment, in January 2018 the AU announced it was seeking an Advisory Opinion from the International Court of Justice (ICJ) on the question of the relationship between Articles 27 and 98 of the Rome Statute, given what it thought was an unsatisfactory decision by the ICC in respect of South Africa's failure to arrest al-Bashir which dealt directly with this question. In its Decision, the AU expressed 'deep concern with the decision of the Pre-Trial Chamber II of the ICC on the legal obligation of the Republic of South Africa to arrest and surrender President Al Bashir of The Sudan, which is at variance with customary international law.'[42] It further requested that 'the Africa Group in New York immediately place on the agenda of the United Nations General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of the immunities of a Head of State'.[43] The request was made by Kenya on behalf of the AU in July 2018. In explaining its request it referred to the ICC's inconsistent interpretation of the law.[44] This reflects a diminished trust and confidence in the Court.

9.3.2. The ICC's Narrow Approach to Justice

One of the main reasons behind South Africa's decision to withdraw from the Court was its belief that the anti-impunity provisions of the Rome Statute which require ICC States Parties to arrest and surrender sitting heads of state subject to an arrest warrant to the Court, such as al-Bashir, hinders the peaceful resolution of conflicts and also prevents South Africa from discharging its role as a

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[41] D. Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98', (2013) 11(1) *Journal of International Criminal Justice* 199-221, 201, 221. *See also,* more generally, J. d'Aspremont and E. De Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise', (2011) 34(2) *Fordham Journal of International Law* 190, 215.

[42] Decision on the International Criminal Court, Adopted at the Assembly of the Union, Thirtieth Ordinary Session, 28-29 January 2018, Addis Ababa, Ethiopia, AU Doc. EX.CL/1068(XXXII). For a more detailed analysis of this development including some of the challenges the AU may face in achieving this objection *see,* A. Mudukuti, 'Immunity, Accountability and Politics - the AU's bid for an ICJ Advisory Opinion', *International Law Under Construction: shaping sustainable societies, Blog of the Groningen Journal of International Law,* 25 June 2018, available online at https://groiil.org/2018/06/25/immunity-accountability-and-politics-the-aus-bid-for-an-icj -advisory-opinion/ (accessed on 24/07/2018).

[43] Decision on the International Criminal Court, AU Doc. EX.CL/1068(XXXII).

[44] Request for the inclusion of an item in the provisional agenda of the seventy-third session. Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and others senior officials. Letter dated 9 July 2018 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary General, 18 July 2018, UN Doc. A/73/144.

peacemaker on the African continent. In other words, South Africa was frustrated by the Court's dogmatic pursuit of its narrow, cosmopolitan approach to transitional justice which privileges retributive justice over peace. As Kemp notes, South Africa's withdrawal document 'convey[ed] the Government's view...the Rome Statute unleashed contradictory forces that do more harm than good; that international criminal justice embodied by the ICC presents a binary choice between peace and justice.'[45]

The ICC's pursuit of a narrow, cosmopolitan conception of justice in the form of prosecuting and punishing those accused of gross human rights violations and violations of humanitarian law, including sitting heads of state, excludes all other mechanisms of transitional justice and does not take into account its impact upon or contribution to the peaceful settlement of conflicts through political negotiations This sits in contradiction to South Africa's more holistic and pragmatic approach to conflict resolution which promotes greater flexibility in terms of the role of retributive justice, including how, when and where criminal prosecutions are deployed as a tool of peace-making. South Africa repeatedly asserted, justice and peace must be pursued in conjunction. This is a view that it has expressed on many occasions previously and is the product if its transition from apartheid where retributive justice was marginalised in favour of truth and reconciliation, and the achievement of a comprehensive political settlement, as discussed in Chapter Four. South Africa therefore became increasingly frustrated with the ICC's persistent attempts to secure al-Bashir's presence in The Hague, which it considered to be detrimental to the possibility of securing a political settlement and peaceful resolution to the conflict in Darfur. As one ANC Minister explained, 'South Africa's own experience pointed to the need for "confidence" to be built up between parties, and that having Bashir indicted would have "jeopardised" the peace process' because:

> [f]rom a mediation point of view, the attempt to superordinate the justice element over all others serves counterproductive ends, as the belligerents have no incentive to settle disputes for fear that they will locked up the day after the resolution of the conflict. It was appreciation of this reality ... may I repeat this: It was appreciation of this reality that informed the ANC to make necessary accommodations to the apartheid leaders who, by the way, had we taken a different route, some of the members of this House [in the opposition parties] would not be sitting where they are sitting right now [because they would be in jail].[46]

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[45] G. Kemp, 'South Africa's (Possible) Withdrawal from the ICC and the Future of Criminalization and Prosecution of Crimes Against Humanity, War Crimes and Genocide Under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations', (2017) 16(3) *Washington University Global Studies Law Review* 411-438, 434.

[46] Speech by Lindiwe Zulu, Minister of Small Business Development, in the Debate on Matter of Public Importance: The Implications of the Attendance and Departure of President Omar Al-Bashir from the African Union Summit in South Africa, National Assembly, Cape Town, 23 July 2014, available online at http://www.politicsweb.co.za/politics/albashir-history-will-absolve-us--lindiwe-zulu (accessed on 23/07/2018).

In its notification of withdrawal, South Africa emphasised that 'from its own experience [it] has always expressed the view that to keep peace one must first make peace' and, furthermore, that:

> [i]n complex and multi-faceted peace negotiations and sensitive post-conflict situations, peace and justice must be viewed as complementary and not mutually exclusive. The reality is that in an imperfect world we cannot apply international law in an idealistic view that strives for justice and accountability and thus competing with the immediate objectives [of] peace, security and stability.[47]

This view was reiterated by South Africa during its speech to the general debate at the Sixteenth Assembly of States Parties (ASP) meeting in 2015 and, additionally, during the 2016 meeting, where its representative explained that '[a]s South Africa we have learned from our own history of crimes against humanity...in promoting reconciliation and avoiding conflict, which in some instances may require action outside of judicial processes. The ICC cannot be the only platform through which we resolve all matters.'[48] This and the above quoted exerts reflect South Africa's view the ICC is wrong to pursue criminal justice without sensitivity as to how it affects political processes and negotiations aimed at settling conflicts, a point it has raised in various occasions in relation to the Court's interventions in Sudan and Libya, and one that is shared by the other BRICS states. Therefore, rather than a rejection of criminal justice outright, it reflects a desire for justice through law to be pursued by the ICC with much greater deference to the work of states engaging in diplomacy to achieve political settlements. This is a state-solidarist position which balances the values of order and justice, and pluralist and cosmopolitan visions of international society.

In addition to its concern that the ICC's approach to justice hindered conflict resolution, South Africa was also frustrated that its membership of the Rome Statute prevented it from making a contribution to the resolution of conflicts, specifically in Darfur, and therefore from fulfilling its role as a regional leader and a peace-maker in Africa, which is a key part of its foreign policy identity. It has been said that 'South Africa's track record of contributing to finding lasting and peaceful solutions to the challenges faced by the continent speaks for itself[49] and, moreover, that 'South Africa's history necessitated that it play an important, active and constructive role on the African continent. The ideological underpinnings of South Africa's engagement in peacekeeping in the African continent are underscored by the belief that to keep peace, one must first make peace.[50]

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[47] Notification of Withdrawal of South Africa, 2.
[48] South Africa ASP16 Statement.
[49] Speech by Lindiwe Zulu, The Implications of the Attendance and Departure of President Omar Al-Bashir from the African Union Summit in South Africa.
[50] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para. 100. *See also*, 'SA formally withdrawing from the ICC', *South African Government News Agency,* 21 October 2016, available online at https://www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc (accessed on 12/06/2018) - '[q]uizzed about South Africa's rationale of choosing the Diplomatic Immunities and Privileges Act over the ICC obligations, Minister Masutha said South Africa's wish is to remain a key player in conflict resolution in Africa. '

In its notification of withdrawal, South Africa confirmed it 'is of the view that to continue to be a State Party to the Rome Statute will compromise its efforts to promote peace and security on the African Continent.'[51] This is particularly pertinent in light of South Africa's substantial involvement in the attempts to find a solution to the ongoing conflict in Sudan.[52]

More specifically, South Africa pointed to the provisions of the Rome Statute which require it to arrest sitting heads of state and other senior government officials subject to an arrest warrant, such as al-Bashir, as the principal impediment to it exercising its role. This is because, in its view, these provisions hinder South Africa in engaging with such individuals, a mechanism it believes is integral to the political resolution of ongoing conflicts. Mr Masutha, the Minister for Justice and Correctional Services of the government of South Africa, said that 'in exercising its international relations with foreign countries, particularly with countries in which serious conflicts occur, South Africa has been hindered by the Implementation of the Rome Statute of the ICC Act.'[53] Further, he said that 'the implementation of the Rome Statute of the International Criminal Court Act 2002 is in conflict and inconsistent with the provisions of the Diplomatic Immunities and Privileges Act 2001', the domestic legislation in South Africa, and that his country wishes:

> to give effect to the rule of customary international law, which recognises the diplomatic immunity of heads of state and others in order to effectively promote dialogue and peaceful resolution of conflicts wherever they may occur, particularly on the African continent.[54]

More recently, South Africa explained that in June 2015 it 'found itself in the unenviable position where it was faced with conflicting obligations: obligations contained in the Rome Statute [to arrest and surrender al-Bashir] which are in conflict with customary international law pertaining to immunity for sitting heads of state'[55] and, when referring to its decision to withdraw, it stated:

> [t]he Government's resolve in this regard remains unchanged because of the active role that South Africa continues to play in promoting dialogue and peaceful resolution of conflicts in Africa and elsewhere. South Africa's continued membership to the Rome Statute, as it is currently interpreted and applied, carries with it the potential risk of undermining its ability to carry out its peace-making mission efforts in Africa, and elsewhere.[56]

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[51] Notification of Withdrawal of South Africa, 3.
[52] Boehme, ''We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court', 68 - 'South Africa has long been involved in peacemaking efforts in the Sudan'.
[53] Department of Justice and Constitutional Development of the Republic of South Africa, Briefing to the media by Minister Michael Masutha on the matter of the International Criminal Court and Sudanese President Omar Al Bashir, 21 October 2016, available online at http://www. justice.gov.za/m statements/2016/20161021 -ICC.html (accessed on 27/04/2018).
[54] *Ibid*.
[55] South Africa ASP15 Statement, 2.
[56] South Africa ASP15 Statement, 2.

As is evident, South Africa chose not to arrest al-Bashir and, subsequently, to withdraw from the Rome Statute because it felt the obligations the Rome Statute imposed on South Africa and other states to arrest al-Bashir hindered the resolution of the conflict in Darfur, and would do so in other places too, and it prevented the country from discharging its historic role as a peace-maker on the African continent. South Africa therefore chose to uphold the customary law rule of head of state immunity over the anti-impunity norm in the Rome Statute; the former rule, in South Africa's view, facilitating conflict resolution and South Africa's role in it. However, it must be noted that in withdrawing from the Rome Statute, South Africa was clear that it was not turning its back on justice but rather preferred greater flexibility in when and how justice was delivered, particularly in a manner that was sensitive and complementary to achieving political settlements, and it felt this could not be delivered by the ICC and its continued membership of the institution. Its position can thus be described as state-solidarist, one which advocates pluralist limits to cosmopolitan progress or, in practical terms, a more pragmatic approach to the implementation of international criminal justice which seeks to better balance the objectives of peace and justice.

9.3.3. The ICC's Refusal to Listen

South Africa's frustrations with the ICC were also the result of its perception that the Court had failed to listen, take heed and engage proactively with the legitimate and important concerns that it had raised on a number of occasions in relation to the Court's interventions in Sudan and, particularly, its demands that al-Bashir be arrested. Moreover, it had become frustrated with the Court's refusal to take seriously the problems it and other states identified with the relationship between Articles 27 and 98 of the Rome Statute, and its proposal to make amendments to the Statute to address this issue. As South Africa explained, its 'experience with the ICC left it with the sense that its fundamental right to be heard was violated'.[57] This echoes sentiments that have been expressed by other African states, including Kenya, whose President, Uhuru Kenyatta, said that '[e]very plea we have made to be heard before the court had landed upon deaf ears'.[58] The fact that South Africa attempted to engage with the ICC and bring about change to the Statute is evidence of the correctness of the interpretation that South Africa has specific issues with the Rome Statute and the way in which the Court operates, and that these are the reasons for its decision to withdraw from the Court.

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[57] Department of Justice and Constitutional Development of the Republic of South Africa, 'South Africa's Withdrawal from the Rome Statute of the International Criminal Court', available online at http://www.dirco.gov.za/milan italy/newsandevents/rome statute.pdf (accessed 12/06/2018). *See also*, Notification of Withdrawal of South Africa, 2.

[58] Speech by His Excellency Hon. Uhuru Kenyatta, C.G.H., President and Commander in Chief of the Defence Forces of the Republic of Kenya at the Extraordinary Session of the Assembly of Heads of State and Government of the African Union, Addis Abba, Ethiopia, 12 October 2013, available online at http://www.scribd.com/doc/175602445/President-Uhuru-Kenyatta-s-Speech-during-the-Extraordinary-Session-of-the-Assembly-of-Heads-of-State-and-Government-of-the-African-Union-Addis-Ababa (accessed 23/07/2018).

One particular source of such frustration for South Africa was the nature of the Article 97 consultations which took place in advance of al-Bashir's arrival in South Africa. The South African government requested such consultations, following the ICC issuing a reminder to South Africa that it was under an obligation to arrest al-Bashir and surrender him to the Court if he entered its territory,[59] in order to highlight the difficulty it would face in discharging such obligations, as is the proper use of the provision, and it intended to engage in the process genuinely and in good faith.[60]

However, it felt that the process was not a meaningful one. It was of the view the Court was not engaging with its concerns and merely reiterated the legal position that it had adopted and explained to other African States Parties, despite the legality and appropriateness of this position having been robustly challenged on numerous occasions. During the meeting, South Africa was informed that 'there is no ambiguity in the law and that the Republic of South Africa is under an obligation to arrest and surrender...Al Bashir' and that 'there exists no impediment at the horizontal level' regarding his arrest and surrender.[61] This position was confirmed by way of a Decision of the Court issued on 13 June 2015,[62] the day al-Bashir arrived in South Africa. As was noted in its statement attached to its notification of withdrawal, 'South Africa is disappointed that the process, that in our view should clearly have been a diplomatic process was turned into a judicial process.'[63] Furthermore, South Africa stated that it 'objects in the strongest terms to the manner in which its request for consultation in terms of Article 97 of the Statute was dealt with by the Court' and further noted the Court erred 'by treating the request for consultations directed at the Registry and intended to be a diplomatic and political process, as a quasi-judicial process' .[64] This also reflects the rejection of solidarist progress where the rigidity of law replaces the flexibility afforded by diplomatic solutions, and where supranational institutions dictate to states. It also criticised the process as lacking in structure and purpose,[65] and said that '[i]n not affording South Africa an opportunity to be represented in a proper forum and to be properly heard, South Africa's fundamental right to justice was violated.'[66] The ANC later noted '[t]here is no national interest value for South Africa to continue being a member of the ICC. The manner that we were treated. is consistent with the cheeky arrogance that Africa has experienced in its interaction with the ICC.'[67]

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[59] Decision on South Africa's Non-Cooperation, 6 July 2017, para.6.
[60] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para.34.
[61] The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Case No. ICC-02/05-01/09, Decision following the Prosecutor's request for an order further clarifying that the Republic of South African is under an obligation to immediately arrest and surrender Omar Al Bashir, Pre-Trial Chamber II (13th June 2015), para. 5-7 ('South Africa Obligation Clarification Decision').
[62] South Africa Obligation Clarification Decision.
[63] Notification of Withdrawal of South Africa, 2.
[64] Submissions of South Africa for the ICC Non-Cooperation Proceedings, para.29
[65] Submissions of South Africa for the ICC Non-Cooperation Proceedings, 14-15.
[66] Submissions of South Africa for ICC Non-Cooperation Proceedings, paras.46-47.
[67] African National Congress, NGC 2015 Discussion Documents, ANC International Relations: A Better Africa in a Better and Just World', available online at http://www.anc.org.za/docs/discus/2015/relationsz.pdf (accessed on 12/03/2018) (ANC, 'A Better Africa in a Better and Just World, NCG 2015 Discussion Documents''), 175.

South Africa was also frustrated by the reluctance of the States Parties to engage constructively with its request to critically examine the application and implementation of Articles 97 and 87 of the Rome Statute and, more specifically, to develop clear rules and procedures for Article 97 consultations and to provide an interpretation of 'the nature and scope of article 98 and its relationship with article 27.'[68] In respect of the latter point, South Africa explained that:

> there appear to be fundamental differences on the issue of immunities of Heads of State and Government, and on the relationship between Article 98 and Article 27, between the Pre-Trial Chambers of the Court with equal status, and that a full understanding of the nature and scope of Article 98 and its relationship with Article 27 should be developed.[69]

It further noted that '[t]he legitimacy of the Court as an impartial judicial institution requires that clarity be obtained as to the nature and scope of the provisions of Article 98, and its relationship with Article 27'.[70] In 2016, after South Africa deposited its notification of withdrawal, it explained that while 'valid concerns raised in respect of Article 97 by South Africa at the previous ASP have now been recognised…On Article 98 and its relationship with Article 27, there unfortunately seems to be reluctance among States Parties to give favourable consideration to South Africa's concerns'.[71] Its representative, Mr Masutha, further explained during a specially convened session on Africa and its relationship with the ICC at ASP15, in relation to its concerns about Articles 27 and 98 'we have implored the court to address this challenge, which would allow us to continue participating in the ideals that want to be advanced. We still struggle to understand the difficulties of this house in reaching out to us. We fail to understand where the difficulty is.[72] South Africa was also frustrated by the unwillingness of States Parties to accept, what it considered to be, necessary amendments to the Rome Statute to reflect its weaknesses but also shifting values. South Africa said that '[t]he Rome Statute cannot be regarded as static. It must be amended to address weaknesses in it and enhance the fair and efficient functioning of the ICC itself within a changing and dynamic global environment.'[73] This also demonstrates South Africa's commitment to the Court and its desire to improve it. Its decision to leave can thus be seen as a call for change rather than an outright rejection of the institution and what it represents in terms of the fight against impunity.

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[68] Request by South Africa from the inclusion of a supplementary item in the agenda of the fourteenth session of the Assembly titled 'Application and Implementation of Article 97 and Article 98 of the Rome Statute, Annex I of List of supplementary items requested for inclusion in the agenda of the fourteenth session of the Assembly, 27 October 2015, ICC Doc. ICC-ASP/14/35, p.2 ("Request by South Africa from the inclusion of a supplementary item").

[69] Request by South Africa from the inclusion of a supplementary item, 3, para.17.

[70] Request by South Africa from the inclusion of a supplementary item, 3, para.16.

[71] South Africa ASP15 Statement, 2-3.

[72] Statement by Mr T. M. Masutha, Minister of Justice and Correctional Services, Republicof South Africa to the SpecialSession on Africa and the ICC at the Fifteenth Meeting of the Assembly of States Parties of the International Criminal Court, TheHague,16-24 November 2016 (notes on file with the author).

[73] South Africa ASP15 Statement, 3.

In contrast to previous meetings, there was a general feeling among states at ASP16 that the concerns raised by South Africa and other African States Parties now had to be taken seriously, and this was clear from the statements made during the general debate.[74] For example, New Zealand said '[t]his session is a chance for us to engage in an open, honest and respectful dialogue about how to ensure that the Court works effectively' and the withdrawal of three African States Parties 'underlines the critical importance of being much better at listening to, and engaging with, African states on issues of concern to them.'[75] Similar opinions were expressed by the United Kingdom,[76] Australia,[77] Norway,[78] and Canada,[79] amongst others. However, it should be noted that at the same time as committing to dialogue with African nations, states also emphasised the need to maintain the integrity of the Statute, particularly the provision which denies immunity to sitting heads of state. This highlights the seemingly intractable clash of views in respect of the prioritisation of peace over justice, which reflects the bigger clash of normative conceptions of international society.

Brazil, like the Western states, expressed its disappointment and frustration in the decision of the three African states to withdraw from the Rome Statute but noted it sees this 'as an opportunity to engage in constructive dialogue'[80] and that it should 'strengthen our resolve...for an assessment of the structural challenges faced by the Rome Statute system, as well as avenues to overcome them.'[81] It also explained that 'Article 27 is a very positive development in ICL but we understand calls for an exchange of values on this matter while the core values of the Statute are preserved'.[82] This reflects Brazil's commitment to the ICC and the no immunity norm, and it desire to preserve the

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[74] The author had numerous informal conversations with various people from academia and civil society during ASP16 and was told on numerous occasions that the feeling at this meeting was different to that in the previous year in that there was an express recognition of African states concerns and genuine desire to confront them and engage with states constructively.

[75] New Zealand Statement Delivered by Carl Reaich, Head of Delegation, 15th Session of the ASP to the Rome Statute of the International Criminal Court, 17 November 2016', available online at https ://asp.icc-cpi. int/iccdocs/asp docs/ASP15/GenDeba/ICC-ASP15-GenDeba-NewZealand-ENG.pdf (accessed on 23/07/2018).

[76] United Kingdom, 'Baroness Anelay speech at International Criminal Court Assembly of States Parties', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP15/GenDeba/ICC-ASP15-GenDeba-UK-ENG.pdf (accessed 23/07/2018), 1. *See also,* Statement by the United Kingdom to the Special Session on Africa and the ICC at the Fifteenth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 16-24 November 2016 (notes on file with the author).

[77] Statement by Australia to the 15th Session of the Assembly of States Parties to the International Criminal Court by H.E. Dr Brett Mason, Wednesday 16 November 2016, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP15/GenDeba/ICC-ASP15- GenDeba-Australia-ENG.pdf (accessed on 23/07/2018).

[78] Statement by Margit Tveiten, Director General, Ministry of Foreign Affairs, Norway, 15th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP 15/GenDeba/ICC-ASP 15-GenDeba-Norway-ENG.pdf (accessed on 23/07/2018), 2.

[79] Statement by The Honourable Stephane Dion, Minister of Foreign Affairs, Global Affairs Canada, Fifteenth Assembly of States Parties to the Rome Statute International Criminal Court, The Hague, 16th November 2016, available online at https://asp.icc- cpi.int/iccdocs/asp docs/ASP 15/GenDeba/ICC-ASP 15-GenDeba-CANADA-ENG-FRA.pdf(accessed on 23/07/2018), 2-3.

[80] Statement by Brazil to the Special Session on Africa and the ICC at the Fifteenth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 16-24 November 2016 (notes on file with the author).

[81] Statement by H.E. Ambassador Piragibe dos Santos Tarrago, Head of the Delegation of Brazil to the XV Assembly of States Parties, The Hague, 17 November 2016, available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP15/GenDeba/ICC-ASP15-GenDeba-Brazil-ENG.pdf (accessed on 21/07/2018), 1. ('Brazil ASP15 Statement')

[82] Statement by Brazil to the Special Session on Africa and the ICC at the Fifteenth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 16-24 November 2016 (notes on file with the author).

integrity of the Rome Statute. There is, interestingly, no strong sense from Brazil that it shares South Africa's concerns and its position is in fact more aligned with those of the Western nations. In stark contrast, China spoke strongly in support of South Africa's position. Its representative noted 'serious concerns about the Court's operation still remain which is reflected in the decisions of some state to withdraw'. He also explained that 'it is more urgently needed that the court listens to the concerns and addresses them in a more responsive manner and carries out its work with utmost prudence, and balancing the needs of respecting states sovereignty and fighting impunity'.[83]

We are now also perhaps seeing the Court respond to the concerns that have been raised by South Africa and other African and non-African states, and their criticism that they have for a long time been ignored. After the AU announced that it was seeking an Advisory Opinion from the ICJ on the relationship between Articles 27 and 98 of the Rome Statute, essentially a ruling on al-Bashir's immunity, on 29 March 2018, the Appeals Chamber of the ICC invited international and regional organisations, including the UN and the AU, to submit observations on the issue of al-Bashir's immunity in relation to its consideration of whether Jordan, like South Africa, had failed to discharge its obligations under the Rome Statute by not arresting al-Bashir in its territory.[84] Given that the decision follows so shortly after the AU's decision to seek an Advisory Opinion from the ICJ, this appears like an attempt by the ICC to genuinely take account of the views of African and other affected states. As Jalloh has similarly recognised, '[a] great strategic move on the part of the ICC appeals chamber. In effect, it is saying to the AU, we want to listen to you. Your immunity concerns matter to us.'[85] Moreover, it is perhaps relevant the Presiding Judge on the appeal bench is Chile Eboe-Osuji, a Nigerian national, who has just been elected ICC President,[86] and he may therefore be seeking to develop better relations between the ICC and African States Parties.[87] The AU responded to the invitation, describing it as 'refreshing' and said '[w]e look forward to further opportunities to engage with the ICC'.[88]

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[83] Statement by China to the Special Session on Africa and the ICC at the Fifteenth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 16-24 November 2016 (notes on file with the author). *See also*, Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the Assembly of States Parties to the Rome Statute of the ICC, Mr. Ma Xinmin, Deputy Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (New York, 7 December 2017), available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP16/ASP-16-CHI.pdf (accessed 21/07/2018).

[84] Prosecutor v. Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09, Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence) (29 March 2018).

[85] Twitter, Charles Jalloh, 31/03/2018 at 00.57

[86] ICC Press Release, 'New ICC Presidency elected for 2018-2021', 11 March 2018, available online at https://www.icc- cpi.int/Pages/item.aspx?name=pr1367 (accessed on 31/03/2018).

[87] Wayamo Foundation, 'Building Bridges and Reaching Compromise: Constructive Engagement in the Africa-ICC Relationship', available online at http://www.wayamo.com/wp-content/uploads/2018/05/ICC-Africa-Paper May-2018-1.pdf (accessed on 23/05/2018), 17.

[88] Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 OA2, The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir' (13 July 2008), 3, para.3.

9.3.4. The Politicisation of the Court

South Africa's decision to withdraw from the Rome Statute was also prompted by the country's frustration with the Security Council in the context of its relationship with the Court. As Mills has noted, 'the ICC and the Bashir arrest warrant are tied into much broader discussions about the proper role of global and regional institutions, and the undemocratic nature of the Security Council.'[89] More specifically, South Africa expressed frustration at the Security Council's refusal to consider and act upon the request issued repeatedly by the AU, which South Africa supported from the beginning, to defer the proceedings against al-Bashir pursuant to Article 16 of the Rome Statute on the basis that such a refusal threatened the potential to achieve a political settlement to the Darfur conflict. In its notification of withdrawal it explained '[t]he Security Council has also not played its part in terms of Article 16 of the Rome Statute where the involvement of the ICC will pose a threat to peace and security on the African continent.'[90] Furthermore, South Africa subsequently expressed regret that the Security Council failed to act upon multiple requests for a deferral of the proceedings.[91] This contributed to South Africa's sense that it was being ignored in raising its concerns about the ICC's intervention in Darfur.[92]

It is, however, also the product of a more fundamental unease about the control that the Security Council is able to exercise over the Court, particularly because of the Council's unrepresentative nature and the control that powerful states exercise within it which, it says, affects detrimentally the credibility and the legitimacy of the Court. As Tladi argues, 'the ICC's relationship with the Security Council is certainly a key element of the tension' between the ICC and the AU.[93] South Africa has asserted there are 'perceptions of inequality and unfairness in the practice of the ICC that...emanate[s] from the Court's relationship with the Security Council'.[94] This is particularly an issue because three of the five permanent members of the Council are not States Parties to the Rome Statute, yet they are able to influence the Council's interventions over the Court's work and can subject other non-States Parties, such as Sudan, to its jurisdiction.[95] As South Africa has said, '[q]uestions on the credibility of the ICC will persist so long as three of the five permanent members

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[89] K. Mills, '"Bashir is Diving Us": Africa and the International Criminal Court', (2012) 34(2) *Human Rights Quarterly* 404-447, 444.
[90] Notification of Withdrawal of South Africa, 1.
[91] South Africa ASP15 Statement and South Africa ASP16 Statement.
[92] Ralph and Gallagher argue that the AU's contestation of the ICC is the product of exclusionary decision-making practices within the Security Council whereby the concerns raised by the AU in relation to the Sudan situation and, particularly, the issuing of an arrest warrant for al-Bashir, such as those made by South Africa, for which the AU sought a deferral, were not given due consideration and African states felt as though decisions were being taken for them rather than with them in relation to sensitive situations on their continent.
See, J. Ralph and A. Gallagher, 'Legitimacy faultlines in international society: The responsibility to protect and prosecute after Libya', (2015) 41(3) *Review of International Studies* 553-574, 564.
[93] Tladi, 'When the Elephants Collide it is the Grass that Suffers', 382.
[94] Notification of Withdrawal of South Africa, 1-2. *See also,* South Africa ASP15 Statement, 3.
[95] K. M. Clarke, 'The Legal Politics of the Article 16 *Decision*: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise', (2014) 7(3) *African Journal of Legal Studies* 297-319, 310.

of the Security Council are not State Parties to the Statute.'[96] Moreover, it was noted 'the fact that permanent members of the UN Security Council that are not signatories to the Rome Statute have unfettered powers with regard to referring cases to the ICC' was one of the principal reasons South Africa initiated the process of withdrawing its membership of the Rome Statute.[97] It was also said by the ANC that '[i]t is regrettable that the power relations in the Rome Statute remained skewed in favour of the powerful western powers who were given untrammelled power through an unrepresentative structure like the UNSC.'[98] Particular concern was expressed that states were using the Court to effect regime change in Africa, concerns it had previously raised in relation to the ICC's intervention in Libya and the proposed referral of the situation in Syria to the Court, it noting the ICC has 'allowed itself to be influenced by powerful non-member states. We perceive it as tending to act as a proxy instrument for these states. to persecute African leaders and effect regime change on the continent.[99] The West was particularly singled out for criticism in this regard, the ANC noting 'the West dominates the ICC through the influence they command and huge financial contributions that make to its budget. In return, they use the ICC as their tool for regime change in Africa.'[100]

9.3.5. South Africa's Criticism of the Court's Practice

As has been demonstrated, South Africa's transition from ardent supporter to primary contester of the Court was neither a dramatic and inconceivable shift from one extreme to another, despite how it may appear, and nor was it, as Navi Pillay and Angela Mudukuti argue,[101] an attempt by South Africa to dismantle the international criminal justice system for the sole purpose of protecting al-Bashir.[102] Rather it was the result of the increasing materialisation of many concerns that South Africa had raised over the years in respect of the Court's intervention in Darfur and other situation countries, and the continued failure of the ICC and its States Parties to heed and respond to those concerns. South Africa's issue with the ICC is thus not about its existence as a secondary institution

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[96] Notification of Withdrawal of South Africa, 1.

[97] African National Congress, 'ANC NGC 2015 Resolutions on International Relations', available online at http://www.anc.org.za/content/anc-ngc-2015-resolutions-international-relations (accessed 12/03/2018), para.2.8-2.9.

[98] African National Congress, 'International Relations Discussion Document, 5 th National Policy Conference, 30 th June - 5 th July', available online at http://www.anc.org.za/sites/default/files/National%20Policy%20Conference%202017%20International%20Relations.pdf (accessed 12/03/2018), 5 and 11 ('ANC, 'International Relations Discussion Document, 5th National Policy Conference'').

[99] ANC, 'A Better Africa in a Better and Just World, NCG 2015 Discussion Documents', 175.

[100] ANC, 'A Better Africa in a Better and Just World, NCG 2015 Discussion Documents', 175.

[101] Navi Pillay is a South African jurist and held the position of the United Nations High Commissioner for Human Rights from 2008 to 2014. Angela Mudukuti is an international criminal lawyer and a member of the Wayamo Foundation, and she played a leading role in bringing the case against the South African government in the High Court in respect of its duty to arrest Omar al-Bashir as a lawyer at the Southern African Litigation Centre.

[102] N. Pillay and A. Mudukuti, 'South Africa and the ICC: Dismantling the international criminal justice system to protect one individual', *Daily Maverick,* 19 June 2018, available online at https://www.dailymaverick.co.za/article/2018-06-19-south-africa-and-the-icc-dismantling-the-international-criminal-iustice-system-to-protect-one-individual/#.WypLUi-B2qA (accessed on 24/07/2018).

or what it seeks to achieve - the implementation of international criminal justice - but rather about the way in which it delivers it and how the Court functions. Moreover, South Africa's actions were borne out of a desire to reform the institution not to destroy it, as seen by its continued engagement with the Court.

More specifically, while it is accepted a shift has occurred and South Africa is now resisting and contesting the anti-impunity norm in relation to the situation in Darfur, we must be clear this is not a complete rejection of the norm in its substance and purpose but rather it is a challenge to how and when it is applied, including that it should not have a detrimental effect on peaceful conflict resolution efforts nor should it displace inter-state diplomatic immunity obligations. As Mr John Jeffery, Deputy Minister of Justice of the government of South Africa, said 'while South Africa still believes in the Court's underlying accountability norm, its current institutional manifestation 'is not the Court we signed up for.'[103] To adopt Mills and Bloomfield's words, South Africa is resisting the dominant approach to the implementation of the anti-impunity norm, as adopted by the ICC, as a norm 'antipreneur'.[104] However, it is doing so in an attempt to reform the implementation process to better balance the competing values of justice and accountability, and peace and order. It is therefore perhaps best described as a pragmatic norm reformer. This challenges the argument advanced by Grant and Hamilton that South Africa's response to the al-Bashir incident shows 'the executive branch of the South African government is moving away from Mandela's foreign policy pillars of promoting human rights'.[105] Rather it is challenging the protection of human rights, through the implementation of international criminal law, where it challenges and undermines pluralist primary institutions and values.

This is demonstrated by its past commitment to international justice and the ICC, and by the fact it continues to engage with the Court despite its decision to withdraw. As it said in its speech to the Assembly of States Parties meeting in 2016, '[t]he decision to withdraw was not taken lightly. South Africa played a significant role in the negotiations for the Rome Statute, and was one of the first States to adopt implementing legislation' and it also noted 'South Africa will not become a safe haven for fugitives, especially those who have committed atrocity crimes [and]...will ensure that there is no impunity from prosecution for crimes against humanity'.[106] Furthermore, in its withdrawal statement, South Africa confirmed that it is:

[103] Boehme, ''We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court', 68.
[104] Mills and Bloomfield argue that South Africa's position towards the anti-impunity norm specifically has 'changed significantly' and the country has shifted from being a norm entrepreneur to an antipreneur - K. Mills and A. Bloomfield, 'African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm', (2017) 44(1) *Review of International Studies* 101-127, 108 and 117.
[105] Grant and Hamilton, 'Norm dynamics and international organisations', 177.
[106] South Africa ASP15 Statement, 2.

committed to the protection of human rights and the fight against impunity which commitment was forged in the struggle for liberation against the inhumanity of colonialism and apartheid. We condemn in the strongest terms human rights violations and international crimes wherever they may occur and we call for the accountability of those responsible. This commitment is reflected in significant role that South Africa played in the international negotiations on the establishment of the International Criminal Court (ICC) and was one of the first signatories to the Rome Statute of the International Court (the Rome Statute). The Rome Statute was domesticated in South Africa with the adoption of the Implementation of the Rome Statute of the International Criminal Court thus reaffirming South Africa's commitment to a system of international justice.

9.4. South Africa's Competing Identities and its Status as a Rising Power

In addition to its criticisms of the Court being informed by its normative state-solidarist position, South Africa's actions can also be explained by its commitment to regional solidarity and a desire to remain a leader on the African continent, particularly given that the AU shares South Africa's position that al- Bashir retains his immunity from arrest and surrender, as noted above. This is a material concern for South Africa which is in addition to the legal and normative concerns outlined above. Moreover, the ANC sees the AU as an important vehicle for advancing its interests, and the interests of other African states and the Global South more generally, on the world stage.[107] The ruling party is also concerned with promoting and maintaining African unity. As Oved Bapela, the head of the ANC's international relations subcommittee, said, '[w]e had to choose between the unity of Africa and the ICC and we chose Africa'[108] and similarly, John Jeffery said 'had Bashir been arrested during the summit, there would have been 'extreme consequences in the region.''[109] Boehme has noted that '[t]hese statements speak to a deep concern about the repercussions of an al-Bashir arrest for South Africa's relations with other African countries.'[110] South Africa's prioritisation of African unity and its standing within the AU over the ICC can also be seen in its statements justifying its decision to withdraw. For example, it said that 'South Africa is a proud member of the African Union' and at ASP 2017 it stated that:

> [i]n giving effect to its obligations as a member of the African Union and in pursuance of the African Union Constitutive Act, South Africa's diplomatic efforts over the past two decades have focused on conflict resolution, prevention and mediation to carry out our commitment to ensure peace, human security and stability on the continent. When South Africa agreed to host the AU Summit in 2015 to which President Al Bashir was invited on behalf of Sudan as a full and legitimate member of the AU, it was guided primarily by a

[107] ANC, 'International Relations Discussion Document, 5th National Policy Conference', 5.
[108] Boehme, ''We ChoseAfrica': South Africa and the Regional Politics of Cooperation with the International Criminal Court',67.
[109] Boehme, ''We ChoseAfrica': South Africa and the Regional Politics of Cooperation with the International Criminal Court',68.
[110] Boehme, ''We ChoseAfrica': South Africa and the Regional Politics of Cooperation with the International Criminal Court',68.

> commitment to the advancement of the African Union's vision of Agenda 2063 which promotes the notion of the creation of "An integrated, prosperous and peaceful Africa, driven by its own citizens, representing a dynamic force in the international arena."[111]

Boehme recently argued, '[d]uring al-Bashir's visit, South Africa was forced to choose between loyalty to two norms and international organizations'[112] and that '[i]n trying to cement its leading position in the AU - long critical of the ICC for its prosecution focus on Africa - South Africa was willing to flout its obligations to the ICC by not arresting al Bashir.'[113] Similarly, Grant and Hamilton argued that '[t]he impetus for one set of norms gaining primacy over another set is that South Africa is anticipating a tipping point in AU opinion regarding the ICC'.[114] This has arguably been successful. Isike and Ogunnubi argue 'the decision has bolstered South Africa's image as a continental leader' and it also 'scored very critical points in its representation of Africa's interests globally'.[115] It is therefore the case that South Africa's position is informed by both normative and material concerns.

South Africa's shift from ardent supporter to leading contester of the ICC, citing in justification of this change the importance of African unity and the AU, should be seen in the wider context of South Africa's oscillating and ambivalent foreign policy, particularly on human rights, since the end of apartheid. As Mills and Borer explain, South Africa's patchy record on support for human rights, despite its image as a human rights champion, is the result of the ANC struggling to form and adopt a coherent normative identity which harmoniously combines the ideologies of anti-imperialism, Afro-centerism and liberal commitments to human rights, which have informed South Africa's identity and thus its foreign policy, and to grapple with competing priorities to Africa, the AU and human rights protection.[116] Furthermore, they argue 'the norms embodied in Mbeki's African Renaissance came into conflict with each other, with African unity and anti-imperialism (reflecting their roots in the antiapartheid struggle) frequently winning out over democracy and human rights (which are similarly rooted in the antiapartheid struggle).'[117] This has continued in relation to South Africa's relationship with the ICC. Boehme argues '[s]imilar to the country's broader foreign policy, South Africa's engagement with the Court has oscillated between its proclaimed support for accountability and its obligation and solidarity with fellow African

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[111] South Africa ASP16 Statement.
[112] Boehme, ''We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court', 57.
[113] Boehme, ''We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court', 52.
[114] Grant and Hamilton, 'Norm dynamics and international organisations', 176.
[115] C. Isike and O. Ogunnubi, 'The Discordant Soft Power Tunes of South Africa's Withdrawal from the ICC', (2017) 44(1) *Politikon* 173-179, 173-174.
[116] T. A. Borer and K. Mills, 'Explaining Postapartheid South African Human Rights Foreign Policy: Unsettled Identity and Unclear Interests', (2011) 10(1) *Journal of Human Rights* 76-98.
[117] Borer and Mills, 'Explaining Postapartheid South African Human Rights Foreign Policy: Unsettled Identity and Unclear Interests', 95.

governments',[118] as it appeals to both constituencies where their views conflict. While Kemp has argued 'the ANC's historical commitment to internationalism, humanitarianism, and the quest to end impunity for violations of humanitarian and human rights norms, is currently in question' and that '[t]he ANC's decision to withdraw from the ICC is the most important exhibit',[119] it is suggested here that it is not their commitment to criminal justice as a primary institution and mechanism of transitional justice that is in question but rather their commitment to the manner in which it is implemented by the ICC, as has been argued throughout this chapter and the thesis more widely.

South Africa's decisions can also be attributed to its identity as a rising power in international society and its ruling party's self-identification as a liberation movement.[120] The ANC's identity as a liberation movement strongly influences the construction of South Africa's foreign policy interests and ambitions. One aspect of this is its reformist tendencies which encompasses a desire to promote change at the international level, particularly to achieve a more egalitarian world order and a fairer representation for the developing world in global governance, which has its legacy in anti-colonialism and anti-apartheid struggles. As the ANC said, 'South Africa's participation in the system of global governance has always been about advocating for transformation from within, with an aim to serve the interests of the small poor countries of the South and the Continent.'[121] It is part of the ANC's 'Progressive Internationalism'.[122] These reformist values can be seen in the attempts to reform the Rome Statute, as described. These reformist tendencies have arguably been emboldened by South Africa's accession to the BRICS group as all of the members share such reformist aspirations, particularly in relation to what they view as Western-centric global governance institutions, and it is part of the group's objectives.

South Africa's decision not to arrest al-Bashir and to withdraw from the Rome Statute can be viewed as an attempt to force reform of the ICC; firstly, to have it take more account of alternative, non-Western centric, approaches to conflict resolution which seek to better balance the objectives of the political settlement of conflicts and delivering criminal justice, and second, to have it pay greater deference to the rules of public international law which regulate inter-state relations, specifically rules concerning diplomatic immunity both to advance the peaceful resolution of conflicts but also to restrict the expansive interpretation of international law by the ICC. Moreover,

[118] Boehme, ''We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court', 64.
[119] Kemp, 'South Africa's (Possible) Withdrawal from the ICC', 423.
[120] Kemp, 'South Africa's (Possible) Withdrawal from the ICC', 422-423.
[121] ANC, 'International Relations Discussion Document, 5th National Policy Conference', 11.
[122] African National Congress, 'Policy Discussion Document, March 2012', available online at http://www.anc.org.za/docs/discus/2012/internationalb.pdf (accessed 12/03.2018), 6, 20-22.

given the centrality of its criticisms of the Security Council in its decision to withdraw, this can also be seen as an effort to advance its long-standing objective of securing Security Council reform,[123] an objective that it shared with Brazil and India.

9.5. The Reversal of the Withdrawal and South Africa's Future in the Court

In another strange turn of events, on 7 March 2017 South Africa withdrew its notification of withdrawal from the Rome Statute.[124] It did so following a judgment from the Gauteng High Court of South Africa which decided that the government's withdrawal was invalid and unconstitutional because the approval of the national parliament had not been obtained before the notification of withdrawal was deposited with the UN.[125] Despite this setback, the government confirmed that its position remains the same and that South Africa will withdraw from the Rome Statute in accordance with the correct procedure. The Justice Minister, Mr Masutha, said that 'the country still intends to pull out of the International Criminal Court'[126] and the International Relations Minister, Maite Nkoana-Mashabane, reiterated South Africa's plan to withdraw, noting '[w]e are waiting for [the] parliamentary process. There is no change of the ruling party on this decision'.[127] In addition, during South Africa's statement to ASP16, it was confirmed the government's resolve to withdraw from the ICC 'remains unchanged'[128] It subsequently tabled the International Crimes Bill which, if adopted, would repeal the Implementation of the Rome Statute of the International Criminal Court Act, allowing the government to withdraw from the Court lawfully,[129] and most recently, on 30 May 2018, the government introduced the Bill into parliament.[130] This represented a decisive step forward in the re-withdrawal process.

South Africa has, however, previously committed to ongoing engagement with the ICC, despite its

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[123] *See,* Isike and Ogunnubi, 'The Discordant Soft Power Tunes of South Africa's Withdrawal from the ICC', 177.
[124] United Nations Depository Notification, Rome Statute of the International Criminal Court, Rome, 17 July 1998, South Africa: Withdrawal of Notification of Withdrawal, 2 March 2017, UN Doc. C.N.121.2017.TREATIES-XVIII.10 (Depository Notification), available online at https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf (accessed 16/03/2018).
[125] Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening), North Gauteng High Court, Case. (83145/2016) [2017] ZAGPPHC 53, 22 February 2017, available online at http ://www. saflii.org/za/cases/ZAGPPHC/2017/53.pdf (accessed on 16/03/2018). For an analysis of the judgment and the legal issues involved, *see* M. du Plessis and G. Mattreaux, 'South Africa's Failed Withdrawal from the Rome Statute', (2017) 15(2) *Journal of International Criminal Justice* 361-370.
[126] B. Bateman, 'Minister Masutha Studying Court Ruling on ICC Exit, *Eyewitness News,* available online at http://ewn.co.za/2017/02/22/iudge-icc-exit-notice-violated-constitution (accessed 23/07/2018).
[127] N. Ncana., 'SA still determined to continue with the ICC withdrawal', *The Citizen,* 12 June 2017, available online at https://citizen.co.za/news/south-africa/1539999/sa-still-fixed-icc-withdrawal/ (accessed on 23/07/2018).
[128] South Africa ASP16 Statement.
[129] L. Dentlinger, 'SA's Withdrawal from ICC Back on Table', *Eyewitness News,* available online at http://ewn.co.za/2017/12/13/sa-s-withdrawal-from-icc-back-on-table (accessed on 23/07/2018). *See also,* B. van der Merwe, 'South Africa's International Crimes Bill - an instrument of impunity?', *ICJ African Blog,* 13 December 2017, available online at https://www.icjafrica.com/single-post/2017/12/13/South-Africas-International-Crimes-Bill---an-instrument-of-impunity (accessed 16/03/2018).
[130] Republic of South Africa, International Crimes Bill (As *introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 41309 of 8 December 2017*), B37-2017, available online at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B37-2017 International Crimes.pdf (accessed on 12/06/2018).

decision to withdraw, which creates the potential for its continued membership. During the discussion on Africa's relationship with the ICC at ASP15, the South African representative said 'we continue to remain open to engagement in any formal structure of this forum to find solutions to this problem'.[131] Moreover, the fact South Africa has continued to engage with the Court, such as by attending the annual ASP meetings, demonstrates the importance and legitimacy of the Court, for if it was neither important nor legitimate, South Africa would have simply ignored the Court and distanced itself completely from the institution. It has been suggested that 'South Africa can and should play a leading role in galvanising a compromise on the issues raised in the wake of Bashir's visit. It is in an ideal political and legal position to do so.'[132] It has also been noted that South Africa's decision to withdraw places it 'in a better position to push for the ratification of the Malabo Protocol',[133] which provides for the creation of a criminal chamber of the African Court of Justice and Human Rights,[134] a mechanism that the AU has proposed as a replacement for the ICC.[135] However, despite a government representative explaining that South Africa must now ratify the Malabo Protocol and the ANC confirming that '[i]t is fundamental that the AU and its member states urgently finalise efforts to enable the African Court on People and Human Rights to discharge its expanded mandate',[136] South Africa has not yet signed the document and there is no indication that it intends to do so. This is perhaps indicative of its uncertain position and its unwillingness to sever all ties, symbolically and literally,[137] with the ICC.

Furthermore, it is important to note that anti-ICC efforts were being advanced under the leadership of Jacob Zuma. Zuma has, however, now been replaced as leader of the ANC and as the president of South Africa by Cyril Ramaphosa.[138] This creates further uncertainty as to whether the re-withdrawal will occur because, as du Plessis has noted, 'Ramaphosa campaigned domestically on

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[131] Statement by Mr Masutha to the Debate on Africa's Relationship with the ICC at the Fifteenth Assembly of States Parties Meeting (notes on file with author).

[132] Wayamo Foundation, 'Building Bridges and Reaching Compromise: Constructive Engagement in the Africa-ICC Relationship', available online at http://www.wayamo.com/wp-content/uploads/2018/05/ICC-Africa-Paper May-2018-1 .pdf (accessed 23/05/2018), 17.

[133] Isike and Ogunnubi, 'The Discordant Soft Power Tunes of South Africa's Withdrawal from the ICC', 176.

[134] P. Herman, 'ANC reaffirms intent to withdraw from ICC', *news24,* 6 December 2017, available online at https://www.news24.com/SouthAfrica/News/anc-reaffirms-intent-to-withdraw-from-icc-20171206 (accessed 16/03/2018).

[135] For an analysis of the proposed criminal chamber of the Africa Court of Justice and Human Rights, *see* C. B. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', (2011) 9(5) *Journal of International Criminal Justice* 1067-1088.

[136] ANC, 'International Relations Discussion Document, 5th National Policy Conference', 11.

[137] It is uncertain whether a state could be both a State Party of the Rome Statute and also a party to the Criminal Chamber of the African Court of Justice and Human Rights, or whether the new African institution will operate under the ICC's complementarity provisions allowing membership of both institution. For a more detailed analysis, *see* M. du Plessis, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', *EJIL Talk,* 27 August 2012, available online at https://www.eiiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of- justice-and-human-rights-jurisdiction-over-international-crimes/ (accessed 16/03/2018).

[138] J. Burke, 'Cyril Ramaphosa chosen to lead South Africa's ruling ANC party', *The Guardian,* 18 December 2017, available online at https://www.theguardian.com/world/2017/dec/18/cyril-ramaphosa-chosen-to-lead-south-africas-ruling-anc-party (accessed 16/03/2018).

a ticket of accountability and respect for the rule of law, the obvious parallel - and resounding confirmation of this commitment globally - would be to emulate that commitment at the international level'. He went on to say that '[t]here can be no easier or more profound means of doing so than by re-dedicating to the work of the ICC'.[139] Reinold argues that given Ramaphosa's previously expressed support for the ICC and the domestic challenges facing South Africa, a re-withdrawal under the new president is unlikely.[140] In a sign that the development may bear fruit, in July 2018, after the International Crimes Bill was introduced into parliament, the international relations minister, Lindiwe Sisula, explained that South Africa may change its mind and not withdraw from the Rome Statute. More specifically, Sisula said the decision to withdraw was taken 'under the previous administration', that '[a] final decision had not yet been taken' and, importantly, that 'perhaps we might be married to staying in there if only to make sure that our voices are heard in the ICC', which is further evidence of its desire to bring about reform of the institution. Sisula also hinted at divisions within the ANC in respect of its policy towards the ICC withdrawal which also goes to explaining its flip-flopping.[141] While such a development would not invalidate the argument made here, as the concerns raised about the ICC under the Zuma administration would no doubt continue to be advanced by the Ramaphosa government in its efforts to secure reform of the Court, it demonstrate how a change in administration can result in a change of tack as to how such concerns are addressed, from the outside or from within.

9.6. Conclusion

The decision of South Africa to withdraw from the ICC, even though that decision was reluctantly later reversed with the consequence that South Africa continues to be a member of the Court, at least for the time being, was a very significant event in the Court's short history, bringing to the forefront questions about the institution's legitimacy which had been rumbling in the background for many years, particularly following the ICC's somewhat controversial interventions in Sudan and Libya. Furthermore, when combined with the withdrawals of the Gambia, a decision also later reversed, and that of Burundi, as well as the refusal of states to give the Court a role in the Syrian conflict and the strident criticism directed at it by the AU, which included the ever looming threat of an orchestrated mass withdrawal of African States Parties from the Rome Statute regime, the Court appeared to be in a period of crisis and its future sustainability called into question.

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[139] M. du Plessis, 'Ramaphosa Can Renew South Africa Leadership by Recommitting to the ICC', *Chatham House*, 6 February 2018 - https://goo. gl/omQPR4 (accessed on 23/07/2018).

[140] A. Reinold, 'African Union v International Criminal Court: episode MLXIII(?)', *EJIL Talk*, 23 March 2018, available online at https://www.eiiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/ (accessed 31/03/2018).

[141] C. du Plessis, 'SA might flip-flop on decision to withdraw from ICC - Lindiwe Sisulu', *news24*, 4 July 2018, available online at https://m.news24.com/SouthAfrica/News/sa-might-flip-flop-on-icc-decision-lindiwe-silulu-20180704 (accessed 10/07/2018).

Moreover, this 'crisis' was compounded by the decision of another of the BRICS states, namely Russia, to withdraw its signature from the Rome Statute in November 2016,[142] citing concerns about the Court's lack of impartiality and bias. Russia said it 'has been consistently advocating prosecuting those responsible for the most serious international crimes' and that it 'was at the origins of the Nuremberg and Tokyo tribunals' which 'were the reasons why Russia voted for the adoption of the Rome Statute and signed it'. But, it went on to explain that 'the Court failed to meet the expectations to become a truly independent, authoritative international tribunal' and that '[t]he work of the Court is characterized in a principled way as ineffective and one-sided', criticisms that Russia has levelled against the Court in respect of its interventions in Sudan and Libya, and the reasons it gave for vetoing the proposed referral of Syria to the ICC. It also noted 'during the 14 years of the Court's work it passed only four sentences having spent over a billion dollars' and said 'the demarche of the African Union which has decided to develop measures on a coordinated withdrawal of African States from the Rome Statute is understandable.'[143] Russia complained such lack of independence had compromised the investigations of the Court in both Georgia and Ukraine.[144] Whilst the withdrawal of the Russian signature was not nearly as significant as the South African withdrawal from the Statute, given that Russia was never a State Party, it is still symbolically important as it represents a rejection of the ICC by a major rising power and thus adds fuel to the claims about the institution's legitimacy deficit.

The purpose of this chapter was therefore to better understand why this crisis was occurring, using the case study of South Africa and its tumultuous relationship with the ICC as an example, and drawing upon the context of the wider views expressed by the BRICS states in relation to the Court's interventions in Darfur and Libya, and the failed referral of Syria to the ICC, examined in the previous two chapters. As has been demonstrated, the decision of South Africa to withdraw from the Court was not prompted by a rejection of international criminal justice as an institution of

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[142] Statement by the Russian Foreign Ministry', 16 November 2016, available online at http://www.mid.ru/ru/foreign policy/news/-/asset publisher/cKNonkJE02Bw/content/id/2523566?p p id=101 INSTANCE cKNonkJE02Bw& 101 INSTANCE cKNonkJE02Bw languageId=en GB (accessed on 18/04/2018) and S. Sayapin, 'Russia's Withdrawal of Signature from Rome Statute Would not Shield its Nationals from Potential Prosecution at the ICC', *EJIL Talk,* 21 November 2016, available online at https://www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc/ (accessed 18/04/2018).

[143] Statement by the Russian Foreign Ministry, 16 November 2016, available online at http://www.mid.ru/ru/foreign policy/news/-/asset publisher/cKNonkJE02Bw/content/id/2523566?p p id=101 INSTANCE cKNonkJE02Bw& 101 INSTANCE cKNonkJE02Bw languageId=en GB (accessed 18/04/2018).

[144] Statement by the Russian Foreign Ministry; Comment by the Information and Press Department regarding the International Criminal Court Prosecutor's request for the Court's authorization to open an official investigation into the August 2008 events in South Ossetia, 15 October 2015, available online at http://www.mid.ru/en/web/guest/kommentarii predstavitelya/-/asset publisher/MCZ7HQuMdqBY/content/id/1859488 (accessed on 18/04/2018); Briefing by the Foreign Ministry Spokesperson Maria Zakharova', 29 January 2016, available online at http://www.mid.ru/en/web/guest/foreign policy/news/- /asset publisher/cKNonkJE02Bw/content/id/2039123#7 (accessed on 18/04/2018); 'Foreign Minister Sergey Lavrov's remarks and answers to media questions following a G20 ministerial meeting and the Munich Security Conference', 18 February 2017, available online at http://www.mid.ru/en/web/guest/meropriyatiya s uchastiem ministra/-/asset publisher/xK1BhB2bUjd3/content/id/2648523 (accessed on 18/04/2018); Briefing by Foreign Ministry Spokesperson Maria Zakharova, 17 November 2016, available online at http://www.mid.ru/en/web/guest/foreign policy/news/-/asset publisher/cKNonkJE02Bw/content/id/2529854 (accessed on 18/04/2018).

international society or as an element of transitional justice and conflict resolution, and nor was it an attempt to bring down the ICC. Rather, it was a rejection of how international criminal justice was being implemented by the ICC and an attempt to bring about reform of the institution and its working practices. More specifically, South Africa contested how the ICC's pursuit of criminal justice was, in its view, undermining pluralist institutions of international society, thus threatening its normative vision of global governance. It opposed what it considered to be the Court's expansive interpretation of the law which it thought sacrificed long-standing diplomatic immunity rules in the pursuit of justice. Given that diplomatic immunity rules are a manifestation of the pluralist institution of sovereignty and seek to uphold the pluralist institution of diplomacy, South Africa's choice of immunity over accountability, reflects its defence of a state-solidarist vision of international society in the face of cosmopolitan-solidarist progress or, in other words, where criminal justice is pursued in a way that pays sufficient deference to pluralist primary institutions.

South Africa also believed the Court's pursuit of al-Bashir and its insistence that states arrest and surrender him, hindered the resolution of the conflict in Sudan and prevented South Africa from discharging its role as conflict-mediator on the African continent. South Africa was in essence rejecting the pursuit of justice at the expense of peace, a view that it and other BRICS states had expressed in the past. It was demonstrated South Africa rejects the narrow, cosmopolitan approach to justice, dogmatically pursued by the ICC, and instead supports pragmatic transitional justice efforts in which retributive justice is pursued in conjunction with the political settlement of conflicts and the creation of lasting peace and, most importantly, where the former do not threaten the latter.

Furthermore, South Africa's decision to withdraw was encouraged by the sense that the legitimate concerns that it and other states had raised about the ICC's actions over the years were consistently ignored. It believed that it was being unfairly dictated to and this frustration was compounded by its concern that the Court was politicised and controlled by powerful states, including Russia and China, through the ICC's relationship with the UN Security Council, which ignited memories of colonial interference in Africa that it was keen to contest. Finally, and related to that last point, this chapter demonstrated how South Africa's withdrawal must be seen in the context of, and can partially be explained by, its ruling party's, the ANC, self-identification as an African liberation movement and its newly acquired status as a rising power. The ANC's identity manifests in both its reformist tendencies and African solidarity, which were emboldened by its membership of the BRICS group which shares its reformist ambitions and is a champion of regionalism and the Global South, and it is clear that both its desire to effect reform of the Rome Statute regime and to demonstrate solidarity with its fellow African states lay behind its decision to withdraw.

Lastly, it should be noted that South Africa's commitment to international criminal justice and the ICC is also evidenced by its continued engagement with the Court and its clear reluctance to drive forward the re-withdrawal process. Despite its decision to withdraw, South Africa has continued to attend the annual ASP meetings, it has not ratified the Malabo protocol which would lead to the operationalisation of an African criminal court, and it has vacillated in its decision to re-withdraw which is evidenced by the contradictory statements and actions emerging from the country. This is perhaps the result of Ramaphosa becoming the South African President but only time will reveal what South Africa's future relationship with the Court will be, and we wait in anticipation.

CONCLUSION

A. The Problematique, Context and Contributions of the Thesis

This thesis principally sought to examine the relationship between the BRICS states and the ICC, and it did so using an English School theoretical framework. More specifically, it sought to understand how the BRICS states have contributed to the establishment of the ICC, the actions that they had taken towards it, and the views expressed in relation to its practice of international criminal justice. The purpose of this was to address a clear gap in the existing literature concerning the engagement of rising powers, particularly the BRICS states, with international organisations generally and the ICC more specifically, with a view to better understanding their contribution to the construction of global order and whether they pose a threat to the continued existence or future cosmopolitan evolutionary trajectory of liberal international society.

The research project was prompted by a desire to understand the contestation faced by the ICC, primarily from the BRICS states, following its controversial intervention in Libya in 2011 and the subsequent refusal of the Security Council to refer the situation in Syria to the ICC in 2014, which was the result of Russian and Chinese vetoes. Moreover, during that period there was a threat of a mass withdrawal of African States Parties from the Court, the incumbent president of Sudan continued to travel around the world despite being indicted for genocide and crimes against humanity by the Court, and concerns were mounting that after ten years of work and well over a billion of dollars having been spent only two defendants had been convicted. Questions were therefore beginning to be asked about whether the fledgling institution was in crisis and whether it had a long-term future as part of the global governance architecture of international society.

The wider context of the research project is the ongoing debate about whether liberal international society is in crisis and the implications of this for the future of global governance. This is particularly the result of the ascendance of rising powers, such as the BRICS, on the basis they share a different normative vision of international society from liberal Western states and which is contrary to the cosmopolitan trajectory upon which international society has been evolving. This issue is compounded by the contemporaneous decline of Western political influence in international affairs. The literature on the topic, including on rising powers generally and within the English School more specifically, had however tended to address the issue quite generally. It has examined the nature of rising powers, how their visions of international society differ to those held by Western states and what this meant for the future of global political order, as was examined in Chapter One. But while this research is important, and has provided the basis for this project, it lacked specificity

and detailed empirical grounding. This issue was articulated by Duncombe and Dunne who said:

> there is no shortage of scholars predicting the demise of liberal world order. Bur what many of these interventions lack is a nuanced account of which aspects of liberal world ordering are at risk, how they are being modified, and whether there is any capacity in the system to adapt and survive.[1]

This thesis is a response to the call by Duncombe and Dunne, albeit conceptualised long before the call was made by them, and makes an original contribution to the literature by examining rising powers engagement, specifically in the form of the BRICS, with a specific aspect of liberal international society, namely international criminal justice and, more particularly, its permanent enforcement mechanism, the ICC. More specifically, it examines the specific criticisms and objections to the structure of the ICC's legal regime and the Court's practices raised by the BRICS states through the lens of their normative visions of global political order. In doing so, the thesis identifies some of the issues and challenges that the ICC needs to confront and, at a more abstract level, highlights the impediments to cosmopolitan-solidarist progress in international society, thereby making a contribution to the English School's research agenda.

The thesis also makes a contribution to another English School research agenda which is concerned with understanding the operation of international organisations within international society, particularly where and how they contribute to its evolution through the reconstitution of pluralist primary institutions, and how states interact with and affect that process. It does so by providing an original empirical case study in the form of a study of the relationship between the ICC and the BRICS countries. Finally, it contributes knowledge to the evolving understanding of non-Western agency in global political order building, specifically how international society may be impacted by the shift in the balance of power from the West to the Global South and East. It does so by examining BRICS states' responses and actions towards the ICC's cosmopolitan elements and actions. The details of these contributions are provided below in a discussion of the key findings of this thesis.

B. The Key Findings

i. The Court's Contribution to the Evolution of International Society

First, it was established that the ICC made a contribution to reconstituting the pluralist primary institutions of international society in a cosmopolitan form, building on the evolution of

[1] C. Duncombe and T. Dunne, 'After liberal world order', (2018) 94(1) *International Affairs* 25-42, 31.

international criminal justice over the past one hundred years and its contribution to the cosmopolitan evolution of the global political order. While existing works have engaged with this issue and reached a similar conclusion, this thesis goes much further in its analysis of the Court's contribution to cosmopolitan progress, particularly in its focus on more recent developments such as the operationalisation of the crime of aggression and by examining how the Court's practice has contributed to that process, which were excluded in previous works including those of Ralph and Roach.

More specifically, it was identified that the establishment of the Rome Statute in 1998 advanced the circumscribing of sovereignty and further marginalised the role of diplomacy as a means of responding to human rights violations and breaches of international humanitarian law committed in the context of armed conflicts. It also circumscribed the institution of war by improving the enforcement of the Geneva Conventions. The Rome Statute also contributed significantly to establishing international criminal justice as a primary institution of international society, particularly given the highly developed nature of the legal regime the Rome Statute established and the widespread support it received. Moreover, the implementation of this legal regime by the Court in discharging its mandate further contributed to the re-conceptualisation of pluralist primary institutions and the status of criminal justice as a new primary institution. However, it was also identified that in the process of negotiating the Rome Statute the cosmopolitan potential of the Court was limited by states, including the BRICS states, in defending the integrity of pluralist primary institutions. This resulted in a compromise court which is described as an *evolutionary* rather than a *revolutionary* institution. Furthermore, it was established that the BRICS states have sought to circumscribe the creeping cosmopolitanism in the Court's practice of international criminal justice.

ii. The BRICS States' Relationships with the ICC

In respect of the BRICS states' relationship with the ICC, the principal finding and the argument developed throughout the thesis is that the BRICS states support the institution of international criminal justice and the ICC but only to the extent that it is pursued and the ICC operates in accordance with a state-solidarist conception of international society with sufficient deference being paid to pluralist primary institutions and values. This differs substantially from the existing literature which has only surveyed the relationship of particular BRICS states with the ICC in no more than a limited or superficial manner, or has portrayed rising power engagement with the Court in an overly negative manner, generally failing to highlight the extent of the contributions that such states have made to advancing international criminal justice and supporting the Court.

As will be summarised in more detail shortly, this is clear from the BRICS states having provided both rhetorical and material support for international criminal justice and the ICC but also criticising and contesting the Court where they perceive it to be undermining the pluralist values and primary institutions on which they believe global political order should be grounded. More specifically, the BRICS states raised objections to the ICC's dogmatic pursuit of its cosmopolitan anti-impunity agenda that manifests in an expansive interpretation of international law by the Court, and the Prosecutor's approach to delivering criminal accountability at the perceived expense of the political settlement of ongoing armed conflicts. This undermines the institutions of sovereignty and diplomacy, marginalises the role of the state and politics in favour of legal approaches to transitional justice delivered by supranational organisations, and amounts to the negligent prioritisation of justice over order. More particularly, the BRICS states have been critical of the Court indicting and seeking the arrest and surrender of sitting heads of state, which they feel contributes to regime change and hinders the achievement of peace. In essence, the BRICS states advocate the prioritisation of peace over justice, at least in the short term.

It has also been established that the majority of the support provided by the BRICS states towards the ICC has been rhetorical in nature. While such support is important, the lack of material support reflects both a cautiousness about the implementation of criminal justice through the ICC but also a lack of willingness on the part of the BRICS states to shoulder the responsibilities and burdens that comes with rising power status, which has been previously confirmed in the literature as a particular characteristic of the BRICS states' engagement with international society. It should be noted, however, that there is evidence of material support being provided by the BRICS states, particularly in the form of the states voting in favour of Security Council resolutions referring situations to the ICC, specifically Sudan and Libya.

It has also been importantly recognised throughout this thesis that a state's position on particular issues and ICC situations can be informed simultaneously by normative concerns about, for example, the pursuit of criminal justice undermining the political settlement of a conflict which is in accordance with a state-solidarist vision of international society, and also material considerations, such as desire to maintain good relations with a state's government in order to further political and economic ties. Both factors are not mutually exclusive in the decision-making process and can both influence the decision of a state. Examples of this can be seen in the analysis of China's position in respect of the ICC's intervention in Sudan and Russia's position in respect of the proposed referral of Syria to the Court and its position on the investigations into the use of chemical weapons in the country.

iii. A Divergence of Opinion among the BRICS States

Other findings of this thesis include a divergence in the views adopted by the individual BRICS states in respect of the implementation of international criminal justice and the operation of the ICC. This is lacking in the existing literature due to its failure to examine the BRICS engagement as a group and to compare their individual positions, views and actions. While all of the states share a commitment to pluralist institutions and a desire to reform international society in way that marginalises the influence and control traditionally exercised by Western states, they differ in their tolerance of cosmopolitan progress. More specifically, whereas Russia, China and India are staunch defenders of sovereignty, South Africa and Brazil are willing to accept greater limitations in furtherance of the effective functioning of criminal justice. Furthermore, whereas Russia and China insist on substantial Security Council control over criminal justice, as a result of their privileged position as permanent members, South Africa and India resist it given their not too distant experiences of great power domination and their strong desire to bring about a more democratic, egalitarian international society without the unfair centralisation of power in the UN Security Council.

It is also important to consider the implications of the identification of divergent opinions as between the BRICS states for the thesis and the argument developed in it. First, it should be noted that while there are differences of opinion as between the BRICS states on specific issues relating to international criminal justice and the work of the ICC, a general common position can still be identified – the BRICS support the institution of international criminal justice and the ICC to the extent international criminal justice is implemented and the ICC operates in accordance with a state-solidarist conception of international society, paying sufficient deference to pluralist values and primary institutions, and does not threaten order within international society. This is advanced on the basis of the views shared by the BRICS states about international criminal justice generally and the ICC specifically being identified. Specific and limited divergences of opinion do not undermine the general view. For example, all of the states have advanced a view that the pursuit of justice should not compromise the pursuit of a peaceful settlement to a conflict, albeit to slightly different extents, but the divergence of opinion as between the states as to the relationship between the UN Security Council and the ICC does not call in question this finding. Moreover, and to be clear, the argument of this thesis is not that there is an entirely hegemonic position as between the BRICS states in relation to international criminal justice and the ICC but that a general common position can be identified within which some divergences of opinion can be tolerated without the general position being undermined.

In terms of the implications for the research, the identification of divergences of opinion as between the BRICS states demonstrates the thoroughness of the research that has been undertaken, the quality of the analysis conducted and nuance of the understanding presented. The thesis does not seek to advance a naïve view that the BRICS are a homogenous group of states that always share exactly the same view on all issues relating to international criminal justice and the ICC. Moreover, the point of the research was to understand the BRICS states views on international criminal justice and the ICC including the shared opinions and divergences, and this has been achieved. Furthermore, the divergences of opinion as between the BRICS states on particular issues are consistent with existing research conducted on the political grouping, as was identified in Chapter Three. The identification of divergences in opinion also contributes to developing a better understanding of the nature of the BRICS as a political grouping which is a secondary contribution of this research project and thesis.

iv. The Reformist Ambitions of the BRICS States

Finally, there is a clear willingness on the part of the BRICS states to challenge existing norms and rules of international criminal justice, as contained in the Rome Statute, and the manner in which they are practised by the Court in order to bring about reform of the institution. This manifests more specifically in the BRICS advocating a more pragmatic approach to the pursuit of justice which does not threaten order within international society. Importantly, however, there have not been any attempts to bring down the Court or the system of international criminal justice, and the support provided by the BRICS has in fact contributed to strengthening the system.

On this basis it is concluded that the BRICS states do not pose a radical challenge to liberal international society but rather will work to restrain further cosmopolitan progress and defend a state-solidarist approach to global governance which ensures sufficient deference is paid to pluralist values and primary institutions, particularly respect for sovereignty, a key role for multilateralism and diplomacy as a means of regulating international affairs, and a classical approach to international law which preserves the principle of consent. This is consistent with the existing literature which describes the BRICS states assimilating and working within the existing international order, and acting as reformist rather than radical revolutionary powers.

In this respect it has also been established that the BRICS states engagement with international criminal justice and the ICC, and by analogy international society more generally, is not driven solely by material, self-interested considerations. Rather their foreign policy decision-making is also informed by their normative vision for international society and its governance structures. This

demonstrates the limits of a realist analysis and the need to take account of both material and normative concerns in trying to understand states' actions, which is the value of an English School approach. In order to substantiate the key findings articulated herein, the next section provides a brief summary of the thesis and identifies its core elements chapter by chapter.

C. A Summary of the Thesis and Key Evidence

After outlining the English School theoretical framework used in this thesis and examining the relevant literature in Chapter One, Chapter Two provided an overview of the evolution of liberal international society, primarily from 1945 to date, giving theoretical and historical context to the subsequent analysis of the ICC and its relationship with the BRICS. The chapter demonstrated that international society has progressively evolved in a cosmopolitan-solidarist direction over the past one hundred years, the result of the dominance of liberal Western powers, particularly in the post-World War Two era. As part of this, there has been a progressive transition from multilateralism to supranationalism as a means of global governance which has involved the transfer of authority from states to increasingly powerful international organisations. There has also been a substantial growth in the number and remit of international courts and tribunals as a natural corollary to the rapid expansion of international law, which represents a shift from politics to legalism as a feature of global governance.

The cosmopolitan aspect of this evolution includes the improved status of the individual in international society and, eventually, the recognition of the individual as a subject of international law alongside states. It was explained this manifested principally in the creation and development of the international human rights and international criminal law systems, and resulted in human rights and criminal justice taking their place alongside pluralist institutions of international society namely sovereignty, diplomacy and a classical inter-state interpretation of international law. The evolution of these new cosmopolitan institutions also forced a reconceptualising of the pluralist institutions of international society.

The chapter further described the entrenchment of criminal justice as a primary response to the commission of gross human rights violations and as a mechanism of conflict resolution which took hold in the 1990s with creation of the *ad hoc* tribunals following the Nuremberg precedent. This was followed closely by the establishment of the ICC and a number of other international criminal courts and tribunals, as well as the increased implementation of international criminal justice through domestic legal systems. It was shown that this marginalised alternative approaches to transitional justice which placed a greater emphasis on the political settlement of conflicts and

post-conflict reconciliation than on individual criminal accountability and punishment. The problems that such a prioritisation created and the limits of criminal justice would come to be highlighted by the BRICS states in their contestation of the ICC, reasserting the pluralism within transitional justice that has been shrouded by dominance of the liberal cosmopolitan approach.

Chapter Three examined the nature of the BRICS grouping and its vision of global political order. It was demonstrated how despite the fact that the BRICS label initially referred to their status as developing economic powers, the states subsequently coalesced into a political group based upon their shared desire to reform global governance. This primarily involved marginalising Western influence and control in global governance, and making decision-making authority at the international level more reflective of the current and future distribution of power in international society. It also involved carving out a privileged role for themselves as rising powers and as the self-identified representatives of the Global South and East. It was, however, noted that the BRICS showed no signs of seeking to precipitate a revolution in international society but rather a desire to bring about incremental reform from within.

The chapter further showed that the BRICS states share a normative vision of global political order. This is a state-solidarist conception of international society in which cosmopolitan values are implemented with deference to pluralist primary institutions of sovereignty, diplomacy, multilateralism and a classical positivist understanding of international law which preserves the fundamental principle of state consent. This vision diverges from the cosmopolitan-solidarist direction in which international society has progressively evolved and, as a result, it was noted that this creates the potential for contestation of cosmopolitan progress and calls into question the sustainability of liberal international society and the particular regimes within it, particularly in light of the contemporaneous decline of Western influence. The remainder of the thesis was then dedicated to examining whether, and if so how and to what extent, the BRICS contest international criminal justice and its permanent enforcement mechanism, the ICC, as a particular aspect of liberal international society.

Chapter Four provided an overview of the BRICS states' engagement with international criminal justice before the remainder of the thesis dealt specifically with their relationship with the ICC. It was shown that the BRICS states supported and made a substantial contribution to advancing the institution of international criminal justice and its implementing framework over the past sixty years. It examined the USSR's and China's role in the creation and operation of the Nuremberg and Tokyo military tribunals, and how Russia, China and Brazil facilitated the establishment of the ICTY and the ICTR. More recently, it was shown how Russia and China voted in favour of the

Security Council Resolution creating the SCSL in 2005 and how in 2007 these states, as well as South Africa, permitted the establishment of the STL by abstaining on the resolution. However, it was also noted that the abstentions mentioned and the subsequent criticism of the Tribunals by the BRICS states demonstrated concern on their part about the implementation of international criminal justice, particularly where its challenges pluralist primary institutions or appears to support the political objectives of the West. It was also noted how the support expressed Russia and China for the development of international criminal justice in the post-World War Two era was also likely to have been informed by a desire play a decisive role in constructing the new world order and asserting their status as important powers international society.

In addition, it was demonstrated how the BRICS states strongly emphasised the need for criminal justice to contribute to the peaceful resolution of ongoing conflicts and how they criticised the Tribunals' failure to do so. Concerns were also noted about the politicisation their work, most notably, allegations of anti-Serb bias directed at the ICTY by Russia. The chapter also examined South Africa's approach to transitional justice in the post-apartheid era, noting how the new government shunned a solely retributive justice approach in favour of a restorative one in the form of truth and reconciliation established as part of a comprehensive political settlement, namely CODESA. It was argued this pragmatic approach to the settlement of conflicts and to transitional justice, in which criminal accountability is sidelined in favour of peace, informed South Africa's approach on this issue and has, as shown later in the thesis, undoubtedly conditioned its approach towards the ICC.

Chapter Five examined the BRICS states' contributions to the Rome negotiations in 1998 which established the ICC and their views on the Rome Statute regime. It was shown that, consistent with their demonstrable support for international criminal justice in the past and their desire to play a meaningful role in international society as emerging rising powers, the BRICS all made a substantial contribution to the establishment of the ICC, participating extensively and constructively in the negotiations. The BRICS states did, however, generally seek to ensure that the Rome Statute regime was constructed in accordance with a state-solidarist conception of international society. It was shown how Russia, China and India all supported a strictly consent-based approach to the Court's jurisdiction which sought to preserve state sovereignty, and both China and India advocated for the exclusion of non-international armed conflicts from the Court's jurisdiction for the same reason. It was also noted, however, that the attempts to limit the Court's jurisdiction were also likely to have been motivated by self-interested concerns about guarding against ICC interference in their domestic affairs. Moreover, the BRICS strongly supported the application of complementarity which granted states the primary responsibility for prosecuting the

crimes within the Court's jurisdiction.

This chapter highlighted a divergence in the positions adopted by the BRICS states, however. In contrast to the conservative views outlined above, South Africa and Brazil supported a more cosmopolitan vision of the ICC, albeit not a radical revolutionary one but rather one which leaned towards the cosmopolitan side of state-solidarism. They argued in favour of the Prosecutor having *proprio motu* powers, which were rejected by the others, and promoted the greatest jurisdictional reach for the Court. It was also shown how the role of the Security Council divided the states, with China and Russia insisting the Security Council exercise significant control over the institution, representing a pushback against cosmopolitan-solidarist legalism and an assertion of the primacy of politics and the UN system, whereas India strongly opposed such a role for the Council on the basis that, *inter alia*, it would politicise the ICC's work and vitiate the principle of state consent. Ultimately, the majority of the BRICS showed strong support for the Court by voting in favour of adopting the Rome Statute, South Africa was also one of the first states to sign the Statute and to implement the necessary legislation within its domestic legal system. China voted against it, however, and India abstained, both on the basis that their pluralist concerns had not been sufficiently addressed, although China did expressly commit to continuing to engage with the Court in the future.

Furthermore, this chapter examined the nature of the Rome Statute and how it contributed to reconstituting the pluralist primary institutions of international society in a more cosmopolitan form. More specifically, it was identified that the establishment of the Rome Statute advanced the circumscribing of sovereignty by permanently subjecting states' actions to the scrutiny of an international court and the ICC's Prosecutor being granted the power to initiate investigations and prosecute states' nationals for crimes falling within the Court's jurisdiction without needing state consent on a case by case basis. Furthermore, sovereignty is curtailed in the denial of immunity to incumbent heads of state by virtue of Article 27 of the Rome Statute and the power of the Court to determine that a state has failed to discharge its obligations under the complementarity provisions and to permit the Prosecutor to assume the responsibility for the conduct of investigations and prosecutions. It was also determined that the creation of the ICC marginalised the role of diplomacy as a means of responding to human rights violations and breaches of humanitarian law committed in the context of armed conflicts given that the Court's sole focus on the implementation of retributive justice, as provided for in Article 53 of the Rome Statute, and by way of the Statute prioritising the denial of immunity to heads of state and government officials in pursuit of accountability over inter-state immunity obligations provided for under customary international which are designed to promote order and stability. In addition, it was identified that the Rome

Statute contributed to further entrenching criminal justice as a new primary institution of international society.

However, it was also identified that in the process of negotiating the Rome Statute states limited the Court's cosmopolitan potential and defended the integrity of pluralist primary institutions. For example, it was identified that states circumscribed the Court's jurisdiction to defend the classical conception of international law principle of state consent and, as a result, reinforcing sovereignty. The complementarity principle was established as a key aspect of the Rome Statute which asserted the primary authority of the state and its sovereignty over international organisations in that states had the primary responsibility to prosecute crimes and were afforded the first attempt at doing so. The institutions of multilateralism and diplomacy were also incorporated to some extent within the Rome Statute regime with the creation of a relationship between the Security Council and the ICC whereby the former could exercise control over the latter. It was concluded that the ICC is a cosmopolitan *evolutionary* rather than a *revolutionary* institution, advancing a cosmopolitan-solidarist vision of international society. This led Megret to conclude '[t]he ICC is the ultimate (and perhaps for the first time totally unavoidable) manifestation of an increasing split between traditional inter-state law and an emerging cosmopolitan legal order'.[2] It was shown how this allowed states such as Russia, Brazil and South Africa to vote in favour of and then sign the Rome Statute but the compromise was not sufficient for China and India.

Chapter Six continued to examine the BRICS' contributions to the development of international criminal justice and the ICC's legal regime with a specific focus on the crime of aggression. It was argued that the criminalisation of aggression represented substantial cosmopolitan progress within international society in that it subjected the primary institution of war, the ultimate sovereign act, to legal regulation and, more particularly, would hold individuals criminally accountable for violations. It was further argued the BRICS states' supported the criminalisation of aggression in the Rome Statute regime but, at the same, time sought to ensure that its implementation was consistent with a state-solidarist conception international society and did not undermine pluralist primary institutions and values, as they had done during the Rome Conference negotiations. It was shown how all of the BRICS states' supported the inclusion of the crime of aggression within the Court's jurisdiction during the negotiations at Rome and beyond, although there were divergent views among the BRICS states as to how it should be operationalised and implemented. It was shown how there was some disagreement over how the crime should be defined and that another key disagreement concerned the role of the Security Council in relation to the ICC assuming

[2] F. Mégret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', (2001) 12(2) *European Journal of International Law* 247-268, 260.

jurisdiction over the prosecution of aggression. Russia and China, along with the P-3, demanded a strong role for the Council, specifically asserting that it should determine whether an act of aggression had occurred before the ICC could go on to prosecute an individual for it. They did so primarily to preserve the Security Council's authority in respect of matters of peace and security as required, they said, by the UN Charter and to prioritise political control over law in such sensitive circumstances. This demonstrated a pluralist leaning but also a defence by China and Russia of their privileged positions within global political order as permanent members of the Security Council. In contrast, South Africa and India rejected such a powerful role for the Council on the basis that it would lead to the politicisation of the Court's work, as they also did generally at the Rome Conference in 1998.

The chapter further showed how the compromise research at Kampala in 2010, which confirmed how the Court would exercise jurisdiction over the crime, was the result of a proposal crafted by Brazil and two other states, which it was argued is demonstrative of Brazil's role as a bride-builder and a consensus-seeker. The compromise balanced a role for the Security Council with the independence of the Court, reflecting the pluralist limits of cosmopolitan progress. Additional pluralist limits included the ability of states to 'opt-out' of the Court's jurisdiction over aggression and the exclusion of nationals of non-States Parties. Moreover, the entry into force of the Court's powers in respect of aggression would be delayed until 2017, almost seven years later. It was shown that whilst Brazil and South Africa were pleased with the outcome, Russia and China were not, stressing the Council was not given sufficient powers. It was also highlighted how India was critical of the deal because it allowed powerful states to remove themselves from the Court's jurisdiction, thus entrenching the unfair power dynamics in international society that it has long rallied against. However, to date, neither South Africa nor Brazil have ratified the aggression amendments. This demonstrates, on South Africa's part, a continuing contestation of the Court which is explored in greater detail in the last chapter of the thesis and, for Brazil, an unwillingness to shoulder the responsibilities of the a rising power which the existing literature identifies as a characteristic of the BRICS states. This is also evident in the fact that while Brazil supports the ICC with rhetoric and votes in the Security Council, as is highlighted in the thesis, it is currently in arrears with its payments to the Court to the value of €16,540,369.[3]

Chapters Seven and Eight provided an examination of the BRICS states' engagement with, and views of, the ICC's practice of international criminal justice, specifically in relation to its interventions in Sudan and Libya, and the failed referral of Syria to the ICC in 2014. The case

[3] Annex II, Status of contributions as at 15 September 2017 (in Euro), Report of the Committee on Budget and Finance on the work of its twenty-ninth session, Sixteenth session, New York, 4-14 December 2017, ICC Doc. ICC-ASP/16/15, p.42.

studies clearly showed a demonstrable commitment by the BRICS states to the institution of international criminal justice and support for the ICC but also a willingness to contest these institutions where they undermined pluralist values and primary institutions which they defend. This is consistent with the positions they had held towards international criminal justice generally and in the development of the Court. This further shows the positions adopted by the BRICS are driven by normative concerns and that they do not merely act in furtherance of national interests. It was also highlighted, however, that in addition to states' positions being informed by normative concerns, at times they were also driven by material considerations such as preserving political and economic relations with states, and supporting ally's for political and strategic advantage. Moreover, the action taken by states in supporting Security Council referrals to the ICC, can also be seen as states acting to seen in shouldering their responsibilities as rising powers and asserting their status as such powers.

The referrals of Sudan and Libya were significant events in the cosmopolitan evolution of international society and the Court's short history. They confirmed a shared consensus on the value of criminal justice as a mechanism of conflict resolution and also the legitimacy of the ICC as a secondary institution. Most significantly, the referrals were generally supported by the BRICS states. Russia voted in favour of the referral of Sudan to the ICC with China and Brazil abstaining, and all five states voted in favour of the Libya resolution. Importantly, the abstentions by China and Brazil in relation to the Sudanese referral were the result of procedural concerns, rather than substantive ones, albeit they were very different in their nature as between China and Brazil. China objected to the violation of state consent that came with forcibly subjecting a non-State Party to a treaty whereas Brazil abstained on the grounds that limits placed on the referral undermined the integrity of the Rome Statute, neither of which undermine their claim to support criminal justice as an institution. The votes of the BRICS represent a very significant material commitment to international criminal justice and to the ICC as its permanent enforcement mechanism. However, it was also noted that China hesitant position in respect of the Sudan referral was likely informed by a concern about the affect the referral would have on its political and economic relations with Khartoum as well as a principled concerns about the impact that that referral would have on the ability to achieve a political settlement of the conflict. This is only conjecture, however, in the absence of any information proving such a motivation on the part of China which is a limitation of this research. Moreover, as noted above, the support or acquiescence in referrals would also have been informed by a desire by states to seen as shouldering their responsibilities as rising powers. Moreover, it was highlighted that the BRICS states spoke of the need for justice and accountability and expressed support, at least initially, for the Court's work in both situations. However, the BRICS states' pluralist leanings tempered their commitment to the Court and this became clear

over the subsequent years and as events unfolded.

First, it was shown how they stressed the view the pursuit of justice should not undermine the political settlement of the conflicts, as they did in relation to the *ad hoc* tribunals, and they criticised the ICC when it failed to pay heed to the concerns, dogmatically pursuing criminal accountability on the basis of its cosmopolitan convictions. One particular issue in relation to this was the indictment of sitting heads of state, President al-Bashir of Sudan and Colonel Gaddafi of Libya. This resolute enforcement of the anti-impunity norm by the ICC, which reflected a staunch commitment to retributive justice, was contested by the BRICS states on the grounds it put at risk the peaceful resolution of the conflicts through diplomatic negotiations. It was highlighted how South Africa was particularly incensed about the ICC's indictment of Colonel Gaddafi given that it had been working hard as part of an AU negotiating team to settle the conflict including through ongoing discussions with the Libyan leader. The chapter demonstrated, with extensive evidence, that the states instead advocated for inclusive political settlements and, furthermore, it was shown how Russia, China and South Africa supported the deferral of the proceedings against al-Bashir, proposed by the AU, in the Sudan situation in order to protect the ongoing peace process there. The states also emphasised the important role played by the Security Council in balancing the objectives of peace and justice, and they encouraged the Court to shoulder this balancing responsibility too. South Africa advocated an amendment to the Rome Statute to allow the Court to embrace that balancing function. This demonstrates a pluralist desire to subject legalism to political control and a recognition of the limits of retributive criminal proceedings as a mechanism of transitional justice.

The BRICS states were also critical of what they perceived as the Court contributing to facilitating regime change, which is perhaps the most significant challenge to state sovereignty, especially given that it was aligned with Western states' foreign policy objectives, particularly in the Libyan situation. It was shown how they criticised what they considered to be the one-sided investigations and indictments aimed only at the two regimes in this respect, including what they perceived as the failure of the ICC to investigate crimes potentially committed by NATO in Libya. Moreover, Russia and China were critical of the Court's insistence States Parties arrest and surrender al-Bashir when he entered their territory on the basis that he retained his diplomatic immunity when travelling abroad and to act otherwise in accordance with this would be a violation of international law by states. This reflects a prioritisation of the pluralist rules protecting diplomacy over attempts to promote accountability or, in other words, a state-solidarist prioritisation of order over justice. In addition, India insisted non-States Parties were under no obligation to arrest al-Bashir, again reiterating the importance of the state consent principle. India, Russia and China's commitment to this principle and contestation of the Court for violating it is seen in their decisions to host al-Bashir

despite his status as a fugitive of justice.

It was, however, also noted that Russia and China's support for the deferral of the proceedings against al-Bashir and their general reluctance to encourage Security Council action in the face of a lack of support by Sudan and others states for the ICC's mandate was likely to have been informed in part by a desire to protect their relations with Khartoum, in the light of their developing economic ties with the country, whilst at the same time seeking to bring a resolution to the conflict, which was also likely in part based upon a view that an ongoing conflict is detrimental to commercial activity. It was argued that this showed how state decision-making is informed simultaneously by both normative and material considerations. This is only conjecture, however, in the absence of any information proving such ulterior, material motives which is a limitation of this research.

It was also shown in Chapter Eight that the issues that had arisen with respect to the ICC's interventions in Sudan and more so in Libya, particularly with the chaos the ensued with the fall of the Gadaffi regime, contributed to the marginalisation of criminal justice and the use of the ICC in the Syrian conflict. The chapter demonstrates how the BRICS states were, from the beginning, very wary about foreign external intervention in the Syrian conflict. They expressed strong, pluralist views that the solution to the conflict lied in a Syrian-led inclusive political process and they cautioned against forcibly military intervention particularly that which had the objective of regime change. It was further highlighted how the BRICS states were palpably wary of P-3 sponsored Security Council resolutions, fearing that they provided a pretext for intervention, and Russia and China vetoed a number of resolutions on that basis. Russia and China also vetoed the proposed resolution that would have referred the situation in Syria to the ICC on the basis of their belief that it was a means to delegitimise the Assad regime and provided the foundations for regime change, and furthermore, that it would not do anything to bring about the peaceful settlement of the civil war, which they say is a priority. This represents somewhat of a fatigue with international criminal justice as delivered through the ICC and what they perceived to be the limits of its usefulness as a transitional justice mechanism. It was also noted, however, that Russia's decision to veto the referral of Syria to the ICC was likely also to have been in part informed by an intention to intervene in the country in support of its ally, the Syrian government, which would have been far more risky if the ICC had jurisdiction over the situation. It was also suggested that this would not have been the case for China in light of the absence of any direct interest on its part in any intervention in Syria. This is only conjecture, however, in the absence of any information proving Russia's ulterior motives which is a limitation of this research.

However, it was pointed out that Russia and China emphasised the need for justice and criminal

accountability in Syria, and their alternative resolution included the same wording as the P-3's draft about the need to end impunity, which is demonstrative of an ongoing commitment to the institution of international criminal justice, just not delivered through the ICC at that time. This commitment to the institution but concern about the manner in which it is implemented is also seen in their engagement with efforts to establish accountability for the use of chemical weapons in Syria. It was shown that while Russia and China initially supported the creation of a Joint Investigative Mechanism, which was to investigate and attribute responsibility for the use of chemical weapons in Syria, such support was later withdrawn due to concerns about inappropriate working methods and the imposition of political pressure by Western states upon the organisation, which they saw was a further attempt by Western states to lay the foundations for regime change. However, like as noted above, it was highlighted that Russia's decision to prevent an ongoing investigation into the use of chemical weapons in Syria would likely have been at least in part informed by a desire to shield its ally from scrutiny by the international community. This also served to reduce the risk of an external military intervention in Syria occurring, which no doubt would have increased if there were conclusions drawn by an independent mechanism that there had been repeated use of chemical weapons by the Syrian forces. It may also have been concerned that Russian forces may have been implicated in war crimes that had been committed, tarnishing its reputation as a responsible global power. Such concerns do not, however, operate to exclude principled concerns about the risk of an ICC referral causing a deterioration in the political situation in Syria, like happened in Libya. This is only conjecture, however, in the absence of any information proving Russia's ulterior motives which is a limitation of this research.

Chapter Nine examined one of the most significant events in the Court's relatively short history namely South Africa's withdrawal from the Rome Statute. It was shown how this development was precipitated by its refusal to arrest al-Bashir when he travelled to the country to attend at AU summit in June 2015 and the furore that followed it, including some robust criticism by the ICC and the South African courts, but that it was also the product of a number of longstanding concerns that South Africa had with the ICC's operation and its implementation of its mandate which had not been addressed despite it raising them with the Court and States Parties. The al-Bashir incident was therefore, it was said, the straw that broke the camel's back.

The chapter went on to provide a detailed analysis of the concerns and objections that South Africa had raised in respect of the Court's practice of international criminal justice, particularly in relation to its treatment of al-Bashir, which laid behind its decision to withdraw. These went beyond purely technical legal factors that have been the subject of existing studies and considered the social and political ones. It demonstrated that while South Africa has long been a supporter of the ICC and

international criminal justice, it felt forced to withdraw in protest at both the manner in which the Court had handled the incident and, more pertinently, its approach to implementing criminal justice. Moreover, the chapter demonstrates that South Africa's issue was not criminal justice as an institution but how it was being implemented, namely undermining a state-solidarist conception of international society. As the new South African president, Cyril Ramaphosa, had previously said, ' [t]he withdrawal should be assumed as a critique in which the institution should function, rather than a rejection of its underlying values'.[4]

More specifically, the chapter demonstrated that South Africa contested what it saw as the ICC's expansive interpretation and misapplication of the relevant law in justifying its position that South Africa and other states were obligated to arrest al-Bashir. Moreover, it was shown how South Africa was incensed by the ICC's failure to take account of its contrasting view as to the correct legal position and, particularly, its refusal to hear South Africa's concern that arresting al-Bashir would require it to act in violation of the diplomatic immunity obligations that it owes to Sudan under international law. It felt that the Court was advancing and imposing an ideological driven position with complete disregard for the law which regulates inter-state interactions or, in other words, it was pursuing justice at the expense of order. In addition, it was shown how South Africa argued that the ICC's insistence that al-Bashir be arrested in pursuit of its narrow cosmopolitan conception of justice, hindered the political settlement of conflicts. Furthermore, it was shown how South Africa supported a more pragmatic approach to transitional justice, noting that as a result of its experience in the post-apartheid era 'promoting reconciliation and avoiding conflict...require[s] action outside of judicial processes' and that '[t]he ICC cannot be the only platform through we resolve all matters.'[5]

Furthermore, it was shown that South Africa's refusal to arrest al-Bashir and later to withdraw from the Rome Statute can partially be explained by reference to the nature of its domestic politics and status as a rising power as a member of the BRICS. More specifically, it was shown how South Africa sees itself as a regional leader and, more particularly, as a peacemaker on the African continent, a core aspect of the ANC's foreign policy as an African liberation movement, and it felt this was being stymied by its membership of the Rome Statute. This was on the basis of the Court's insistence that states adhere to its retributive justice approach to the exclusion of all others, which involved arresting al-Bashir, and thus it felt compelled to withdraw. Moreover, it was shown that

[4] P. Herman, 'Ramaphosa: SA not against ICC, but its methods', *news24,* 9 November 2016, available online at https://www.news24.com/SouthAfrica/News/ramaphosa-sa-not-against-icc-but-its-methods-20161109 (accessed on 31/03/2018).
[5] South Africa, 'Opening Statement by Adv. Tshililo Michael Masutha, MP, Minister of Justice and Correctional Services, Republic of South Africa, General Debate: Sixteenth Session of the Assembly of States Parties of the International Criminal Court, New York, 4 - 14 December 2017', available online at https://asp.icc-cpi.int/iccdocs/asp docs/ASP16/ASP-16-ZA.pdf (accessed 23/07/2018).

South Africa's withdrawal was an attempt to encourage reform of the Court and international criminal justice generally, evidenced by its continued engagement with the Court. This approach is guided by the ANC's reformist ambitions which have been emboldened by its membership of the BRICS group which share the same aspirations to reform international society in accordance with their state-solidarist vision of international society and to carve out a bigger role for themselves in global governance, limiting Western control in the process.

D. The Implications of the Key Findings and Policy Recommendations

As Acharya notes, 'the particular historical circumstances behind the rise of libera l hegemony are gone. The global power shift is for real and here to stay',[6] and in light of this, it is necessary for international society to confront the potential challenges this poses, particularly for international criminal justice, as have been identified throughout the thesis. More specifically, this research has highlighted that the BRICS states have a different view as to how international criminal justice should be implemented from that pursued by the ICC. The BRICS states oppose the dogmatic pursuit of retributive criminal justice, informed by liberal cosmopolitan moralism, which had been adopted by the ICC and is evident in how it discharges its mandate. They do so on the basis that it is inappropriate and unsuitable in complex conflict and post-conflict situations where inclusive political settlements are required to establish lasting peace, and this cannot be achieved where some or all parties are under the threat of prosecution.

The BRICS states thus instead advocate a more pragmatic and holistic approach to transitional justice which does not prioritise accountability at the expense of achieving political settlements of ongoing conflicts and, moreover, seeks to better balance the objectives of peace and criminal accountability, justice and order in international society, including through the use of deferred prosecutions. While the limits of retributive justice and the benefits of alternative transitional justice mechanisms have been widely discussed within the literature, the BRICS have brought the debate into the political arena, challenging the liberal cosmopolitan ideological approach and highlighting the normative pluralism that exists with respect to transitional justice, that has traditionally been obscured by liberal dominance in international society.

There has, more recently, been an increased recognition of the lack of universal consensus about the primacy traditionally afforded to retributive justice and a greater willingness by states to engage with specific concerns that have been raised by states about its application, particularly in the

[6] A. Acharya, 'After Liberal Hegemony: The Advent of a Multiplex World Order', (2017) 31(3) *Ethics and International Affairs* 271285, 279.

aftermath of South Africa's decision to withdraw from the ICC. There is, however, clearly much more that needs to be done, especially as the issue of the mass withdrawal of African States Parties from the ICC continues to linger in the air and the Court remains impotent in relation to the atrocities that are continuing to be committed with seemingly absolute impunity in Syria, as a result of Security Council paralysis. As the Wayamo Foundation, a leading research institute on international criminal justice in Africa, emphasises, '[g]enuine differences of opinion about justice, accountability, and the ICC's role therein, should not be ignored'.[7] More particularly, in this author's view, if liberal international society wishes to avoid further contestation of its normative regimes and governance mechanisms, such as international criminal justice and the ICC, there needs to be greater recognition that the cosmopolitan approach is not a panacea and that it in fact can do greater harm than good in the longer term; conflict and post-conflict situations are complex and they cannot be resolved with simple legal solutions only.[8] They require us to grapple with their complexity and adopt pragmatic solutions, and this is the position the BRICS states are advancing. The lesson being that sometimes, it seems, we need to compromise on our ideals in order to protect them and advance them in the longer term.

This requires an acceptance by the Court and its supporters that law cannot be applied blind to political realities, and a revisiting of Cherif Bassouini's famous proclamation at the signing ceremony of the Rome Statute that with the establishment of the ICC justice will no longer be sacrificed at the altar of political settlements.[9] In other words, the Court has to accept that it is a political actor and work with that in mind, rather than simply asserting that the Court and law operates above and beyond the political sphere. This was perhaps always unrealistic but now more so in the changing international society as has been shown in this thesis. If the international society fails to grapple with these issues it is likely the ICC and international criminal justice more generally will continue to suffer from contestation and, as rising powers continue in their ascendance, such contestation is only likely to increase and could, in the worst case scenario, threaten the long term sustainability of the Court and the primary institution of international criminal justice. This is thinking is informed by the pragmatic turn in international relations, as discussed in the Introduction and Chapter One.

One of the ways in which this could be addressed is for the Court and its States Parties to revisit Article 53 of the Rome Statute and to consider whether the Prosecutor should, in determining

[7] Wayamo Foundation, 'Building Bridges and Reaching Compromise: Constructive Engagement in the Africa-ICC Relationship', available online at http://www.wayamo.com/wp-content/uploads/2018/05/ICC-Africa-Paper May-2018-1.pdf (accessed 23/05/2018), p.7.
[8] It should be noted that the author is not advancing a personal normative position here. Rather the argument is made that if liberal international society wants to preserve and advance international criminal justice and the ICC, a more pragmatic approach will be required in the future and even changes may need to be made to the Rome Statute.
[9] M. Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of the International Criminal Court', (1999) 32(3) *Cornell International Law Journal* 443-469, 467.

whether to investigate, now take account of the political circumstances in which it would take place and the impact it may have on peace negotiations, as has been advocated by Russia, China and South Africa. This would allow the Court to act more pragmatically which it is technically unable to do at the present time. Furthermore, we are perhaps seeing the beginnings of a recognition by the ICC of some of the issues with its mandate that have been articulated by the BRICS states and others, and a need to think more broadly. As Judge Song recently noted, the retributive justice on which the ICC is based will need to be expanded to include restorative and reparative justice.[10]

Another of the key issues that perhaps needs to be confronted, as raised by the BRICS states, is the application of the no-immunity principle for incumbent heads of state and other senior government officials, as provided for in Article 27 of the Rome Statute.[11] As was explained in Chapters Two and Five, the anti-impunity principle, as it is otherwise known, is a fundamental aspect of the international criminal justice system. It reflects the cosmopolitan progress of international society in that whereas sitting heads of state were traditionally immune from arrest and prosecution on the basis they were the embodiment of a state's sovereignty and consequently entitled to non - interference, and because such immunity facilitated good international relations between states, international society's evolving desire for accountability and retribution rendered this principle obsolete before international courts, piercing the veil of sovereignty and prioritising justice over order. The BRICS states raised concerns the ICC's approach to enforcing this anti -impunity norm unlawfully required states to violate the diplomatic immunity obligations that they held towards other states, thus exceeding its powers, interfering with inter-state relations and hindering the active diplomacy required to facilitate the political settlement of ongoing conflicts. This arguably represents an imposition of the cosmopolitan value of justice in disregard for pluralist concerns about order which has, as a result, promoted a pluralist backlash against the Court. It would perhaps be beneficial to reconsider the implementation of the no-immunity principle in the circumstances, as advocated by the AU with support from the BRICS states, and to consider how it could be employed without negatively affecting the aim of achieving a political settlement of a conflict and with deference to inter-state immunity obligations.

In light of the conclusion there has been cosmopolitan progress in international society but that this has, and continues to be, tempered by the resilience of pluralist primary institutions, defended by the BRICS states, it must be recognised that global political order is not approaching a world society conception in which the state simply acts as an agent of supranational organisations, implementing

[10] Tweet by Diana Goff, 21/05/2018 at 15:25, available online at https://twitter.com/dianaianaegoff/status/998570425142702080 (accessed 22/05/2018).
[11] Wayamo Foundation, 'Building Bridges and Reaching Compromise', p.14 - 'It is essential that states explore avenues within the Rome Statute regime to resolve the matter of head of state immunity before the ICC'.

their mandate without question or criticism. Moreover, given the ascendance of rising powers and their willingness to staunchly defend the pluralist primary institutions where they are undermined, as has been identified within this thesis, we are perhaps moving in the opposite direction of the cosmopolitan progress witnessed over the past one hundred years, as Hurrell says back in a Westphalian direction.[12] In order to confront this trend, it is arguably necessary for greater deference to be paid to the pluralist values and institutions, and to adopt a more pragmatic approach to cosmopolitan progress, which recognises the limits of consensus. On a more theoretical level, it can be argued that the BRICS contestation of the ICC has demonstrated that the way past the order vs justice impasse is to adopt a more pragmatic approach which prioritises neither value dogmatically but rather purses them sensitively in combination but favouring one over the other on a case by case basis. Moreover, international organisations would be best advised to respect and strictly adhere to the limits of their competences and powers given to them by states, and to take into account the political lifeworld which they inhabit and are reliant upon for support. This is because a perception of legitimacy is the foundation of an organisation's support and the cooperation that it receives from states. Without such deference there is a risk that the global governance framework that has been developed over the past one hundred years will fall into disrepute.

E. Recommendations for Further Research

Given the time and space constraints there are some limitations to this thesis and numerous avenues for further research as a result. First, it has not been possible to conduct an in depth analysis of each of the BRICS states' cultural, social and political histories which inform their foreign policy approaches including towards international criminal justice and the ICC. In order to gain a deeper understanding of the BRICS states' positions such historical research could be conducted in relation to each state and to consider whether and to what extent this has conditioned their views on international criminal justice. This would contribute to an evolving approach in international relations scholarship which examines the link between sub-state conditions and policy manifestations at the global level.[13]

Second, given part of the context to this thesis is the 'decline of the West' and, as Acharya argues, an element of the threat to liberal international order comes from the voluntary withdrawal by liberal states, it would be a valuable piece of research to comprehensively examine the P-3 states' relationships with international criminal justice and the ICC, including an updated assessment of

[12] A. Hurrell, 'Order and Justice' in C. Navari and D. M. Green (eds), *Guide to the English School of International Relations,* (Wiley, 2014), 153.
[13] *See*, for example, M. Malksoo, 'The Transitional Justice and Foreign Policy Nexus: The Inefficient Causation of State Ontological Security-Seeking', (2018) *International Studies Review* 1-25, available at https://academic.oup.com/isr/advance-article/doi/10.1093/isr/viy006/4959061 (accessed 8/5/2018).

the US' position. This could be looked at alongside the findings of this thesis to identify the additional, and perhaps conflicting, challenges faced by the Court, and a more comprehensive assessment of the future sustainability of the ICC would be provided. Third, it would be beneficial to expand the study of rising power engagement with the ICC with an examination of other rising powers relationships with the Court.

Fourth, further research should be undertaken in the English School tradition and using the theoretical framework utilised in this thesis to examine other international organisations and normative regimes, and states' relationships and engagement with them, particularly rising powers such as the BRICS. This would fill the substantial gaps in the existing literature which, as was previously argued, need to be addressed. This is important because, as things stand, the power shifts in international society are continuing and we need to understand the potential implications of this as soon as possible.

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