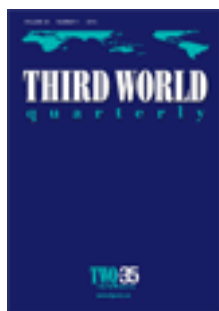


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Third World Quarterly

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/ctwq20>

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Published online: 24 Jun 2013.

To cite this article: Catherine Gegout (2013) The International Criminal Court: limits, potential and conditions for the promotion of justice and peace, *Third World Quarterly*, 34:5, 800-818, DOI: [10.1080/01436597.2013.800737](https://doi.org/10.1080/01436597.2013.800737)

To link to this article: <http://dx.doi.org/10.1080/01436597.2013.800737>

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The International Criminal Court: limits, potential and conditions for the promotion of justice and peace

CATHERINE GEGOUT

ABSTRACT The International Criminal Court (icc) aims to promote not only justice, but also peace. It has been widely criticised for doing neither, yet it has to contend with some severe structural and political difficulties: it has limited resources, it faces institutional restrictions, it is manipulated by states, and it is criticised for an alleged selectivity in the way it dispenses justice. However, the icc could contribute significantly to the promotion of international justice and peace, and have a major impact on the prevention of crime, since its prosecutions represent a clear threat to highly placed individuals who commit serious crimes. While this article concentrates on the work of the icc in Africa, the only continent where it has issued indictments against suspected criminals, it also looks at its efforts on other continents. It argues that, in the larger international context, the contribution of the icc to international justice and peace depends on its institutional power and the support it receives from states, on its own impartial work, and on the way it is perceived by potential criminals and victims in the world.

The International Criminal Court (icc, or the Court) was created in 2002. The aim of the icc is to put an end to impunity for perpetrators of the most serious crimes of concern to the international community, and to contribute to the prevention of such crimes. The icc can prosecute any individual anywhere in the world, but for suspected criminals who are citizens of a state which has not ratified the icc Statute, a United Nations Security Council (UNSC) resolution is necessary.¹ In accordance with the principle of jurisdiction *ratione temporis* (temporal jurisdiction) the Court can only investigate crimes committed after 1 July 2002, when the icc Statute came into force.²

Despite the ethical and human rights agenda of the icc, and its ambition to punish criminals and prevent crimes, it is not always subscribed to by

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ISSN 0143-6597 print/ISSN 1360-2241 online/13/000800-19

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international organisations, states and people. As of 2013, a majority of states in the world—122—have ratified the Rome Statute that established the institution. The ICC has jurisdiction with respect to a particular range of crimes: genocide, crimes against humanity, war crimes, and in 2017 it may be able to investigate the crime of aggression (committed by one state in another state).³ The ICC Preamble declares that these are serious crimes which threaten the peace, security and well-being of the world. However, the terms ‘peace’ and ‘justice’ are not defined in the ICC Preamble, and this leads to different interpretations, as peace and justice for some can mean conditions of war and injustice for others.

What are in effect the shortcomings of the ICC, and has it made positive contributions to justice and peace? And under which conditions can it provide international justice and peace? This article shows the limits and problems of the ICC but also its inherent potential. A number of factors hamper the ICC: it lacks legitimacy, and it can be constrained by power politics when it investigates a case and when an arrest warrant needs implementing. It is very selective in its cases, and this goes against the principle of universal justice on the ground. Furthermore it has only indicted Africans. For some criminals and victims alike the Court lacks credibility. The ICC is considered by some researchers and practitioners a potentially counterproductive actor in peace negotiations.

Despite all this, the ICC does have the potential to become a Court that provides international justice and peace. It is a court with an ethical aim, that is, the prosecution of criminals, and it is gaining in legitimacy. It could attract states which want to show their support for the defence of human rights. The Court sometimes does work independently from state leaders: on its own initiative it is focusing on the actions of regime leaders in Kenya and Ivory Coast. But the ICC is not only centred on Africa, it has also considered investigating crimes committed in other regions of the world, such as South America, Asia and the Middle East. The work of the ICC could create a long-term deterrent effect, that is, potential criminals could fear the consequences of their acts, especially once they are no longer in positions of power.

It is also argued here that the contribution of the ICC to justice and peace depends on its institutional autonomy to indict potential criminals, on the support it receives from states parties to the ICC, on its own impartial work, and on the extent to which it is respected by people in the world. The institutional autonomy of the ICC is conditioned by the goodwill of states parties and non-party states to the ICC Statute. This autonomy would increase if a majority of, if not all, states in the world were party to the Statute and systematically respected its obligations. The credibility of the ICC is linked to its capacity to provide universal criminal justice without bias. This credibility would increase if the ICC could: 1) act independently from states; 2) investigate criminals on all continents, whether state officials or not; 3) have the means to deliver justice in a fair way and in a short period of time; and 4) where possible, defer prosecutions at the local level. Finally, the ICC must be considered a legitimate actor by all those who have reason to fear indictment, by indicted persons and their supporters, and by the general population in areas where serious crimes are being committed.

Four contributions are made here to the literature on the International Criminal Court, on justice and peace, and on theories of policy making. First, I point out the difficulties the ICC faces in seeking to provide not only justice but also peace. Second, I use studies of the ICC by lawyers and political scientists, by those interested in the current impact of the ICC on the ground, in countries where it already operates, and by those interested in its potential for wider independent action. Third, conditions under which the ICC could provide international justice and peace are proposed. Fourth, by identifying the limits within which the ICC operates and its potential, this article hopes to rectify the flawed perception of the ICC, which is considered by some a Western court manipulated by the USA and European states, and to open up a debate on the measures needed to enhance its legitimacy.

The article is organised into three main sections. The first discusses the institutional limits within which the ICC currently works. The Court has to face a lack of support from all states in the world, and the absence of systematic cooperation by states parties to its Statute. It is an instrument for power politics, and manipulated by states parties and non-party states to the ICC Statute. Nonetheless, its legitimacy is growing, and the ICC is shown to be a political actor which can set its own agenda.

The second section seeks to evaluate the action of the ICC on the ground. It analyses the impact of the ICC on local justice, its influence on peace negotiations, and the way it is perceived by perpetrators and victims of crimes. It shows that the ICC provides important symbolic justice and peace. Even if leaders with a history of violence have continued being violent, despite the threat of an ICC arrest warrant, the ICC could have a deterrent effect in the long term, as no state or militia leader wants to be arrested. Some indicted people have changed their attitude for fear of the ICC. Victims of crime seem to have diverging views on the utility of the ICC, but they generally welcome its work.

The last and concluding section highlights the difficulties for the ICC to provide both international justice and peace, and suggests possible practical policies both it and the international community might implement to provide justice and durable peace for people. The main proposals are that: 1) the ICC has to be given the means to deliver justice without bias, that is, without control by states and with a focus on *all* individuals and parties responsible for crimes in a conflict; 2) an emphasis needs to be laid on strengthening institutions providing local justice; and 3) officials who work within states which have ratified the ICC treaty cannot rely solely on the ICC to provide justice: states themselves should also be focusing their policies on the promotion of long-term economic and social development for victims of conflict.

Rising legitimacy and autonomy

The contribution of the ICC to furthering the cause of justice and peace is limited by the fact that some states do not yet accept its legitimacy, by the tendency of certain states to seek to control and use it as an instrument to reinforce their own power, and by its own ability to pursue its investigations successfully. Increasingly, however, the ICC is being recognised as a legitimate international

institution by a growing number of states. It has gained visibility through its strategy whereby the cases it selects concern all parties to a conflict, and have a high likelihood of success, that is, the person or persons investigated and prosecuted are eventually found guilty of a crime.

Rising legitimacy

Legitimacy means that: 1) most states on all continents (and especially the permanent five of the UNSC) are party to the ICC and/or recognise its work as useful and fair; and 2) most people in both poor and rich regions, and in different political systems, think its work helps provide international justice and peace.⁴ This second point will be analysed in the second section.

As stated by Katherina Coleman, the power of an institution depends on how many and which states are part of this organisation.⁵ An increasing number of states accept the legitimacy of the ICC, even if some states do not ratify its status. Three out of five permanent members of the UNSC are not party to it. However, the USA, China and Russia seem to be progressively agreeing with its work, as they did not refuse to refer the case of Sudan in 2005 to the ICC, and they also agreed to a referral with the case of Libya in 2011.⁶ Although Russia does not always agree to referrals to the ICC, it has made use of the Court, as Russian officials filed a complaint against Georgia.⁷

The absence of the hegemonic state, the USA, from the ICC presents problems for its legitimacy. Some scholars argue that US ratification is in the interest of the USA.⁸ This it is unlikely at present, as US officials still argue that the ICC could indict US soldiers for war crimes when they conduct operations abroad with legitimate uses of force. However, the USA has made progress in terms of cooperation with the ICC. In the past some countries which had refused to sign immunity agreements with the USA had seen their aid allocations cut.⁹ But since Barack Obama came to power this is no longer the case. In addition, the Secretary of State, Hillary Rodham Clinton, has certainly expressed great regret that the USA is not a signatory to the ICC, and the USA was in fact an observer at the first review conference of the ICC in June 2010. Further cooperation from the hegemon was noted when, in 2013, President Obama signed a bill in order to reward people giving information which could lead to 'the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal (including a hybrid or mixed tribunal), of any foreign national accused of war crimes, crimes against humanity, or genocide, as defined under the statute of such tribunal'.¹⁰ Subsequently, when Bosco Ntaganda, who had been wanted by the ICC since 2006, voluntarily surrendered himself to the US Embassy in Kigali in Rwanda in March 2013, the USA transferred him swiftly to the ICC.

When the ICC treaty was adopted in 1998, seven countries voted against it, the USA, China, Libya, Iraq, Israel, Qatar and Yemen. Today, a majority of African states (34 out of 53), most countries in South America and all the states within the European Union have ratified the treaty. Thirty-one states have signed but not ratified the ICC Statute, and 40 states are not party to the ICC.¹¹

India, for instance, fears that it acts as a judicial bully.¹² And several states in the Middle East, Africa and Asia have not acceded to the Statute.

There are signs nonetheless that this situation is changing. For example, following the 2011 spring revolutions in the Middle East and North Africa, Tunisia has joined the ICC, and both Egypt and Qatar are considering being part of it. Palestinian leaders too are aware of the Court's potential to promote justice and peace. Given that Palestine became a state, when it became a member of UNESCO in 2011 and a non-member observer state of the United Nations' General Assembly in 2012, it could either accept the Court's jurisdiction on an *ad hoc* basis, pursuant to Article 12(3), or apply to become a member of the ICC.¹³ The UN Human Rights Council appears to be in favour of Palestine joining the ICC as, referring to the Israeli settlements in the West Bank, it stated that 'ratification of the statute by Palestine may lead to accountability for gross violations of human rights law and serious violations of international humanitarian law and justice for victims'.¹⁴ NGOs and states parties to the ICC also called upon it to investigate crimes in Ivory Coast after the elections in winter 2010. In addition, some states, led by Switzerland, the United Nations High Commissioner for Human Rights, Navi Pillay, and a member of the Commission of Enquiry on Syria, Carla del Ponte, would like the ICC to investigate crimes committed by Syrian president Bashar al-Assad since spring 2011.¹⁵

States can be encouraged by other states and by civil society to ratify the ICC.¹⁶ In July 2011 the ICC and the Commonwealth signed a memorandum of understanding in order to promote the work of the ICC within the Commonwealth area. Groups such as the Indian Coalition for the ICC, Chinese academia, the Indonesian Civil Society for the International Criminal Court and the Malaysian Bar Association have been active in their respective states. The Philippines Coalition for the ICC seems to have been influential in the decision of the Philippines to ratify the ICC treaty in 2011.¹⁷ In the future many states which are members of the Organisation of the Islamic Community (OIC) and which have ratified the ICC treaty could encourage other OIC members to do so. Similarly, on the European continent, pressure could be exerted by all EU member states on those states not party to the ICC but which are members of the Council of Europe (Armenia, Azerbaijan, Moldova, Russia and Ukraine), and therefore potential EU members, and especially on Serbia and Turkey, already candidate EU member states.¹⁸

The ICC instrumentalised by states

The independence of the ICC has always been compromised by external attempts to exercise control over its operations. States, while acting legally, use the ICC for political motives, and this can sometimes work against the principles of international criminal justice. This corresponds to the argument made by the realist author EH Carr, according to whom law 'cannot be understood independently of the political foundation on which it rests and of the political interests which it serves'.¹⁹

Power politics have a direct impact on the functioning of the ICC. The role of the permanent five members of the UN Security Council is crucial when crimes

are committed in states which are not party to the ICC. In such an instance a UNSC decision is necessary for triggering the ICC's jurisdiction; the big powers are likely to be the only states politically capable of carrying out an ICC arrest warrant; and at any moment the UNSC can decide to delay an ICC investigation or prosecution (subject to the conditions in Article 16 of the ICC Statute). As a result, even states within the UNSC which are not party to the ICC Statute (the USA, China and Russia), can play a major role in ICC investigations: they can encourage the ICC to act, or prevent the international community from cooperating with it. In effect, the UNSC used the ICC as a diplomatic instrument to deal with the crisis in Sudan. Referring the Darfur case to the ICC served the interests of the international community, which had not managed to reach a common position on significant sanctions against Sudan.²⁰ In addition, the USA expected the UNSC to exercise firm political oversight of the ICC process in connection with the situation in Darfur.²¹ States, incapable of acting by any other means, use the ICC as they want 'a way of being seen to act' and this helps 'assuage the conscience of the international community'.²²

The ICC can become or be considered a biased actor by states and people. State leaders who ask the ICC to act against rebels in order to reinforce their own regime and authority are effectively seeking to turn the ICC into their political instrument. They are also contributing to the creation of an unjust international legal system, as they want the Court to focus on one side of a conflict.²³ This was the case with Joseph Kabila in the DRC in 2004, Yoweri Museveni in Uganda in 2004, François Bozizé in the Central African Republic (CAR) in 2005, and with the government in Mali in 2012.

States can hamper the work of the ICC when they decide not to cooperate with it when it has issued an arrest warrant. If states are hosting someone wanted by the ICC, they might want to avoid the indicted person divulging information about crimes committed by their own government, or they may hope to use the ICC as a threat in negotiations with their opponents. For instance, at the implementation stage, in contravention of ICC rules, the DRC government has not been fully cooperative with the ICC. The DRC government referred the situation in North Eastern Congo to the ICC in 2003, but then did not arrest all those who had been indicted. Despite the arrest warrant issued against him by the ICC, Bosco Ntaganda—who handed himself over to the ICC in 2013—was seen in January 2009 in Goma alongside the Congolese minister of the interior and other senior Congolese military officers. The government made it clear that domestic peace was best served by Bosco Ntaganda remaining free.²⁴ Similarly, in 2008 the Ugandan government changed policy towards the ICC: the government offered the Lord's Resistance Army (LRA) the possibility of being tried at the national level rather than at the ICC. In a more recent example, the Kenyan government has not been cooperating with the ICC, as the ICC prosecutor, Fatou Bensouda has said that 'we still have difficulties with witness intimidation. This is ongoing...it's not stopping and I think it will get more serious'.²⁵

If states are not actually hosting an indicted individual they should, according to the Statute, help the ICC serve its arrest warrants. France, the USA and the UK had an ambiguous position towards the ICC in the cases of Sudan, Kenya and Libya. In November 2008 Nicolas Sarkozy, the French president, met

Sudanese leader Omar-al Bashir privately in Qatar. Sarkozy was apparently ready to prevent the ICC from investigating crimes in Sudan in order to reach a peace agreement on Darfur.²⁶ Similarly, the UK does not always seem to find the indictment against Bashir helpful for the peace process.²⁷ In the Libya case in 2011 an analyst for the journal *Foreign Policy* suggested that the UNSC members might have considered ‘stopping the ICC process in exchange for the peaceful transfer of power’.²⁸ Still in Libya, the UK encouraged local courts, against the wishes of the ICC, to deal with the prosecution of Saif Gaddafi. In Kenya in February 2011 France and the USA seem to have ‘seriously considered’ the African Union’s (AU) requests to defer the ICC’s prosecution of six Kenyan officials.²⁹ However, deferral did not happen. Moreover, when Uhuru Kenyatta, indicted by the ICC, was about to win Kenya’s presidential election in 2013, the UK merely indicated that ‘officials will avoid any but essential contact with him’.³⁰ The US Assistant Secretary of State for African Affairs, Johnnie Carson, told Kenyan voters that ‘choices have consequences’; these ‘consequences’ remain to be seen.³¹ The lack of full support for the ICC goes particularly against the spirit of the agreement between the ICC and the EU on cooperation and assistance signed in 2005.³²

In August 2009 the African Union made it clear that its member states would not cooperate with the ICC in order to arrest Bashir. Chad was the first country which has ratified the ICC treaty to welcome Bashir on its territory in July 2010 (and again in 2011 and 2013), Kenya followed suit shortly after in August 2010, Djibouti in May 2011 and Malawi in October 2011.³³ Bashir was also present in five African states which have not ratified the ICC treaty: Egypt and Zimbabwe in 2009, Ethiopia in 2010, Eritrea in 2009, 2010 and 2011, and Libya in 2012.

However, other African states do not want to renege on their international legal obligations. Botswana and South Africa have said they would arrest Bashir if he travelled to these states. The Kenyan High Court issued a domestic arrest warrant against him in 2011. CAR and Libya, which was hosting the Africa–EU summit in 2010, prevented Bashir from travelling to their countries. Similarly Malawi cancelled an AU summit which was to take place on its own territory in 2012, as it did not want to welcome Bashir. Regarding the Libya crisis, in 2011 Burkina Faso and Niger said that they would not give safe haven to Muammar Gaddafi.

Some states in the international community, it seems, used the ICC to suit their own purposes of preserving relations with Sudan and Libya, or giving peace negotiations a chance: complying with the law is not always the first option for states. States which fail to implement ICC requests clearly do not consider them as binding, and as a consequence the legitimacy of the ICC is called into question.

Political and selective actor

The ICC is a legal body, supposedly concerned with justice, and not politics. However, the Court can have considerable political impact because it has significant independent power. The chief prosecutor can initiate an investigation on

the basis of a referral from any state which is party to the ICC, or from the UNSC acting under Chapter VII of the Charter of the United Nations. In addition, the prosecutor can initiate investigations *proprio motu*, on the basis of information received from individuals or organisations about crimes within the jurisdiction of the Court. The prosecutor has done this twice since its creation: in Kenya and in Ivory Coast.

The ICC does not work consistently according to the principles of international law, and it does not always appear fair. The Court chooses its prosecutions strategically, following criteria of its own. The ICC has to decide whether it will be more effective to pursue one case, and see the person indicted, judged and imprisoned, than to investigate many cases where evidence is limited and successful prosecution uncertain. The procedure used by the ICC can sometimes yield controversial results.

The prosecutor uses the jurisdictional threshold of gravity: only serious crimes are investigated. But s/he does not follow his/her own threshold consistently. For instance, in the DRC those investigating the crimes of Thomas Lubanga found evidence of torture, pillage, rape and enslavement, but as this evidence was insufficient, a decision was made to focus only on child soldiers.³⁴

The ICC focuses on cases where an investigation is feasible.³⁵ It only works on crimes in regions which already have systems of local justice, and which are accessible by ICC investigators with the protection of the government. This reduces the geographical scope of its investigations. For instance, in the DRC the ICC was present in Ituri but not in Nyankunde, where people were reluctant to bury their dead in the hope of an ICC investigation.³⁶ Also, for the situation in Darfur, ICC investigators could not obtain visas from the Sudanese government, so they had to interview people in refugee camps in Chad.

The Court has targeted some individuals, but neglected others equally well known for their violence and crimes. For instance, in the DRC the ICC has not indicted Laurent Nkunda, leader of the rebel group known as the National Congress for the Defence of the People (CNDP) in Eastern Congo. In Kenya the ICC investigation is not considered fair by everyone, as the ICC prosecutor does not appear to be investigating the worst offenders, but rather those who are easily apprehended.³⁷

When the ICC launches its own investigations without a UNSC referral, it has in the past avoided investigating people in power and, as a result, it has played a political role as it took sides in a conflict. In the DRC and Uganda it has only acted against rebels or members of the opposition, whereas a UN envoy said that government troops in the DRC might have committed rape and murder in North Kivu in summer 2010, and Ugandan human rights activists have asked the ICC to indict both sides of the conflict in Uganda.³⁸ However, the ICC has been acting increasingly against state representatives. This is welcomed, as states can rarely prosecute crimes committed by their own officials.³⁹ The prosecutor decided to conduct preliminary examinations of the situations in Guinea in 2009 and Nigeria in 2010, and to use *proprio motu* powers to investigate crimes committed by government officials in Kenya in 2007, and in Ivory Coast in June 2011.⁴⁰ Armed groups in favour either of the former President Laurent

Gbagbo or the present President Alassane Ouattara would both be investigated for crimes committed between 2002 and 2010. In November 2011 Laurent Gbagbo became the first former head of state to appear at the ICC. In 2013 the prosecutor also made it clear that not only Malian rebels but also officials would be investigated.⁴¹

Serious criticism has been levelled against the ICC, as it has concentrated on crimes solely committed in Africa.⁴² Arrest warrants against named individuals have only been issued in the DRC and Uganda (2004), Sudan (2005), CAR (2007), Kenya (2010), and Libya (2011). However, the ICC has conducted preliminary investigations throughout the world: Iraq, Venezuela and Colombia (2006); Afghanistan (2007); Georgia and Sri Lanka (2008); and Gaza, Honduras and South Korea (2010). These investigations have not led to any indictments for various reasons: crimes were insufficient in number, national justice systems were able to deal with the issue, investigations are ongoing and/or the ICC cannot legally address some crimes committed in a state non-party to the ICC Statute.⁴³

The investigation in Iraq did not get very far: in 2006 the then ICC prosecutor rejected the idea of investigating the situation there on grounds of 'gravity'. The Court, he said, should only investigate the most severe cases of war crimes, crimes against humanity and genocide.⁴⁴ In 2006 the ICC prosecutor analysed the 2002 crisis in Venezuela, during which supporters and opponents of Hugo Chavez opposed one another, but subsequently rejected the idea of a formal investigation. The ICC put a lot of pressure on Colombia for it to make appropriate use of its criminal justice system.⁴⁵ As regards Afghanistan, investigations started in 2007. The ICC prosecutor said both NATO forces, including US personnel, and the Taliban would be investigated. The ICC is monitoring the crisis which took place in Georgia in 2008, and has sent delegations to Georgia and to Russia. It investigated the use of child soldiers in Sri Lanka in 2008 since, although this state has not ratified the ICC treaty, it could potentially have jurisdiction over crimes committed by nationals of states parties on its territory.

In 2010 the ICC considered investigating war crimes committed in Gaza in winter 2009–10. However, the ICC could not indict crimes committed in the Palestinian territories, as these territories did not legally constitute a state.⁴⁶ Neither could Israelis be indicted, as Israel has not signed the ICC treaty, and as the USA within the UNSC would not endorse a referral of the Gaza issue to the ICC. As mentioned above, the situation could be different now since Palestine has been recognised as a state: it could become a state party to the ICC.

2010 also saw preliminary examinations opened on crimes committed during the 2009 coup in Honduras, when the military ousted President Manuel Zelaya, and on war crimes committed by North Korean forces in the territory of the Republic of Korea in 2010. These examinations are ongoing, and welcomed by some scholars.⁴⁷ The ICC can only deliver justice and peace with the support of states. More states parties to the ICC means more legitimacy, and more states cooperating with the ICC in order to implement arrest warrants means its work can be more effective. The ICC can also make sure it delivers fair and unbiased justice. But, as the following section shows, the way people perceive the ICC is also crucial for the good conduct of its work.

Significance of the ICC for criminals and victims

I argue in this section that the ICC either has no impact or a positive impact in terms of providing international justice and peace. First, the ICC does not seem to have prevented potential criminals from being violent, whether they live in states parties or non-party states to the ICC, but this could change in the future given that some potential criminals seem to fear the ICC. Second, the reaction of individuals indicted by the ICC is indeterminate: some have continued to use violence, whereas others seem to have contained it. Finally, victims who are aware of the ICC seem to be generally in favour of it, even if it only provides symbolic justice.

Prevention of crime in the long term?

The ICC could have a deterrent effect and prevent future atrocities.⁴⁸ By indicting heads of government, the ICC marks the end of impunity for leaders who do not take steps to protect their citizens, or actively do them harm. The ICC therefore helps implement the concept of ‘responsibility to protect’ agreed upon by the UN General Assembly in 2005.⁴⁹ Its existence could also encourage militia groups to reduce violence, national courts to act against criminals, and leaders to change politics within member states.

Former and current heads of state such as Laurent Gbagbo in Ivory Coast and Robert Mugabe in Zimbabwe, who were or are responsible for violence in their own state, seem to fear the ICC.⁵⁰ Whether the ICC is feared or not does not change the fact that it might in the future be responsible for judging heads of state such as Paul Kagame in Rwanda or Bashar al-Assad in Syria, either with a UN Security Council referral or especially following a change of regime in those states.

However, the work of the ICC is not guaranteed to deter criminals.⁵¹ Heads of state considered leaders of authoritarian regimes are still in power. Robert Mugabe has been officially re-elected. In addition, despite the offer of amnesty, and the use of the threat of the ICC by the Economic Community of West African States and the AU, Laurent Gbagbo did not step down from power in Ivory Coast. The fact that the UN issued a report on the abuses, which could amount to crimes against humanity, did not deter the Syrian leader Assad from committing further violence in his state.⁵² The fact that Mali ratified the ICC treaty in 2000 did not prevent rebels and government troops from committing crimes in northern Mali in 2012.

The work of the ICC, as well as the work of international courts, could also have an impact on local and regional courts.⁵³ For instance, the ICC encouraged Nigeria to organise trials to judge members of the terrorist group organisation Boko Haram, and also Kenya to organise domestic trials for war crimes.⁵⁴ The work of the ICC could also be the reason for discussions on the creation by the AU of a regional crime court.⁵⁵ Researchers have also shown that international law can influence politics.⁵⁶ In particular, the ICC monitors elections in order to gather evidence of violence. This was the case in the DRC in 2011.⁵⁷

Indicted criminals still holding power: impact on peace?

The reaction of individuals indicted by the Court is also unpredictable. On the one hand, the ICC could have a negative impact on peace. Some indicted persons have continued their criminal activities. This is the case with both Omar al-Bashir in Sudan and Muammar Gaddafi in Libya. Indicted rebels have also continued to commit crimes. An ICC indictment could also encourage further violence. In addition, an indictment makes peace negotiations impossible, as potential criminals are no longer legitimate actors and cannot travel abroad without fearing arrest. Many international actors, such as the AU, the Arab League, the OIC and the Group of 77 (an influential UN bloc of developing nations, which includes China), are afraid of the consequences in Darfur of the ICC's investigation.⁵⁸ State leaders themselves could fear the arrest of a rebel leader, if he or she has knowledge of crimes they supported. This is for instance the case of Bosco Ntaganda: Rwanda is likely to be worried about his arrest, as he could confirm the findings of a confidential UN report in October 2012 that Rwanda and Uganda supported his M23 rebel movement. This arrest could be positive for justice, but not necessarily for peace.

When an indicted leader is involved in several conflicts, this can obviously lead to preventing or stalling peace negotiations in other regions. In the Great Lakes the absence of peace negotiations in Uganda and the indictment of LRA leaders have led the LRA to commit crimes beyond Uganda, in the DRC, CAR and Darfur. The ICC's contribution to peace also depends on the extent to which its indictments lead to the legitimacy of perpetrators being questioned. This too is unpredictable: a suspected criminal might continue to receive support despite an ICC investigation. As with other international tribunals involved in investigating core international crimes, ICC intervention could cause a nationalist backlash that would exacerbate peace initiatives.⁵⁹ For instance, according to Antonio Cassese, the first President of the International Criminal Tribunal for the Former Yugoslavia, the warrant against Omar al-Bashir has reinforced his legitimacy in Sudan and in African and Arab states.⁶⁰

Conversely the ICC can have a positive political impact, and can influence the internal politics of all states: it can change the domestic political balance. Some experts argue that, by sidelining the LRA in Uganda, the ICC has diminished the former's political force.⁶¹ And they believe that violence will be further reduced when Joseph Kony, who is under an ICC arrest warrant, is apprehended.⁶² In Mali the ICC investigations might reduce violence committed by government troops.⁶³ In Sudan the threat of ICC action may also have encouraged some politicians to distance themselves from the indicted individuals. Some senior members of the ruling party in Sudan seem to have 'seriously questioned' the wisdom of the regime's confrontational approach to the international community.⁶⁴ Similarly the threat of ICC prosecutions might have encouraged defections from the Libyan and Syrian regimes. Events in Kenya show that the ICC can have a positive impact on peace: violence in the 2013 elections could have occurred again, but the ICC might have made leaders reluctant to support or foster violence, and indirectly contribute to peace in Kenya.⁶⁵

When potential criminals, including heads of state, are arrested or hand themselves in, such as Laurent and Simone Gbagbo in Ivory Coast, Saif Gaddafi or Abdullah Al-Senussi in Libya, or Bosco Ntaganda in the DRC, it can mark the end of violence, with the dismantling of groups which supported them, and be a step forward on the road to peace.

Victims of crimes: symbolic and retributive justice welcomed

The reaction of victims to the work of the ICC is also indeterminate, but overall it seems positive. On the one hand, victims can disagree with the work of the ICC, as they feel it provides symbolic justice, it is biased, it does not provide protection, it does not provide justice as they understand it, and it does not address their needs. Justice can only be symbolic, given the limited number of cases investigated by the ICC. Only 30 people have been indicted since 2002. Victims in a conflict can disagree with the ICC on its choice of person indicted. For instance, in the DRC the Hemas people, who are from the same ethnic group as Thomas Lubanga, did not understand why Lubanga was arrested.⁶⁶ Victims are often reluctant to testify to the ICC for fear of further attack. Victims could prefer local justice systems to justice meted out by an international court. They may be in favour of restorative justice through reconciliation, and not of retributive justice through punishment. People might view the ICC as a neo-colonial body.⁶⁷ Further, some people in conflict areas feel that the ICC is detached from their daily concerns, and that their welfare and will to live in a peaceful and secure environment are not taken into consideration.⁶⁸ They do not necessarily consider the aims of the ICC a priority, and are generally more concerned with the struggle against poverty than the fight for justice.

On the other hand, symbolism can be important, retributive justice is valued by people and the ICC is making an effort to address the concerns of victims. The ICC brings the idea of justice into local and national politics in the places where it is known by people. For instance, it was used by domestic actors in Namibia to advance their claims for reconciliation, and provides hope for victims of crimes committed in states which are not party to the ICC. In Zimbabwe the strongest support for the ICC comes from the grassroots level.⁶⁹ Activists involved in the Arab Spring have also invoked the Court.⁷⁰ In addition, victims can prefer retributive to restorative justice. According to a survey with over 2000 respondents, conducted in northern Uganda by the University of California, Berkeley, 66% are in favour of punishment, and 22% in favour of amnesty.⁷¹

Victims do seem to agree with the ICC. In the July 2009 edition of the *New African* several African lawyers and African human rights NGOs spoke out for the ICC. Victims from Darfur welcomed the work of the ICC.⁷² According to the survey mentioned above, a majority of respondents who had heard of the Court in Uganda (bearing in mind that 73% had not!) attached high expectations to it, believing that the ICC would contribute both to peace (91%) and justice (89%). And in Kenya in 2011 some MPs and most people (73%) were in favour of the ICC prosecution of their leaders responsible for the 2007 election violence.⁷³

For the ICC to have a lasting positive impact on justice and peace, the needs of victims must be satisfied. It has set up a Victims and Witnesses Unit to provide protection, support and other appropriate assistance to witnesses and victims who appear before the Court.⁷⁴ Unfortunately there is no long-term support, and victims who have left the Court remain at the mercy of criminals and their supporters. The ICC has also set up a Trust Fund for Victims, and it is trying to reach out to people in conflict areas who are not direct victims of the conflict. It has for instance established channels of communication and information about its work with university students in Bunia and with military officials in the DRC. In order to address the concerns of victims, states have to make sure that global social and economic justice is provided to victims of conflict, as criminal justice alone is insufficient for justice and peace in the long term.⁷⁵

Overcoming the difficulty of providing justice and peace

The ICC has very ambitious aims, as it is not only concerned with establishing international justice, but also peace. Researchers disagree on the impact a tribunal can have on peace. For some theorists the two aims of justice and peace can contradict one another and, as a result, in its quest to establish justice, the ICC does not always serve the cause of peace. First, peace can exist without justice.⁷⁶ Peace is enjoyed in countries such as Mozambique and Namibia, where reconciliation took place without trials.⁷⁷ The ICC, it is thought, should sometimes refrain from acting in an area of conflict, since indicting a rebel is not necessarily the solution. Second, some commentators argue that peace should come first, then justice.⁷⁸ Third, justice can be a danger for peace. *Fiat Justitia et Pereat Mundus?* As long as international justice is done, does it matter if peace is subverted, and the world perishes? Some researchers demonstrate that international tribunals do not appear to contribute to peace.⁷⁹ In addition, the circumstances under which the ICC works make peace even more difficult to achieve. Unlike the Tribunals in Nuremberg and in Tokyo, the ICC does not for the most part work in times of peace, but in times of conflict. The Court is inevitably drawn into active conflict situations, and ends up being considered a biased actor. The ICC can also be criticised for attempting to transpose principles of liberal democracy to all states, and to impose ‘one-size-fits-all’ solutions in order to provide international justice.⁸⁰

But, for other theorists, any attempt at peace building which ignores justice is doomed to fail. This is exactly why the ICC was created. Negotiations to create the ICC in 1998 were mainly instigated by lawyers, whose unique aim was to establish a tribunal at the international level on a permanent basis. For these theorists justice is the foundation of democracy and democratic institutions, and of international and local peace negotiations.⁸¹ They offer examples of failed amnesties: Foday Sankoh in Sierra Leone and Jonas Savimbi in Angola. For legalists and some liberal theorists justice should be pursued even at the cost of peace, because justice will lead to removing victims’ resentment and banishing extremism, and thus long-term peace will ensue.⁸²

I have shown that the contribution of the ICC to international justice and peace depends on structural and agency factors: its legitimacy among states in the

world, the support it receives from the international community to promote and implement justice, its independence, and its capacity to render justice and allow or encourage local and national justice to prevail over international justice. I argue that the ICC is likely to make a positive contribution to justice and peace. It is progressively being recognised worldwide as a legitimate institution. The fact that Tunisia joined the ICC in 2011 following its fight for democracy highlights the importance of the international values it promotes. The more states join the ICC statute, the more power the ICC has, as the prosecutor can investigate crimes on his or her own initiative in these states, and as the ICC can act independently from states.

The ICC must focus on fairness, local justice and international social justice in order to improve its legitimacy and work. Even though the ICC faces power politics constraints when crimes are committed in a state which has not joined the ICC Statute, the ICC is trying to adopt a fair and impartial approach to delivering justice by investigating crimes committed all over the world, and by both sides to a conflict. In order to enhance the remit of the Court, researchers are discussing the possibility of it indicting companies and their executives, but this would require an amendment to the Statute.⁸³

The ICC should be open to discussions with, and respectful of, local justice systems, state institutions and people who live in conflict areas. This is all the more important as people must have confidence in their own legal and political systems. At the 2010 ICC Review conference in Kampala, ICC officials promoted the concept of ‘positive complementarity’, which is about states assisting one another, and receiving additional support from the Court itself, as well as from civil society, to meet Rome Statute obligations. The ICC must avoid being present where local systems of justice can operate, and it should encourage local and national courts to deal with criminal justice.⁸⁴ It has done so to a certain extent in Libya: in 2011 it accepted to defer cases to Libya on condition that its judges would be involved, but in 2013 it ordered Libya to hand over Gaddafi’s intelligence chief, Abdullah al-Sanussi.⁸⁵

In order to improve the impact of the ICC, its members have a crucial role to play in supporting the Court to provide international justice. They must create a safe environment for those victims of crime willing to testify at the ICC, and protect them from further violence. States should also help the ICC implement its arrest warrants, and contribute to the ICC’s reparations system for victims of crime.⁸⁶ States parties to the ICC could, for instance, include support for victims of grave crimes into their programmes on development. More broadly states must work on promoting justice for all people, independently from the work of the ICC focused on punishment for particular individuals.⁸⁷

Notes

Special thanks go to Olympia Bekou, Devon Curtis, Miwa Hirono, Ben Holland, Adam Morton and Matthew Rendall, who commented on earlier drafts of this article. I would also like to thank the editor for his advice. The article was written in the framework of the project on ‘Armed Groups and Postconflict Peace-building in Africa’ funded by the British Academy.

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2 Articles 11 and 24 of the Rome Statute of the International Criminal Court.

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