The ICC: a straw man in the peace-versus-justice debate?

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Summary

This paper aims to stimulate discussion within the mediation community about the role of the International Criminal Court (ICC) in peace processes. In a brief overview of the peace-versus-justice debate to date, it lays out the main arguments for and against the Court. The arguments 'in favour' are that prosecution individualises guilt and marginalises abusive leaders, and that the ICC strengthens the rule of law and has a deterrent effect. The main arguments 'against' are that the Court is politically biased, impedes peace processes and discriminates against Africans. Each argument is countered with a rebuttal.

The paper then argues that the ICC has become a 'straw man' in the peace and justice debate, being misrepresented sometimes. It is one actor among many in the complex fields of justice and peacemaking in which there are many international and regional human rights frameworks as well as other normative standards. The ICC is intended as a court of last resort, bringing to account the most responsible for the most serious human rights violations. In effect, the ICC only directly affects formal, Track I peace mediation. Besides the formal talks, there may be many different types of peacemaking, over which the ICC will have much less influence, if any. The ICC represents one strand of international criminal justice, but justice can be pursued through a whole range of judicial and non-judicial processes (transitional justice). Equating the ICC with justice oversimplifies the complexity of justice in (post-) conflict situations.

Against this background, the paper suggests that success for the ICC must be understood in relation to its role and limitations, rather than the expectations pinned to it. Elements of success in relation to peacemaking would include fairness, balance, independence and complementarity.

The paper closes with suggestions for greater synergies between peace and justice, including the Court. It suggests that mediators and the Court maintain an appropriate distance between them. Mediators have to integrate an increasing number of different normative standards into their approaches. The paper recommends considering justice beyond the narrow scope of international criminal justice, and highlights that the effects of institutional arrangements in peace deals on human rights, justice and even future violence are not sufficiently analysed, particularly by justice advocates. There are many options on the spectrum between ICC indictments and amnesty that are yet to be explored, and which could advance a pro-justice and pro-peace agenda.

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Introduction

The Rome Statute of the International Criminal Court (ICC) came into force on 1 July 2002, and the Court currently has jurisdiction over genocide, war crimes and crimes against humanity committed after that date.[2] The Court begins investigations if situations are referred by the government of a state party or the UN Security Council, or by the Prosecutor acting on his/her own initiative ('*proprio motu*'). There are currently 19 cases before the Court, from eight 'situations': Uganda, the Democratic Republic of Congo (DRC), Darfur (Sudan), Central African Republic (CAR), Kenya, Libya, Côte d'Ivoire and Mali. Uganda, DRC, CAR and Mali are examples of 'self-referrals' as they were referred by the government. Libya and Sudan – both non-state parties – were referred by the UN Security Council. The situations in Kenya (a state party) and Côte d'Ivoire (a non-state party[3]) were the result of the Prosecutor acting under *proprio motu*.

The Court is conducting preliminary examinations in Afghanistan, Georgia, Guinea, Colombia, Honduras, Republic of Korea and Nigeria, which may or may not lead to investigation of the alleged crimes committed in the territories. In 2012, the preliminary examination in Palestine concluded that the Court would not open an investigation there, for example.

The ICC is a court of last resort. It is only intended – and able – to prosecute a small number of cases, ideally focusing on those who bear the greatest responsibility. Complementarity is a central principle of the Rome Statute: domestic jurisdictions must act where possible, the ICC acts only when the state concerned is unwilling or unable to prosecute these crimes. In other words, the ICC should complement national efforts, not replace them.[4]

State of the debate

The main points of debate between the 'justice' and 'mediation' communities – so far as either of these exist – concern the timing and type of interventions ('sequencing'), rather than the existence of the ICC. This section briefly summarises the dominant arguments in the debate.

'In favour'

Prosecution individualises guilt and marginalises abusive leaders. Placing the blame for atrocities with named individuals rather than broader groups reduces the ability of group leaders to manipulate inter-group suspicion to achieve their political ends. Defining these acts as criminal reduces the individual's respectability and public support. Although pre-dating the ICC, proponents of this argument cite indictments issued by the International Criminal Tribunal for the former Yugoslavia (ICTY) for Slobodan Milosevic and Radovan Karadzic and by the Special Court for Sierra Leone for Charles Taylor, as well as ICC indictments for the Lord's Resistance Army (LRA) leaders.[5]

Yet the hypothesis that indicting leaders from highly divided societies cuts off their support is increasingly challenged – ICC indictments seem to have contributed to President Kenyatta and Deputy President Ruto's electoral success in Kenya,[6] while the arrest of militia leaders in eastern Congo may have hardened sectarian divides in Ituri.[7] President al-Bashir of Sudan remains in office. This argument may also ascribe too much power to individuals and overlook the strength of the movements and/or causes of which indictees are part.

2 For new state parties, the date of jurisdiction may be later than 1 July 2002.
3 Côte d'Ivoire is not a state party but has accepted the jurisdiction of the Court.
4 Hence the decision in October 2013 that the Al-Senussi case will proceed in Libya and is therefore inadmissible before the ICC.
5 Human Rights Watch, Selling Justice Short: Why Accountability Matters for Peace. New York: Human Rights Watch, 2010.
6 'What Kenya's withdrawal means for the international criminal court', Kenya Today, 8 September 2013, available at http://www.kenya-today.com/facing-justice/kenya-withdrawal-international-criminal-court-credibility.
7 Personal observations, Ituri.

A second argument is that where local justice systems are weak, the ICC presents a viable alternative for justice and may help **strengthen the rule of law** and justice systems. However, this can also be seen as 'outsourcing' justice, potentially weakening the ability of national actors to strengthen national systems and prosecute crimes through the domestic system, contrary to the complementarity principle.[8] This argument has also been used politically to great effect by opponents of the Court in Sudan and Kenya.

A third key argument is that prosecution can have a **deterrent effect** and will make future would-be perpetrators choose a different course of action. Deterrence is very difficult to prove. The ICC cannot arrest indictees – it relies on national systems to transfer suspects to The Hague for trial – which must reduce any deterrent effect the Court may have. The Congolese government transferred three indictees (Lubanga, Ndjolo Chui and Katanga) to The Hague, but the authorities refused to hand over Bosco Ntaganda in 2009, saying that 'there are moments when the demands of peace override the traditional needs of justice'.[9] The Sudanese government has not handed over any suspects.

'Against'

Critics of the ICC point to **political bias** in the Court's activities: the UN Security Council referred the situation of Darfur to the Court, but not that of Syria. The Court has also been heavily criticised for a lack of balance in its indictments, giving the appearance of partial investigations. In Uganda, the now-notorious joint press conference by the Prosecutor Moreno Ocampo and President Museveni fuelled perceptions of bias. The ICC has issued indictments for leaders of the LRA but not for members of the Ugandan People's Defense Forces (UPDF), despite calls to investigate all sides in the conflict.[10] In Côte d'Ivoire, the ICC has indicted Laurent and Simone Gbagbo and Charles Blé Goudé (a Gbagbo loyalist) but no one from the pro-Ouattara camp despite evidence, including from an international committee of enquiry,[11] that forces loyal to both sides had committed atrocities.

There are clearly cases missing, yet none of the cases before the Court is trivial or unsubstantiated. There is evidence that serious human rights violations, possibly amounting to genocide, war crimes or crimes against humanity, have been committed in each case. The question to be addressed – partly by the Court – is who is responsible for committing the violations. When Matthieu Ndjujolo Chui was acquitted by the Court in December 2012 of the charges of war crimes and crimes against humanity against him, the judges emphasised that their verdict did not mean that no crimes were committed during the attack on the village of Bogoro in February 2003 nor deny the suffering of the villagers, only that there was not enough evidence to find Mr Ndjujolo Chui responsible for the crimes.[12]

The second argument is that **indictments impede peace processes**, giving leaders no alternative but to fight it out, but there is no undisputed evidence for this claim. There was no meaningful peace process in Darfur at the time of the indictments. The Court may have impeded talks with the LRA, but ICC indictments are also said by some to have brought LRA leaders to the table, illustrating the difficulty of proving the impact of one strand of a complex process. The small sample size also means that personal calculations by indictees are not taken into account. Bosco Ntaganda's surrender to the ICC via the US Embassy in Rwanda, for example, came as a surprise and was presumably based on his own calculations of his best interests.

8 Leslie Vinjamuri, 'Deterrence, Democracy, and the Pursuit of International Justice', Ethics & International Affairs 24(2), 2010, pp. 191–211, 202.
9 Agence France Press, 'Peace before justice', Congo minister tells ICC, 13 February 2009, available at http://www.google.com/hostednews/afp/article/ALeqM5hbGnGCoztEJHzlf5HMghzlMfjv6w.
10 Human Rights Watch, ICC: 'Investigate All Sides in Uganda', 5 February 2004, available at http://www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda.
11 UN Human Rights Council, 'Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire' Doc A/HRC/17/48 14 June 201, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cote%20d%27Ivoire%20A%20HRC%2017%2048.pdf.
12 International Criminal Court, Press Release 18/12/2012: ICC Trial Chamber II acquits Mathieu Ngudjolo Chui ICC-CPI-20121218-PR865, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr865.aspx.

The decision by the Nigerian authorities to end former Liberian President Charles Taylor's asylum in that country and transfer him to the Special Court for Sierra Leone has become known as the 'Taylor effect' – meaning the end of asylum/exile as an option in peace talks. This pre-dates the ICC, but the Court reinforces the principle in many states. A state party to the ICC may be reluctant to offer exile to someone they later may be asked to turn over to the Court but this has apparently not happened in any of the current ICC situations.

There is some flexibility in the system. The Court can keep indictments under seal. In Congo, the warrant for Bosco Ntaganda was unsealed only after peace talks had concluded with the group in which he had a leading role.[13] The UN and other organisations may restrict direct contact between their mediators and indictees, but usually allow 'essential contact'. Article 16 of the Rome Statute enables the UN Security Council to suspend any investigation or prosecution for one year, on a renewable basis. Article 16 has not yet been used despite calls from the African Union, the Arab League and China for the UN Security Council to invoke Article 16 in relation to the warrants issued for President al-Bashir, President Kenyatta and Deputy President Ruto, so the effect of using Article 16 remains conjectural.

A further serious criticism of the Court is that it **discriminates against Africans** ('race-hunting' according to AU Chairperson Hailemariam Desale[14]) and the AU has raised a number of concerns with the Court. There is general agreement that the Court must extend its geographical reach, and there are examinations ongoing in other continents. Seen another way, African states and civil society are strong supporters of the Court: 34 African states are party to the Court, compared with 18 states in the Asia-Pacific. After the AU's Sirte resolution in 2009 criticising the Court,[15] African ICC state parties led by Botswana and civil society organisations spoke out in support of the ICC. The South African government was strongly criticised for supporting the motion, not least by South African civil society. It then clarified its intention to honour its commitments as a state party to the ICC.[16]

Problems with the ICC and peace debate

The influence of the ICC on peace processes is hotly debated and is only briefly summarised above. It seems that the role of the ICC has been overblown while the 'peace' part of the debate has been conflated with sovereignty, democracy and legitimacy as well as broader peace- and state-building. This has arguably complicated and muddied understanding of the Court's impact on peace mediation.

The ICC is one tool of many in the international peace and security architecture. However flawed it may be, the UN Security Council remains the ultimate arbiter of international peace and security, and the Court's level of independence from the Security Council is a constant negotiation. The Court currently maintains quite a high level of independence but it cannot remain immune to ***realpolitik***, as the case of Syria shows. Although some of its supporters may wish the Court were truly independent of the Security Council, full independence would likely mean the end of the Court. Debates about the Court's jurisdiction show that the permanent members of the Security Council will not allow a fully independent court.

There is no uncontested example of the Court helping or hindering a peace process. This is partly because the Court is so recent and the sample size so small. Analysts tend to include examples of other international justice initiatives, like the Special Court for Sierra Leone, or the ICTY (as above), even though these are qualitatively different temporary courts set up to examine specific conflicts.

13 Laura Davis and Priscilla Hayner, 'Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC'. New York: International Center for Transitional Justice, 2009, p.33.
14 BBC News Africa, 'African Union accuses ICC of 'hunting' Africans', 27 May 2013, available at: http://www.bbc.co.uk/news/world-africa-22681894.
15 African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Sirte, Libya (Assembly/AU/13 (XIII)) 3 July 2009.
16 Max du Plessis, 'The International Criminal Court that Africa Wants'. Pretoria, South Africa: Insitute for Security Studies, 2010, pp.15–17.

In some conflicts, the Court is simply not relevant because the state concerned is not a state party and the conflict is not of high enough international or regional interest to engage the Security Council. Alternatively, regional powers may be able to resist ICC engagement – it seems unlikely that the Court will intervene extensively in Asia, for example, given the resistance of Russia, China and India to the Court and the low number of state parties.

The focus on the ICC tends to overshadow other human rights frameworks, which arguably have greater (potential) influence on peace processes, and often have a wider geographical reach. The question of amnesty is illustrative. Although the Rome Statute does not mention amnesty explicitly, some provisions have been interpreted to render invalid amnesties for the crimes coming under the Court's jurisdiction, but this has not been tested.[17] UN policy is clear: 'United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.'[18] UN Security Council Resolution 1820 (2008) calls for the exclusion of sexual violence crimes for amnesties, for example. Regional organisations may also bring to bear their own human rights frameworks.

Prosecution and amnesty are not the only justice responses to human rights violations. Transitional justice is a set of judicial and non-judicial approaches, including prosecutions, truth-seeking, reparations and institutional reform, that societies may use to deal with the legacy of massive and systematic human rights violations. The core principles of transitional justice emerge from international human rights, humanitarian and criminal law, particularly the obligation on states to investigate and prosecute human rights violations and to prevent abuse, and the rights to remedy, truth and reparation. There is however no single blueprint in law for whether, how and when to implement transitional justice – states navigate these potentially competing rights within the parameters of their political and social realities.

Mediators may also have to take into account other normative standards. In Madagascar, mediators had to consider AU and SADC normative positions on human rights and the non-recognition of unconstitutional transfer of power, which due to the circumstances of that process were effectively in competition. Mediators may also be restricted by sanctions regimes imposed on individuals by the UN or other bodies, or by the proscription of certain groups by governments or international organisations. (The Court has jurisdiction over persons, it does not proscribe groups.)

The focus of the ICC and peace debate is almost exclusively at the formal, Track I level, perhaps due to the high profile of both ICC indictments and high-level peace processes. This overshadows extensive peacemaking at other levels, where the impact of the ICC is likely to be much less tangible. For example, while some of the high-level LRA leaders have been indicted by the ICC, lower ranks of fighters, particularly those outside Uganda, are treated as victims of the LRA to encourage defection and demobilisation.

17 In the preamble: 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' and Article 27 states that immunities enjoyed by heads of state, for example, are not a bar to prosecution by the ICC for these crimes.

18 The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General Document S/2004/616, 2004, p.5. (Note that there is no universally agreed definition of what constitutes 'gross human rights violations'.)

What constitutes success for the ICC?

Defining success for the ICC is a huge task. Yet, however it is defined, it should relate to the ICC's role and limitations rather than the expectations pinned on it. In any case, ICC success in the context of peace mediation, would surely include the following elements.

- ***Fairness.*** The Court tries people accused of the most serious crimes, therefore it has to conduct fair trials. Success cannot therefore only be measured by numbers of indictments, trials and convictions, but must also take into account acquittals (e.g. Mathieu Ngudjolo Chui).
- ***Balance.*** As discussed above, the Court is accused of bias in the indictments it issues and in the situations it pursues. It must be seen to be impartial in the situations in which it intervenes. It must also broaden its geographical reach.
- ***Independence.*** Negotiating the Court's independence from the UN Security Council remains delicate, but the more independent, balanced and fair the Court is seen to be, the more it may be trusted. The Court should also therefore remain independent from mediators, as well as parties to a conflict.
- ***Complementarity.*** A lack of cases can also be a sign of success for the Court, either because deterrence has worked, or – more likely – because national systems have investigated and prosecuted the crimes themselves.

Over time, it may also be possible to assess the sustainability of peace in situations where the ICC has intervened, but isolating the contribution of one actor in peacebuilding is fraught with the difficulties associated with feasible attribution. The Court should do no harm, yet assessing what harm is (not) done by the Court acting or not acting may also be highly conjectural.

The Court has well-known weaknesses, such as the inability to arrest. It has also been criticised for indicting sitting heads of state. The Kenyatta/Ruto trials may show that the ICC is not able to prosecute sitting heads of state, particularly those elected in countries with economic and geopolitical weight. The Kenyan parliament's vote in September 2013 to withdraw from the Rome Statute is unlikely to affect these trials. Boycotted by the opposition, the vote is perhaps little more than an expression of the governing coalition's hostility to the Court. But there is no doubt that the trials are a difficult test for the ICC. There are complex practical questions, from scheduling court appearances for the president and deputy president, safeguarding evidence, and allegations of witness intimidation.[19] Some African states support an end to the trials, raising their concerns through the African Union, or by filing legal observations (***amicus curiae*** briefs) through the Court itself.[20]

The Kenyatta/Ruto trials may be a watershed for the ICC, and also for Kenya and the African Union. The debate focuses on whether or not the ICC should be able to investigate and prosecute serious crimes allegedly committed by senior elected politicians. This overshadows the other side of the same debate: if the ICC cannot or should not investigate and prosecute serious human rights violations, like the post-election violence in Kenya, will another institution – Kenyan, regional, or international – be able to bring those responsible to account?

It is possible that a compromise will be found, for example that future indictments have to wait until after the accused has left office. Such a compromise has potentially far-reaching consequences. In relation to particular trials, evidence could be lost and witnesses silenced. More broadly, this would be likely to contribute to conflict over time by creating incentives for politicians to refuse to relinquish power, undermining the democratic process, and to use their positions to influence the justice system, undermining the rule of law and human rights.

19 The latter led to the indictment of Walter Osapiri Barasa on charges of influencing witnesses.

20 See Thomas Obel Hansen, Justice in Conflict blogpost, 16 September 2013, available at http://justiceinconflict.org/2013/09/16/the-price-of-deference-is-the-icc-bowing-to-pressure-in-the-kenya-cases/, accessed 17 October 2013.

Improving synergies for peace and justice

The peace and justice debate remains central to peacemakers and justice advocates alike. Closer scrutiny of the actual roles and limitations of the ICC, rather than the expectations pinned on it, and more clarity on the broader peace and justice landscape can help mediators and justice activists achieve both peace and justice. The following guidance may be helpful in this regard.

1. *Appropriate distance between Court and mediators*

Mediators and the Court need to remain independent of each other, while maintaining (indirect) communication. Mediators have passed limited, factual information about the Court to parties, for example.[21]

Mediators may be prohibited by their institutions from all, or all but essential, contact with indictees. To date, mediators have not been prevented by ICC indictments from dealing with other, non-indicted members of the same group. The ICC has no power to proscribe groups, only to accuse individuals, so this is unlikely to change.

Unsealing indictments may be sensitive and may need to be timed to try to minimise any disruptive impact on talks.

2. *Integrating the increasing number of normative frameworks*

The ICC is not alone in pushing for an end to impunity in peace processes, and neither, arguably, does it have the furthest reach. The human rights frameworks of the UN and regional institutions, for example, influence peace processes in situations where the ICC has no jurisdiction. The (policy) prohibitions on blanket amnesties stem from the UN, not the Court, for example, while UN Security Council Resolution 1325 requires mediators to take into account a range of issues related to gender and women's participation.

In the course of peace processes, mediators may have to take other normative standards into account, such as the non-recognition of unconstitutional transfer of power, which may compete with human rights obligations.

3. *Considering justice beyond international criminal prosecutions*

The rights to remedy, truth and reparation may influence peace processes, but there is no requirement that they be addressed directly and no blueprint for how this may be done. The trend is, however, for peace processes to take justice into account including through transitional justice approaches as well as criminal prosecutions. A more holistic approach to justice may be more effective for promoting justice in peacemaking at and beyond the formal, Track I levels. This includes prosecutions at the national and international levels, and also truth-seeking, reparation and institutional reform.

Justice provisions need to be examined carefully, however, from both justice and peace perspectives. The pursuit of accountability through transitional justice initiatives may risk destabilisation, increased violence or even a return to conflict. The trials of powerful leaders may provoke instability if they or their supporters try to resist prosecution. Trials may further reinforce divisions in society, or, in some cases, transitional justice initiatives may be externally imposed and culturally inappropriate.[22] Yet entrenching impunity may stymie future efforts to address the past and may contribute to future conflict.

21 Laura Davis and Priscilla Hayner, 'Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC'. New York: International Center for Transitional Justice, 2009, p.29.

22 See Jack Snyder and Leslie Vinjamuri, 'Trials and errors: principle and pragmatism in strategies of international justice', International Security 28(3) 2004; Chandra Lekhra Sriram, C.L. 'Justice as peace? Liberal peacebuilding and strategies of transitional justice' Global Society 21(4) 2007, pp.579–591.

4. Assessing the impact of peace deals on justice

The type of institutional arrangements agreed in a peace deal may have a more important impact on justice and human rights than the explicitly justice-related provisions in the deal. In Kenya and the Democratic Republic of Congo, for example, the power-sharing agreements negotiated in each situation had a much more important effect on human rights and justice in these two countries than the justice provisions. The power-sharing deals enabled elites to entrench their power within the political and security institutions, and then fundamentally undermine justice efforts in the implementation phase.[23]

The possible effects of justice provisions on 'peace' are often considered, but rarely those of peace on justice. Justice activists and mediators need to take a more comprehensive approach to designing and analysing peace deals. Particular attention should be paid to the justice and security sectors. If security arrangements, for example, entrench impunity within the security and justice sectors, no justice initiative, national or international, judicial or non-judicial, is likely to succeed. Such arrangements may also contain the seeds for prolonging conflict until it erupts into violence at a later stage.

Jack Snyder and Leslie Vinjamuri have argued that offering (potential) spoilers amnesty should not be ruled out if it means that institutional reform can be introduced to strengthen justice norms in the aftermath of conflict.[24] It is difficult to imagine amnesties, at least for the most serious crimes, returning to use in the current climate. Yet at the same time, the current hope seems to be that in the absence of an ICC warrant, or (rarely) a national warrant, human rights violators will turn over a new leaf at the end of conflict. There are too few attempts to regulate the behaviour of (previously) abusive leaders once in power. Between ICC indictments and amnesty, there is fertile ground in which to uncover creative ways to hold leaders responsible for supporting justice norms in their post-conflict society; and, when necessary, to hold them accountable if they fail to do so.

23 Thomas Obel Hansen, 'Kenya's power-sharing arrangement and its implications for transitional justice'; Laura Davis, 'Power shared and justice shelved: the Democratic Republic of Congo', both in International Journal of Human Rights 17(2) February 2013 'Special Issue: Law, power-sharing and human rights', eds Sahla Aroussi, Koen de Feyter and Stef Vandeginste.

24 Jack Snyder and Leslie Vinjamuri, 'Trials and errors: principle and pragmatism in strategies of international justice', International Security 28(3) 2004, p.44.