
Peace making, justice and the ICC

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Introduction

Many accounts of the International Criminal Court (ICC) treat it as an isolated legal institution tasked with adjudicating international crimes. The project of international criminal accountability is taken to be separate from peace processes, entrenching a binary distinction between peace and justice. By contrast, this chapter locates the work of the ICC within the broader context of peace making, as its founding documents had envisioned. The Court's governing Statute recognises the intrinsic link between international criminal justice and peace. By consenting to this treaty, the Court's states parties recognised that 'grave crimes threaten the peace, security and well-being of the world' and expressed determination 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.¹ To achieve this they agreed 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'² and established an institution that would intervene when states cannot or will not exercise that responsibility themselves.

States party to the Statute recognised that this obligation is not limited solely to its signatories. Under international humanitarian law and human rights law, states are required to investigate, prosecute and punish international crimes. This obligation originates in the genocide and torture conventions, in the legacy of Nuremberg, in the notion of 'crimes against humanity', in the Geneva Conventions with respect to war crimes and in the jurisprudence of all major human rights tribunals in the last quarter century. After the Nuremberg and Tokyo trials there was an early emphasis on criminal accountability and punishment during a period when the first human rights treaties were also being drafted. The Genocide Convention of 1948 and the four Geneva Conventions of

¹ Preamble, Rome Statute. ² *Ibid.*

1949 emphasised the obligation to investigate, prosecute and punish the most severe crimes. Human rights standard-setting in the mid-twentieth century abandoned the emphasis on individual criminal liability in favour of state responsibility. Despite references to the need for universal jurisdiction, for multilateral commissions of inquiry, and for international tribunals, when it came to atrocity crimes the human rights canon seemed to yield to notions of national sovereignty and non-intervention in internal affairs.

The Rome Statute revives the recognition that accountability and punishment are essential to the establishment of lasting peace. Building upon the legacy of the post-World War II tribunals, a novel framework has been developed to enforce individual accountability for perpetrators of mass crimes with the aspiration of deterring future violations and encouraging peaceful solutions to international and internal conflicts. Through placing the work of the ICC in the broader context of peace making, this chapter argues that justice complements efforts at conflict resolution. Ultimately, it contends that international criminal justice should be situated in relation to other post-conflict transitional mechanisms, which should work towards harmonised social and political objectives.

The role of the 'justice track'

Drawing upon the experience of Darfur, four approaches or 'tracks' of conflict resolution form distinct aspects of peace-building processes.³ The 'political track' involves peace negotiations and mediation. The 'security track' emphasises the protection of civilian populations from attack and deploying military units if necessary. The 'humanitarian track' works to deliver relief supplies and assistance. Finally, the 'justice track' seeks to break the cycle of impunity for crimes already committed and works towards deterring future violations.

The 'justice track' forms an essential aspect of the peace-building process. It refers to the investigation, prosecution and punishment of those most responsible for violence and victimisation of civilian populations. Without confronting the crimes of the past, individual victims and communities struggle to obtain closure and move on to a lasting peaceful solution. Some well-meaning advocates of 'peace' argue that seeking

³ In the early stages of the crisis in Darfur, Sudan, Juan Méndez was the Special Advisor to the UN Secretary-General on the Prevention of Genocide. He visited Darfur twice in that capacity.

criminal accountability hampers the peace process. The ICC's intervention in Uganda has produced a large body of literature arguing for the priority of one value over the other, presuming that peace and justice are dichotomous choices.⁴ While it may be true that the demands of justice may complicate peace negotiations, it also creates a more sustainable solution at the end of the process by laying the foundation for a culture of accountability. Negotiations that sacrifice accountability for an immediate peace create obstacles to redress for victims and communities, which is needed to create a fair and lasting resolution to violent tensions.

Justice, understood here as criminal accountability, forms one of the available measures or policies that can lead to conflict resolution, but in almost every case it cannot be the only one. Mediators, conflict resolution specialists, the parties to the conflict and victims and civil society working together will have to come up with a combination of measures most appropriate to the unique circumstances of each conflict. As a conflict evolves through different phases, initiatives in each of the four tracks need to be adapted and combined in a dynamic and anticipatory response to events.

Breaking the cycle of impunity is central to the 'justice track' of peace making, as it is necessary to prevent the repetition of violations and to dismantle the structures that enable violence in the first place. Of course, nothing can provide a guarantee against the re-articulation of these structures in the future or the formation of new ones that lead to abuses. This does not mean that prevention is not a proper motive for justice measures. We may not have empirical proof that prosecution of international crimes prevents their recurrence in the future, but we do know that a climate of impunity is an invitation to perpetrators to commit new abuses and perhaps even to escalate existing conflicts.

Criminal prosecution is an essential ingredient of any effort, but it should never be contemplated as the only response. In the early 1990s, some observers interpreted the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a token gesture by an international community that could not manage a more robust response to the genocidal campaigns in the Balkans. To the credit of the ICTY, its impartiality and independence – as well as the continuation of atrocities

⁴ For different positions on this debate, see T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006); A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (New York: Cambridge University Press, 2011); P. Hazan, *Judging War, Judging History: Behind Truth and Reconciliation* (Palo Alto, CA: Stanford University Press, 2010).

in the region – soon prompted other actions, albeit never enough and never on time. In fact, criminal accountability can serve to prevent future atrocities only if it is seen as one dimension of a larger peace-making objective that needs to be coordinated with effective armed protection of civilian populations, with distribution of humanitarian assistance, and with genuine, comprehensive efforts at resolving conflict. At the same time, actors must ensure that they do not permit the parties to the conflict to condition their consent to any one of these four components upon progress on any other. If each aspect is contingent upon another, the risk of failure increases considerably. All four must be pursued individually, yet in a coordinated fashion and in good faith.

The risks of an uncoordinated approach are substantial. In the Darfur conflict, for example, the Sudanese government played the different processes against each other, often holding hostage the access of humanitarian organisations to conflict zones in retaliation for peacekeeping and justice interventions. The international community acceded to Khartoum's demands on a number of occasions, possibly prolonging the move towards a peaceful resolution. In Uganda, delivering humanitarian assistance directly into the hands of the Lord's Resistance Army (LRA) leadership as a means to encourage engagement in the Juba peace talks had the effect of emboldening the LRA leadership to defy the ICC arrest warrants and demand more concessions during negotiations. International actors should be encouraged to support peace efforts, including the provision of incentives to the parties of a conflict. At the very least, those measures should not work at cross-purposes with judicial efforts and should be carefully coordinated to integrate peace with justice.

Case study: Ahmed Harun

The case against Ahmed Harun in the Darfur situation illustrates the need for an integrated approach. For three years, mediators and political leaders ignored the arrest warrant against Harun as they pursued a three-track approach that included political negotiation, peacekeeping and humanitarian aid, but excluded accountability. While the first substantial steps towards resolving the Darfur situation were the establishment of the UN Mission in Sudan and the ICC referral in March 2005,⁵ in practice the use of peacekeeping, political negotiation, and humanitarian aid dominated the process. The Bashir regime refused to cooperate with ICC

⁵ See UN Doc. S/RES/1590 (2005) and UN Doc. S/RES/1593 (2005), respectively.

investigations and threatened to withdraw its consent to the other three tracks if the warrants were not dropped.

Harun played a role in hindering the provision of humanitarian assistance, and as a member of the African Union/United Nations hybrid operation in Darfur (UNAMID) oversight committee he also hindered the deployment of peacekeepers. In June 2007, one month after the arrest warrant against Harun was issued, the UN Security Council visited Khartoum and failed to raise the matter of enforcing the warrant with the Sudanese government. In 2008, Harun intervened in Abyei on the border between North and South Sudan, leaving 60,000 people displaced. For three years, the Security Council failed to remind Sudan that the referral, a decision under Chapter VII, was binding on all member states. This was not an oversight, but rather a deliberate decision to sequence peace first followed by justice. As a result, neither peace nor justice was attained.

Despite Harun's indictment by the ICC, he continued to serve as the Minister of State for Humanitarian Affairs and later as the governor of South Kordofan. In early 2011, with escalating tensions in the Abyei region on the border between North and South Sudan, the United Nations decided to fly Harun to the region to serve as a mediator in the crisis. While this act may have been practical under the circumstances, and although the United Nations is not required to assist the ICC in apprehension of wanted persons, it undermined the UN commitment to cooperate with the ICC and harmed efforts to disarticulate the cycle of impunity stemming from the crimes committed in the Darfur region.

The Harun case illustrates that justice cannot be subject to bargaining, nor should it be subjected to the vagaries of peace processes. To maintain legitimacy, it must be allowed to work in its own separate channel, albeit one that interacts with, supports and requires support from the other channels to peace. As the UN Secretary General has noted,

Ignoring the administration of justice . . . leads to a culture of impunity that will undermine sustainable peace. Now that the ICC has been established, mediators should make the international legal position clear to the parties. They should understand that if the jurisdiction of the ICC is established in a particular situation, then, as an independent judicial body, the Court will proceed to deal with it in accordance with the relevant provisions of the Rome Statute and the process of justice will take its course.⁶

⁶ Report of the Secretary-General on Enhancing Mediation and its Support Activities, UN Doc. S/2009/189 (2009), 37.

The ICC and other international justice mechanisms are foremost instruments of justice, and only secondarily instruments of peace or of prevention. However, these mechanisms do not operate in apolitical or decontextualised settings, as they are sometimes depicted. Political, security and humanitarian concerns often form part of the contextual backdrop in which justice mechanisms operate, and a more effective peace-building strategy should seek to understand the complex network of relationships between these different tracks.

Acceptance of the ‘justice track’

States made a conscious decision in Rome to connect peace and justice, as is reflected in the Rome Statute preamble. By providing for interaction between the Court and the UN Security Council, the ‘justice track’ has been envisioned as a complement to political, security and humanitarian ‘tracks’ in international peace processes. This vision was put into practice as early as March 2005 with Security Council Resolution 1593 on Darfur, which invoked peace and security concerns as a basis for referring the situation to the ICC.⁷ The Rome Statute has created new rules to which actors involved in conflict management must adjust. The new framework and specific provisions – such as Article 27(2), which negates claims for immunity based on a suspect’s official capacity – are already factored into contemporary peace efforts.

Justice through the Rome Statute framework has affected the dynamics of peace making at the United Nations. There are many indications that the ICC has received increasing attention from the United Nations. For example, the UN General Assembly debates and adopts an annual resolution expressing support for the ICC and encouraging participation by member states.⁸ Furthermore, states parties to the ICC that are members of the Security Council keep ICC issues on the agenda.⁹ Meanwhile, UN Secretary General Ban Ki Moon has stated that ‘[i]nternational criminal justice, a concept based on the premise that the achievement of justice provides a firmer foundation

⁷ UN Doc. S/RES/1593 (2005), 1, ‘*Determining* that the situation in Sudan continues to constitute a threat to international peace and security.’

⁸ See, e.g., Report of the International Criminal Court, UN Doc. A/RES/65/12 (2011).

⁹ ‘States Parties that are members of the Security Council should ensure that the Court’s interests, need for assistance and mandate are taken into account.’ Recommendation 51, Strengthening the International Criminal Court and the Assembly of States Parties, Resolution ICC-ASP/6/Res.2 (2007).

for lasting peace, has become a defining aspect of the work of the organization'.¹⁰

In addition to receiving significant expressions of support from the United Nations, the Rome Statute system has enjoyed widespread ratification by states and increasing support from non-state parties. Since 2002, when the Rome Statute entered into force with the ratification of sixty states, more than sixty other states have joined the ICC. Its jurisdiction covers all of Western Europe, all of South America and the majority of African states. Evolution of the role of states that are not parties to the Statute has also been significant. In an address to the Council on Foreign Relations, Luis Moreno-Ocampo, former prosecutor of the ICC, discussed the shadow the ICC throws over all states, even non-state parties. He commented that:

In my 6-year tenure, I saw a great evolution. I just mentioned the case of Turkey, a State not party. The Chinese authorities describe themselves as a 'Non State Party partner of the Court'; Russia sent more than 3000 communications to my Office on alleged crimes committed in Georgia; my Office regularly interacts and cooperates with Qatar, Egypt, Rwanda, and regional organizations such as the League of Arab States. Since 2005, the United States has followed a similar policy of constructive engagement with the ICC . . . Today, the new administration is also very supportive, including on our efforts to open an investigation in Kenya. US cooperation is important to arrest individuals protected by militias as Joseph Kony or to isolate others such as President Al Bashir.¹¹

Collaboration between the ICC and individual states as well as regional actors is also an indication of the Court's growing presence within the broader field of peace making. The ICC's Office of the Prosecutor (OTP) has worked with African Union (AU) mediators in Kenya, Darfur and Guinea; with the Organization of American States regarding Colombia and Honduras; and with the League of Arab States. All European Union states are states parties, and to date they have consistently insisted on implementation of the Court's decisions. The ICC and the justice track it elicits have shaped how states and intergovernmental organisations have come to conceptualise peace making. The following section illustrates some concrete examples of the Court's effects upon the geopolitics of peace making.

¹⁰ Report of the Secretary-General on the Work of the Organization, UN Doc. A/62/1 (2007), para. 81.

¹¹ Keynote speech by L. Moreno-Ocampo, Prosecutor of the ICC, to the Council of Foreign Relations (4 February 2010), 12–13.

Implementing the 'justice track'

Referrals and other decisions

Where it has been impracticable to implement justice in domestic circumstances, many states have voluntarily involved the ICC in an attempt to resolve ongoing conflicts. In mid-2003, the prosecutor reported that crimes in the Ituri region of the Democratic Republic of Congo (DRC) appeared to fall within the jurisdiction of the Court. Almost 5,000 persons were killed after 1 July 2002 (the date in which the Rome Statute went into effect), and the Congolese government recognised its inability to control the area. There appeared to be no pending domestic judicial proceedings concerning these crimes, nor was it thought they could truly be undertaken. The prosecutor selected the DRC situation as the first to investigate, expressing his intention to use his *proprio motu* powers if necessary, but at the same time inviting the DRC to proceed with a referral, which it eventually did on 3 March 2004. Following a similar invitation from the prosecutor, President Museveni of Uganda also decided in December 2003 to refer the situation concerning the LRA.

In the search for peaceful solutions to conflicts, the UN Security Council has issued resolutions referring situations to the ICC. On 31 March 2005, it referred the Darfur situation to the Court, 'determining that the situation in Sudan continues to constitute a threat to international peace and security'.¹² The Security Council subsequently used its referral power to open an investigation into the crackdown on protesters in Libya in an attempt to prevent further escalation of the violence.¹³ This resolution was quickly followed by other measures, including the use of military force to restore peace, but justice was central to the UN plan to end the conflict in Libya. As Gaddafi lost power in Libya, calls from inside and outside the country for the capture and transfer to the ICC of the deposed leader, his son Saif Al-Islam Gaddafi and Abdullah Al-Senussi underscore how accountability was considered central to creating greater stability in Libya.¹⁴ The Libyan referral was also the first time that the 'responsibility to protect' was invoked in relation to the ICC, suggesting that judicial institutions could be used as a means of strengthening prevention. As the UN Secretary General noted in a 2012 report, 'the threat of referrals to the ICC can undoubtedly serve a preventative purpose and the engagement

¹² UN Doc. S/RES/1593 (2005). ¹³ UN Doc. S/RES/1970 (2011).

¹⁴ See further Chapter 18 by Kersten in this volume.

of ICC in response to the alleged perpetration of crimes can contribute to the overall response'.¹⁵

Exclusion of amnesties from peace processes

Not only is the granting of amnesty for crimes antithetical to the ideal of accountability, it can also be counterproductive to the reconciliation of a society to its past wrongs. This has been increasingly recognised in peace-making practices, where criminal accountability has been favoured over the granting of amnesties. In the DRC, for example, there were discussions in 2007 of possible amnesties for senior commanders to encourage the demobilisation of armed groups. Following contacts between the OTP and the mediators, an 'ICC clause' excluding amnesties for Rome Statute crimes was incorporated in the Goma Agreement of January 2008.¹⁶ The former militia group leader, Mathieu Ngudjolo, was arrested and transferred to the Court by the Congolese authorities in the following month. Ngudjolo had agreed to be integrated into the Congolese Armed Forces and was in Kinshasa for training at the time of his arrest. Some observers claimed that his surrender could jeopardise the on-going demobilisation. It did not, however, and in February 2008, when the amnesty issue was raised again at a political dialogue in the Central African Republic, the ICC prosecutor was invited to brief participants in the dialogue. The resulting Global Peace Agreement of June 2008 excluded amnesty for war crimes, crimes against humanity and genocide.¹⁷

In Colombia, prosecutors, courts, legislators and members of the executive branch explicitly mentioned the prospect of the ICC attaining jurisdiction as an important reason to implement Colombia's Justice and Peace Law, ensuring that the main perpetrators of crimes would be prosecuted.¹⁸ In Kenya, former Secretary General Kofi Annan, on behalf of the AU, maintained at all times that post-election violence had to be prosecuted in order to avoid recurring violence during the next election cycle, either through mechanisms established by the Kenyans or by the ICC.¹⁹

¹⁵ Report of the Secretary-General, Responsibility to Protect: Timely and Decisive Response, UN Doc. A/66/874-S/2012/578 (2012), para. 29.

¹⁶ 'DR Congo: Cautious Welcome for Kivu Peace Deal', *IRIN*, 29 January 2008.

¹⁷ 'Background Paper on Inclusive Political Dialogue', UN Peacebuilding Commission, Country-specific configuration on the Central African Republic (2008), para. 13.

¹⁸ See further Chapter 17 by Easterday in this volume.

¹⁹ 'Kenya Needs Reforms to Avoid 2012 Violence – Annan', *Reuters*, 31 March 2009.

Integrating accountability into mediation efforts

The requirements of accountability form part of any lasting peaceful solution. Other aspects of transitional justice are also fundamental for establishing peace, but the inclusion of measures ensuring accountability for those most responsible for international crimes has become a necessary part of any successful mediation effort. As shown above, seeking criminal accountability is one aspect where justice arises in negotiations. Yet, successful peace mediation will include both judicial and non-judicial elements.

The situation in Darfur illustrates the significant incentive that judicial interventions can provide for mediation efforts. Before the ICC prosecutor's application for an arrest warrant in 2008, the peace process had stalled; UN and AU envoys Jan Eliasson and Salim Salem, respectively, had resigned. The ICC indictment revived the negotiations. The AU and Arab League increased efforts to achieve peace, creating a committee headed by Qatar. A new UN-AU mediator was appointed. The United States, a non-state party to the Rome Statute, took a leading role.

President al-Bashir was effectively cornered through these developments. His government then engaged with the UN's Department of Peacekeeping Operations more actively than at any time before, and 65 per cent of UNAMID was deployed in the following six months. Al-Bashir's efforts to appear constructive led to renewed negotiations with the rebels, and the UN-AU mediator, Djibril Bassole, brought the parties to the negotiating table without ever challenging the ICC's independent work.²⁰ In short, efforts to bring President al-Bashir before the ICC did not hamper the peace process; to the contrary, they may have had a decisive role in fostering it.

Evaluating the impact of justice on peace and stability

Implementing justice measures does not guarantee that the desired outcome will be achieved. This is true of all peace measures. The importance of justice does not stem from thinking of it as an instrument for the pursuit of social goods (such as stability, peace and legitimacy), but rather from the idea that benefits to conflict-affected communities and building the rule of law are ends in themselves.

²⁰ The AU eventually called upon the Security Council to suspend the ICC actions under Article 16 of the ICC Statute, which the ICC has not done. Otherwise, the AU has never acceded to Khartoum's demand that it put pressure on the ICC to drop charges.

Such claims about the worth of international justice efforts are difficult to demonstrate empirically. This may especially be the case with demonstrating deterrence – namely, that further violence has been prevented through judicial interventions – and with demonstrating that alleged perpetrators have been marginalised. The following sections address these two aims of international criminal accountability. Drawing upon specific examples from the experience of the ICC, they show how justice can be used to promote peace and stability through preventing further conflict and marginalising alleged perpetrators.

Preventing violence

It will always be difficult to establish a causal connection between a certain act of justice and its deterrent effect upon criminal conduct that did not take place by virtue of that act. However, this does not disprove the claim that punishment has preventative effects. In essence, attempting to measure international justice is a process of measuring the counterfactual. Specific *penalties* may not have a deterrent effect, but there is deterrence in the *likelihood* of punishment. The deterrent effects of international and domestic criminal justice efforts can be more reliably assessed once the system is more developed and its results more reliably predicted. Meanwhile, the certainty of criminal investigation and prosecution is central to achieving deterrent effects. Now that a permanent institution exists to prosecute international crimes, there are increasing signs of the justice track's deterrent effects.

Although the deterrent effects of judicial interventions may be generally difficult to measure, these claims can be substantiated in specific cases. Drawing upon one of the authors' experience as Special Advisor to the UN Secretary General on the Prevention of Genocide, the following examples illustrate the importance of integrating accountability measures into conflict prevention. In the first instance, during two official UN visits to Darfur in 2004 and 2005, it was evident that the circumstances of protracted impunity were complicating peace-building efforts. The fact that crimes committed against the civilian population of Darfur remained unpunished had a paralysing effect upon other measures taken by the international community to prevent the conflict from escalating. The perpetrators were still armed and active in the region, and their supporters in the Sudanese government were still ready to unleash the *janjaweed* and to provide them with logistical and combat support. Within that context, international observers strained to conduct serious

monitoring on the ground, and armed peacekeeping contingents could not distinguish between people armed in self-defence and militias that used their weapons to commit atrocities.

Likewise, the presence and activity of the perpetrators seriously impaired the delivery of relief assistance, making it more difficult to prevent violence through a cease-fire, let alone a comprehensive peace accord. Equally important, the widespread impunity made it impossible for internally displaced populations to make their own decisions about whether to return to their villages. The fact that millions of individuals were dependent on others for even their most basic needs and were still threatened made peacekeeping, humanitarian assistance and peace negotiations more difficult. All four tracks of conflict prevention – political, security, humanitarian and justice – require the active participation of victims and their community representatives.

Meanwhile, the threat of prosecution can contribute to preventing further conflict. In November 2004, the conflict in Ivory Coast escalated to the scale of mass atrocities based upon ethnicity or national origin of groups considered ‘non-Ivoirien’ by the Gbagbo government. Armed militias in the countryside and mobs of ‘Jeunes Patriotes’ in Abidjan threatened to attack those considered non-citizens even if they had been born in the country. The Ivorian airwaves were filled with hate speech. As Special Advisor, I urged action by Kofi Annan and the Security Council. Because Ivory Coast had accepted the jurisdiction of the ICC in 2002 and the Statute included instigation to commit genocide as a crime under its jurisdiction, it could be announced publicly that those responsible for incitement to violence could face prosecution in The Hague. The press release was widely publicised in Abidjan, and after 48 hours, the racial hatred being expressed on radio and TV ceased; calm returned to the capital. It was later established that individuals in authority and their legal advisors had carefully analysed the prospect of ICC prosecution.

Based upon such experiences of the potential preventative force of the threat of prosecutions, the OTP’s strategy commits to providing early information on its activities and to alert states and organisations of the commission of Rome Statute crimes. In Georgia, for example, the OTP made public statements affirming that it had jurisdiction over alleged crimes as soon as violence started in August 2008. Both parties pledged cooperation with the Court. The OTP visited Georgia in November 2008 and Moscow in February 2010, following the governments’ invitations. The fact that these two countries chose to resolve the remaining issues of the 2008 conflict lawfully is an important step. In Guinea, the OTP

announced in mid-October that it was monitoring the allegations of crimes committed against civilians on 28 September 2009. Six days later, Guinea's minister of foreign affairs met with the OTP to offer cooperation, and the OTP visited Conakry in February 2010. In Kenya, the OTP stated as early as January 2008 that it had jurisdiction over alleged crimes. All actors then committed to addressing and preventing political violence. In all three examples, it is plausible to assert that the decision to cooperate with the investigation and punishment of crimes had an important effect on the reduction of violence and on the reduced scope and extent of new violations. The OTP continues to assert its commitment to prevention, as reflected in its 2012–2015 Prosecutorial Strategy.

Finally, the events of the 'Arab Spring' may provide further support for claims regarding the deterrent effects of the justice track. Even though it is not possible to say with certainty that the threat of ICC prosecution has played a role in avoiding greater loss of life, some relationships are clear. The new Tunisian government has signed and ratified the Rome Statute. It is also investigating human rights crimes of the 'revolutionary period' from December 2010 to January 2011. Opening a regional seminar on the ICC in Tunis, Mohammed Charef, attorney general and director of Judicial Services of the Ministry of Justice, encouraged more states to join the ICC.²¹ As the Court's jurisdiction is extended through further ratifications of the Statute, the possibility of preventing violence through the threat of international criminal accountability continues to increase.

Marginalising alleged perpetrators

Justice can also contribute to peace building through isolating and marginalising alleged perpetrators and violent regimes. International and domestic allies will often distance themselves from those who stand accused of violating international law, thus weakening the support that repressive regimes depend upon to maintain their power. Marginalisation builds upon itself: as more allies turn away from a regime, more are inclined to do the same. As a regime is weakened, incentives – in the form of both showing international goodwill and deferring to international pressures – arise for other states to aid in the detention and transfer of alleged criminals. Although some commentators have argued that this has effectively politicised the ICC's work and

²¹ 'Opening of the Regional Seminar on the ICC in Tunisia', *ICC Press Release*, 19 September 2011.

tends to reinforce the power of strong states, such critiques do not account for the constructive effects that marginalising alleged perpetrators may have on ongoing peace processes.²²

Several examples illustrate how this marginalisation can contribute to peace building. At the time of the Dayton agreement for the former Yugoslavia, there were pressures on the ICTY to revoke the arrest warrants against Radovan Karadžić and Ratko Mladić so that they could participate in negotiations. There were fears that criminal prosecution would be an obstacle to a negotiated end to the conflict. Despite this pressure, ICTY president Antonio Cassese and Prosecutor Richard Goldstone refused to suspend actions against the accused. The exclusion of both suspects from the talks contributed to the successful end of the conflict. Based on such experience, the ICC's OTP has called on states to 'eliminate non-essential contacts with individuals subject to an arrest warrant issued by the Court' and to 'contribute to the marginalization of fugitives', while 'tak[ing] steps to prevent that aid and funds meant for humanitarian purposes or peace talks are diverted for the benefit of persons subject to a warrant'.²³

Meanwhile, President al-Bashir of Sudan has been isolated through the issuance of an ICC arrest warrant against him. Legally, he cannot travel to states parties to the Statute. South Africa informed him in 2009 that although he was invited to the inauguration of President Zuma, he would be arrested upon entry into the country.²⁴ Uganda and Nigeria did the same. Presidents Lula of Brazil and Fernández de Kirchner of Argentina refused to approach him in an Arab–South America summit in March 2009. President Sarkozy took the unprecedented decision to postpone and relocate a French–African summit rather than run the risk of meeting him in a corridor. Turkey had him cancel an appearance at an Organisation of the Islamic Conference meeting in Ankara. Al-Bashir did visit Kenya, a state party to the ICC, in August 2009. While the Kenyan government did not uphold its obligation to arrest the Sudanese president, the episode resulted in much international embarrassment

²² See, e.g., S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21 (2010), 941–965.

²³ Office of the Prosecutor, 'Prosecutorial Strategy 2009–2012' (2010), 48.

²⁴ In an apparent reversal, Bashir was subsequently allowed to attend an African Union summit in South Africa in 2015 and later permitted to depart, in violation of an order from the South Africa High Court that he not leave the country. See M. Cohen, 'Al-Bashir Sets Up High Court and Zuma Administration Clash', *Mail & Guardian*, 23 June 2015.

(including the summoning of Kenyan ambassadors to explain the failure), extensive complaints from civil society and a rift in the coalition government. A year later, in August of 2010, an International Authority on Development conference that was to be attended by al-Bashir was moved from Kenya to Ethiopia (a non-state party) under pressure from the ICC that the Kenyan government fulfil its obligations both under the Rome Statute and under Kenyan law.²⁵ Al-Bashir's capacity to travel has been restricted, and the Sudanese government now deploys fighter aircraft to escort his plane on any trip. The ease with which South Sudan's secession occurred may have been influenced by the fact that al-Bashir's regime, isolated and weakened from the pressure of the ICC warrants, must act reasonably on the international stage in order to retain its remaining power and alliances.

The Libyan situation provides another example of the power of marginalisation. Colonel Gaddafi's Libya had been considered a pariah state for many years before Gaddafi lost power during the 'Arab Spring'. After the ICC issued an arrest warrant against him, his remaining supporters distanced themselves. Referring to the warrant, the spokesman for the Transitional National Council claimed, 'This is very important. These people have caused nightmares over the last 42 years. This sends a very clear signal to all those around Gaddafi that no one is exempt. It will speed defections and desertions, and minimise deaths as much as possible.'²⁶

Conclusion

At the international level, the ICC serves as the sole permanent institution where international crimes are adjudicated. Its contribution to peace building is tied to the deterrent and marginalising effects of its capacity to prosecute crimes and, by extension, to contribute to international security. As the Court's current prosecutor maintained, 'Since the International Criminal Court became operational in 2002, we have witnessed an unprecedented integration between peace and security and international justice.'²⁷ The Court's impact in deterring violence will emanate from the certainty of application of its law. Commentators have observed that 'trials deter future human rights violations by

²⁵ 'IGAD Summit Moved From Kenya As ICC Demands Arrest of Sudan's Bashir', *AllAfrica*, 26 October 2010.

²⁶ A. Gilligan, 'Libya: Col Gaddafi regime dismissed ICC arrest warrant requests', *The Telegraph*, 16 May 2011.

²⁷ F. Bensouda, 'International Justice and Diplomacy', *The New York Times*, 19 March 2013.

increasing the perception of the possibility of costs of repression for individual state officials'.²⁸ The impression that they will be held to account for their acts will compromise the calculus of leaders seeking to use violence to gain or retain power.

Defining the conflict as a dilemma of peace versus justice, some commentators have argued that by pressing for justice, the rational calculus of any violent regime is to hold on to power so as to avoid prosecution. However, the ultimate goal is not just the immediate end to hostilities, but the establishment of lasting peace. Certainty that law will be applied is therefore a key means of contributing to this goal. The calculus of a regime changes when, because of the pressures of international justice, it becomes isolated and has less power or credibility in negotiations. As was seen with the resolution of conflicts in Sierra Leone and the former Yugoslavia, international justice mechanisms can contribute to the peace process by marginalising offenders from other actors who can be brought into the process.

For justice to have an impact, it must be able to preserve the integrity of its objectives. Prosecutor Bensouda has maintained that the ICC's work must remain independent of other interests, yet in working towards its objective of criminal accountability, it still contributes to peace and security:

As the [ICC] is an independent and judicial institution, it cannot take into consideration the interests of peace, which is the mandate of other institutions, such as the United Nations Security Council. However, justice can have a positive impact on peace and security: this is what the U.N. Secretary General, Ban Ki-moon, calls the 'shadow of the Court' – its preventative role, and its capacity to diffuse potentially tense situations that could lead to violence by setting a clear line of accountability.²⁹

As the prosecutor claims, justice contributes to conflict prevention when it is pursued for its own sake. If the ICC is contemplated simply as a lever, however, it will be undermined, as some will expect it to be turned on and off as political circumstances dictate. Justice contributes to peace precisely by concentrating on its own specific role for the benefit of victims and for the contribution that it makes to the long-term stabilising effects of the rule of law.

The 'justice track' thus complements political, humanitarian and security objectives, and it is a necessary dimension of post-conflict

²⁸ K. Sikkink and H. Kim, 'Do Human Rights Trials Make a Difference?', American Political Science Association annual meeting (Chicago, August 2007).

²⁹ F. Bensouda, 'International Justice and Diplomacy'.

peace building. Persuasive scholarship has argued that creating cultures of accountability is instrumental in establishing the basis for peaceful societies.³⁰ Although the precise relationship between cause and effect may not be fully understood, the examples taken up through this chapter illustrate how justice encourages the prevention of further conflict and the marginalisation of alleged perpetrators by disarticulating structures of violence. In considering the ICC as an element of the 'justice track', it should not be regarded as an isolated legal institution but rather as part of a dynamic and multi-tracked peace-making process.

³⁰ See, e.g., K. Sikkink, *The Justice Cascade* (New York, NY: W.W. Norton & Company, 2011).