How Should the International Criminal Court Be Assessed?

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The International Criminal Court (ICC) has been subject to a significant amount of scholarly debate since its inception in 2002. As part of the wider expansion of the field of transitional justice, it has become a 'well established fixture on the global terrain of human rights' (Nagy, 2008: 275). By intervening in active wars, the Court has 'emerged as an increasingly relevant actor in ongoing conflicts' and a central pillar of the 'peace versus justice' debate (Kersten, 2016: 4-5). The Court has attracted a growing amount of scholarly attention and 'the critical note has come to dominate the discourse' (Robinson, 2015: 324). This may in part be down to unrealistically high expectations (ibid*;* Chung, 2008: 235; Cassese, 2006: 434) but it also requires us to clarify the criteria by which we are assessing its relative success or failure, to think about 'the norms, values and expectations against which it is reasonable to evaluate it' (Clark, 2018: 24).

This essay will begin with a critical assessment of the two main schools of thought used in assessing the impact of the ICC, most commonly referred to as legalism and pragmatism (Vinjamuri and Snyder, 2004; Cacciatori, 2018: 390). Legalism begins from the belief that universal criminal accountability is a positive end in itself. It sees that international legal norms and institutions can work in beneficial tandem with domestic jurisdictions to end a culture of impunity for perpetrators of genocide, war crimes, and other atrocities, providing justice for its victims and creating a powerful deterrence effect. In this framework, the ICC is assessed by its ability to remain outside of political interference and to pursue objective, impartial prosecutions. Pragmatism, on the other hand, sees international criminal justice as inherently political. In this understanding, the ICC is an institution that needs to navigate the complexities of international politics to produce the best outcomes in conflict and post-conflict situations. According to this approach, the ICC should therefore be assessed by its contribution to conflict resolution and peacebuilding.

The essay will then look at different methodological approaches that have been used for assessing the ICC. Epistemologically, there is a divide in the literature between those who evaluate the logical consistency of the court's mandate, actions and expected outcomes, and those who seek to infer its impact from empirical observations. These contributions can be considered respectively along the lines of deductive and inductive reasoning (Kersten, 2016: 10). Empirical studies of the ICC can also be split into two broad camps: those that rely on in-depth case studies or comparative analysis and those that seek to find statistical significance and understand the impact of specific variables.

Throughout the essay I will argue that the pragmatic school offers the better framework for assessing the ICC. It is more valid to evaluate the Court's impact on the dynamics of conflict and peace than simply an abstract and imposed notion of justice. I will make the case that, while it is appropriate to analyse the Court's own conceptual logic, ultimately its impact should be assessed empirically. Given the limited number of ICC interventions, I will argue that case studies and comparative analyses tend to have greater validity than quantitative and statistical methods. I will conclude with some thoughts on the value of this critical exercise and its implications for future research.

Criteria for assessing the ICC

The literature that critically assesses the role of the ICC can broadly be categorised into two groups: legalism and

pragmatism. As Vinjamuri and Snyder (2004: 346) have said, these two 'general orientations' are premised respectively on a 'logic of appropriateness' and a 'logic of consequences'. Scholars have characterised these camps as the 'naïve "judicial romantic" who blindly pursues justice and the cynical "political realist" who seeks peace by appeasing the powerful' (Akhavan, 2009: 625). These have also been called 'the utopia critique [which] describes a decision as unanchored, unsupported, unwise, unrealistic, or unhelpful' and 'the apology critique [which] describes a decision as unprincipled, unambitious, or uninspiring' (Robinson, 2015: 327). We can see in these two groups a reflection of the wider 'peace versus justice' debate in which the value of judicial indictments is set against the need to negotiate pragmatic solutions to wars (Mendeloff, 2018: 410).

Legalism

The ICC can be seen as the 'institutional zenith' of the legalist approach and its establishment as a result of legalism's ascent during the 1990s (Cacciatori, 2018: 389-390). In line with legalist ideals, 'ending impunity goes to the heart of the ICC's mandate' (Kersten, 2016: 21). Assessing the Court's impact from this perspective, then, involves measuring it against 'universal standards of justice' (Vinjamuri and Snyder, 2004: 346) as a court that 'seeks impartiality, rising above the political fray to investigate and prosecute suspects without fear or favour' (Clark, 2018: 22). The Court indeed holds itself to these legalistic standards, arguing that 'the broader matter of international peace and security is not the responsibility of the Prosecutor' (ICC, 2007: 9). Along this line of scrutiny, the ICC's political impartiality and independence is 'a key test of its credibility and legitimacy' (Tiemessen, 2014: 458). Criticism of the ICC has most often come from the charge that it is politically compromised; its legitimacy 'hinges' on its independence, yet it is 'utterly dependent' on powerful states for its international mandate and host states for the practicalities of investigations and arrests (Robinson, 2015: 338). Cases referred to the Office of the Prosecutor (OTP) by 'political actors' (the UN Security Council or member state self-referrals) are seen as less likely to result in impartial prosecutions, creating 'dangerous impartiality gaps'. However, this is seen as being more viable operationally (Tiemessen, 2014: 445). Nonetheless, the Court loses credibility when relying on state officials (Clark, 2018: 37; Roach, 2011: 550) yet has struggled to 'not simply allow itself to become a puppet of sovereigns' designs' (Megret, 2015: 35). The legalist framework has also exposed failings in terms of the universal applicability of criminal law. Scholars have pointed out the fundamental discrepancies between human rights, humanitarian law and criminal justice (Robinson, 2008) in light of the fact that obligations for enforcement and policing lie with individual states (Chung, 2008). Legalist frameworks can also be applied to the universality of ICC jurisdiction. The Court is seen to be enacting justice on behalf of 'humanity' (Megret, 2015: 28) yet is criticised for applying 'alien and distant' justice on behalf of liberal democracies and predominantly in African situations (Nagy, 2008: 275). Within the cases it does investigate, the Court's mandate has been criticized for rendering it 'unable to respond to violent conflict that spills across borders' (ibid: 283) or to prosecute perpetrators below a certain rank (Akhavan, 2009: 631).

While the legalism critique mostly focuses on justice outcomes, it does emphasise two ways in which judicial procedures can contribute to wider goals of conflict resolution and prevention: 'through its pedagogical mechanism of spreading the rule of law and through deterrence' (Branch, 2011: 181). Firstly, the ICC itself has argued that its impact does not simply rely on the prosecutions that it undertakes, because 'the absence of trials by the ICC, as a consequence of the effective function of national systems, would be a major success' (ICC, 2003: 4). Within this strand of legalism, the activities of the Court aim to contribute to a wider improvement in domestic standards (Chung, 2008: 230) and a virtuous cycle of systemic social and legal reforms (Lipscomb, 2006: 194-195). The Court promotes its principle of complementarity, in which it only pursues cases when national courts are 'unwilling or unable to prosecute' and works alongside domestic institutions to avoid infringing sovereignty and preserve political independence (ibid: 199). As such, the Court has legitimately been criticised from a legalist perspective when it falls short of this ideal, behaving as if it is 'superior to the domestic realm and often actively undermining it' (Clark, 2018: 17). Secondly, Schabas (2007: 57) has said that 'deterrence is supposed to be one of the purposes of international criminal justice in general, and the International Criminal Court in particular'. This concept rests on the assumptions that individuals cannot escape criminal responsibility for the actions of groups under their command, that trials can break a cycle of violent retribution and that justice will be seen to be done (Vinjamuri and Snyder, 20004: 347). The ICC has consequently been criticised for pursuing such 'elusive' objectives (Akhavan, 2009: 628) that 'suffer from a lack of rigorous empirical analysis' (Kersten, 2016: 24). The logic of ICC deterrence has also been questioned, on the basis that a failure to secure arrests and prosecutions could lead to an 'anti-deterrent effect' (ibid: 25). The legalism

critique therefore finds itself straddling two often contradictory lines of thought, in which the Court has a moral duty to end impunity for genocidaires (Akhavan, 2009: 654) but is also evaluated by its impact on ongoing and future conflicts through its reinforcement of deterrence and the rule of law.

Pragmatism

The pragmatism approach starts from the position that 'the consequences of trials for the consolidation of peace and democracy trump the goal of justice per se' (Vinjamuri and Snyder, 2004: 353). The Court itself recognises that it was 'created on the premise that justice is an essential component of a stable peace' (ICC, 2007: 8) and the pragmatism line of critique therefore evaluates its impact on this wider basis. Unlike the ad hoc courts set up in Rwanda and the former Yugoslavia in the 1990s, the ICC is a permanent institution with a mandate to initiate proceedings during conflict situations. It is argued that this 'demonstrated willingness to intervene in ongoing wars necessitates a critical examination of how it affects the ability of combatants to achieve lasting peace' (Prorok, 2017: 213). ICC interventions have the potential to create a contradiction with ongoing peace talks by portraying one side as 'criminals' (Perrot, 2010: 199) and reinforcing an unhelpful and reductive 'good versus evil' conflict narrative (Kersten, 2016: 144). By applying individual criminal responsibility to acts committed in war zones, 'threats of prosecution can actually impede peacemaking, prolong conflict, and multiply the atrocities associated with them' (Cobban, 2009). By prioritising indictments and prosecutions, 'the ICC may directly deter humanitarian intervention and peacekeeping' (Neumayer, 2009: 662). This critique argues that stability and peace should be prioritised because 'the key to ending wartime civilian violence is ending wars themselves' (Mendeloff, 2018: 411). This rationale can also be used to justify ICC involvement in cases where doing so increases the prospects for peace. There is an argument that 'fear of arrest might cause leaders to negotiate their own peaceful exit from power' (*ibid:* 401), while Simmons and Danner (2010) advance a 'credible commitment theory' which sees ICC signatories as tying their hands to peaceful processes, thus limiting their ability to resort to arms.

Where legalism expects the ICC to be impartial and to operate outside the realm of politics, pragmatism argues that it should accept its inherently political nature and utilise its opportunities for the best outcomes in terms of peace. Branch (2011: 181-182) has argued that 'ICC interventions inescapably take place in deeply political contexts within which it tends to be instrumentalized to unaccountable political power'. The fact that the Court relies on host states for operational support opens itself up to manipulation and one-sided interventions, with 'a number of detrimental consequences for peace' (ibid*:* 186). The inference here is that by relying on state cooperation 'the ICC will serve the interests of the state which is one party to the conflict' (Robinson, 2015: 327) or else face the possibility that 'it might be crippled by the absence of such cooperation' (Cassese, 2006: 435). In wider geopolitical terms, the ICC regularly faces criticism that it is 'acting as a servant of the permanent five, or [is] a tool of powerful Western countries' (Robinson, 2015: 328). With its almost exclusive focus to date on African conflicts, the Court is viewed as the 'the latest in a long line of international actors' to intervene in the continent (Clark, 2018: 12) and has been criticised for doing so with 'insufficient deference to national and community-level responses to mass conflict… [producing] a range of negative effects for African societies' (ibid*:* 17). It is these real-world implications for civilians in ongoing conflict situations that justifies the expansion of the pragmatism critique over legalism. As Kersten (2016: 39) has said, 'there is a slow but welcome acknowledgement that international criminal justice should be studied through the lens of peacebuilding'.

Methods for assessing the ICC

Having established the two dominant criteria frameworks, I will now explore the methods that researchers have used for assessing the ICC. In general, the literature can be divided into those methods which question the logic of the ICC and those which empirically measure its impact. Of those who seek to observe the effects of the Court, most adopt a case study or comparative approach, while others have tried to draw out more generalised statistical inferences. I argue that, while it is valid to point out logical contradictions in the Court's behaviours, on the question of its impact on peace and justice we must rely on empirical evidence. Given the relative paucity of ICC interventions, however, we must be cautious with attempts at universal explanations and rely instead on context and heavily nuanced analyses.

Logic and empiricism

Many of the commentaries on the ICC have relied heavily on a logical analysis of the Court's impact based on assumed behaviours of various actors. This is based partly on the difficulty of 'proving' the effects of its actions. The concept of deterrence, for example, is usually inferred from the logical result that fear of arrest would have on a potential perpetrator. In other words, 'while we can readily point to those who are not deterred, it is nearly impossible to identify those who are' (Schabas, 2007: 57). As Cobban (2009) has said, 'proving deterrence is, admittedly, a tough task'. Mendeloff (2018: 415) has dissected the logical incompatibility of expecting ICC indictments to simultaneously act as 'weapons of pure punishment' and as a 'bargaining chip to change behaviour'. Similarly, the theory of premeditated sequencing – the belief that justice can be pursued once peace has been established – is logically undermined by the necessity of a leader agreeing to a revocable amnesty, but cannot be disproved empirically because it has never happened (Kersten, 2016: 31-32). Robinson (2015: 334/347) has suggested that some charges held against the ICC are logically incompatible and put the Court in a 'lose-lose' situation by presenting it with insurmountable paradoxes and non-falsifiable hypotheses.

Most critical assessments of the ICC, however, have relied on empirical observations. This is of course in line with the idea that 'the main objective of any research is to confront theory with the empirical world' (Dubois, 2002: 555). The Court's ability to 'reduce the commission of mass crimes and support peace…[will] ultimately be the best test' of its contribution (Simmons and Danner, 2010: 254). Conducting such empirical observations are not without inherent difficulties, however. The ICC can be presented with 'distant, long-term and sometimes conceptually 'fuzzy' goals whose ultimate achievability is unclear' (Kersten, 2016: 38). Given the different methods and timings of ICC intervention, we should expect complex and variable outcomes (*ibid:* 63) that defy measurement in 'a mechanistic "cause and effect" manner' (Akhavan, 2009: 636). These challenges to empiricism are not unique to this topic among the social sciences, but it remains true that 'clear and compelling evidence about the effects of ICC intervention remains elusive and contentious' (Mendeloff, 2018: 397). Notwithstanding these difficulties, however, when it comes to assessing the Court's effect on peace and justice, it is fair to say that 'ultimately, this is an empirical question' (ibid*:* 397).

Case studies and comparative analysis

Within the body of empirical analyses into the ICC, the bulk of evidence has been gathered by case study research. Case study methods allow researchers to 'retain the holistic and meaningful characteristics of real-life events' (Yin, 2009: 4). They allow for a systematic investigation of related events and the description and explanation of the underlying phenomena (Berg, 2009: 317). Specifically, in the field of international criminal justice, case studies can reveal 'how the credible threat of punishment, or the mere stigmatization of indictment, influences the behavior of such ruthless leaders' (Akhavan, 2009: 634). By providing context-rich empirical insights, case studies can prove valuable in developing and testing theory (Dubois, 2002: 555), but are limited in their ability to provide generalisations beyond the individual cases that are being studied (Thomas, 2010: 575-576; Yin, 2009: 15). These limitations are not unique to case study approaches but are found in many political science methods, and case studies are able to effectively use comparative techniques, which provide 'the most obvious route to testing theoretical propositions' (Hopkin, 2002: 250-251).

There are different approaches to the comparative case study method found across social science and in analyses of the ICC. The 'method of difference' aims to compare similar cases differing only in the variable being studied, while the 'method of agreement' selects cases that only have the selected variable in common (ibid: 252-3). This approach often suffers from a 'too many variables, too few countries' problem in which the limited number of available cases restricts the potential options for comparison (ibid: 255). This problem is particularly evident when comparing ICC cases, with the Court having only opened thirteen full investigations to date (ICC, 2020). Nevertheless, researchers have chosen comparative cases in this area for a variety of reasons. Kersten (2016) chose to compare the cases in Uganda and Libya in order to illuminate their differences. He stated that 'the divergence in referral type, the targets of ICC indictments, and the existence of official negotiations provide valuable differences and possible comparative insights into the effects of the ICC across these two cases' (12). Cacciatori (2018: 387) chose to compare the cases of Sudan and Kenya for their similarities, because in both situations 'the ICC faced the dilemmas arising from

prosecuting the most powerful actors in the country'. Clark (2018: 6) analysed the cases of Uganda and DRC in order to highlight the 'structural features of the ICC's work as well as important difference that stem from the varied local contexts in which the Court operates'. In depth case studies like these also have the benefit of allowing a longer timeframe of study, facilitating 'a wide range of methodological approaches and different angles of analysis, extending from field-based research to participant observation in ICC cases' (ibid*:* 9). Tiemmesen (2014: 445), however, selected six of the eight conflicts then under ICC jurisdiction, arguing that 'collectively the case studies present variation in the nature of referrals and degree of cooperation, which makes for an instructive comparison and reveals an identifiable pattern of politicisation'. Comparing multiple case studies allows for extensive analytical inference but should not necessarily be relied on for statistical significance (Dubois, 2002: 557-558).

Large-N studies and statistical analysis

There have been fewer attempts to assess the ICC using large-N data sets and statistical techniques. The aim of these types of study is to test the relationship between variables across a large number of cases. This process allows researchers to make stronger arguments about causal links between variables and to 'establish robust and parsimonious generalisations' about political phenomena (Hopkin, 2002: 255). One of the main drawbacks of such an approach is 'the paucity of available cases and the even greater paucity of available data on cases' (ibid: 258), which is certainly the case when studying the ICC, and the potential to overlook the accuracy of concepts and measurements while focusing on sophisticated statistical techniques (ibid: 260). One way to measure the impact of the ICC, which the Court itself regularly invokes to justify its own actions, is perception surveys of affected populations. These surveys often show 'that large segments of affected communities support the idea of prosecutions for high-level atrocity suspects', although the studies tend to suffer from limited conceptual clarity given different understandings of justice, peace and reconciliation (Clark, 2018: 101). When trying to demonstrate its impact on ongoing conflict, 'the work of the Court must be associated with a decrease in, or cessation of, direct, physical violence' (Kersten, 2016: 37) yet there has been a lack of systematic testing of these hypotheses in cases of ICC intervention (Mendeloff, 2018: 415).

A number of scholars have attempted to draw statistical conclusions about ICC interventions. Hillebrecht (2012), for example, used 'time-series intervention analyses' to test the relationship between levels of violence in Libya and the ICC intervention. This approach, however, runs the risk of 'decontextualizing political violence, [and] attributing responsibility for increases and decreases in violence to the ICC without adequately considering other factors which also contribute to alterations in levels of violence' (Kersten, 2016: 38). Statistical studies have sought to widen the data set by looking at potential implications for ratifications of the ICC's founding Rome Statute, rather than interventions by the Court itself. Prorok (2017) has tested country ratifications and ICC interventions against data on civil conflicts, controlling for a number of variables such as the risk of domestic punishment and the relative levels of civilian deaths caused by governments and rebels. She concludes by saying that 'the findings indicate that when risks of domestic punishment are low the ICC's pursuit of justice undermines peace by threatening leaders' political survival and personal freedom' (ibid: 215). Simmons and Danner (2010) test their 'credible commitment theory' by modelling ICC ratification against the durability of peace arrangements in civil wars. These studies have a certain amount of validity in demonstrating whether there is a correlation between ICC involvement and conflict outcomes, but they struggle to tell us why that might be the case and to identify 'extraneous variance', meaning the impact of factors outside the proposition being tested (Hopkin, 2002: 253). To have an understanding of the full complexities of peace and justice in these contexts, more in-depth case studies are required.

Conclusion

This essay has argued that the most appropriate way to evaluate the success or failure of the International Criminal Court is to apply comparative case study methods to a critique based in pragmatism. Moving on from the dominance of the legalist perspective during the 1990s, this is becoming the leading approach to answering questions in the 'peace versus justice' debate. Legalist approaches apply value to 'justice' as a goal in itself. Holding perpetrators to a standard of individual criminal accountability is seen as a right to be exercised on behalf of victims and an obligation on behalf of humanity. Yet legalism also argues that ending impunity, creating deterrence, and developing the rule of law provide positive outcomes in terms of conflict resolution and peacebuilding. These criteria present the ICC with a

'contradictory assignment' (Robinson, 2015: 330). On this basis, pragmatism is the more appropriate lens for evaluation. If peace is a metric of success then it should be included in its entirety, and the Court should be recognised as an inherently political actor. A pragmatic approach allows us to consider peace and justice holistically in terms of their real-world impact on the lives of civilians. Doing so requires us to consider the logical consistency of the Court's underpinnings but, more importantly, to empirically assess the impact that interventions have on ending conflicts and building peace. Statistical studies attempting to describe relationships between variables in cases of ICC involvement tend to be unsatisfactory. Tracking violence according to ICC actions removes political context and ascribes unjustified significance to the Court's actions. We should, for example, 'expect that little attention is paid by ICC targets to the dropping of arrest warrants compared to the dropping of bombs' (Kersten: 2016: 47). Case studies and small-N comparative techniques are better placed to understand the full complexities and implications of ICC interventions, which is reflected by their prevalence in the literature.

This exercise has identified some of the key strengths and weaknesses of different approaches to evaluating the ICC. In doing so, it has reinforced the need to carefully consider epistemological assumptions and research design. Identifying existing schools of thought helps researchers choose the most appropriate parameters for studying political and social behaviours. Therefore, looking carefully at methodology should improve the validity of one's research.

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