The ICC: Progress Toward a More Just International Order?

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VALERIE LUENSMANN, FEB 12 2014

When the allies declared victory at the end of the Second World War, very few would have even imagined trying the German war criminals in the International Criminal Court (ICC). But the Nuremberg trials set an important precedent: international law not only imposed duties upon nations, but also upon individuals (Sadat, 2010). Fast-forward a mere fifty years and the ICC is a reality. The Court forms the first permanent judicial body that is capable of trying individuals for three crimes[1]: genocide, crimes against humanity, and war crimes and has been described as the force that "deals a blow to impunity" (Annan, 2002).

However, the Court remains a complementary institution and only has jurisdiction over individuals whose states have ratified the Rome Statute and thus accepted its establishment (ICC, 2013). The very prominent absence of the US, Israel, and China (amongst others) to the ICC begs an important question: does the ICC have the capacity to establish a more just international order, or is it, indeed, just another example of power politics and Western dominance, given that all the indictees stem from the Global South, and more precisely, Africa?

As there are two terms in this question that need definition before any further analysis can be discussed, the essay will briefly define the terms "order" and "just(ice)," in order to then explore two distinct narratives of analysis and come to a comprehensive conclusion. First, it will set out to examine the Court's impact on the international order using the historical narrative and cosmopolitan conceptions of both order and norms, as well as their impact on structures in international life. Secondly, it will contrast the cosmopolitan notion with a more critical realist notion which focuses on the status-quo and the hard facts more than the normative framework necessary for – or created by – the Court. Finally, the essay will conclude putting forth the argument that the ICC remains an important step in the right direction to end impunity for the worst crimes. However, its existence does not suffice to significantly change the international order as such. While the world has taken a step towards achieving individual justice at a global scale, there remain far too many injustices in the structure of the international system that the Court does not even set out to address, which render the Court insufficient to change the working principles of international order.

As much as beauty lies in the eyes of the beholder, justice does, too. For many, justice in the international realm is about a just distribution of resources and equal treatment. As early as 1863, John Stewart Mill defined equality and fairness as important principles for justice: "everybody to count for one, nobody to count for more than one" (Campbell, 2000, p.58). Almost a century later, John Rawls (1971) developed his theory of distributive justice in his book "Theory of Justice". While Rawls saw his own theory as inapplicable internationally, Beitz (1979) expanded upon his work and argued for an application of what he termed the 'global difference principle'. Yet, while certainly desirable, these forms of justice cannot be awarded the attention that they deserve within the scope of this essay, since the parties to the Rome Statute in 1998 "Resolved to guarantee lasting respect for and the enforcement of international justice" and, hence, criminal justice and the injustice of impunity are at stake (UNHR, 1998; Clark, 2011). Whether such a limited account of justice suffices to establish a more just international order will be examined after a brief discussion of the term 'order'.

Traditionally, order is contrasted with no more than "chaos, instability, and a lack of predictability" (Hurrell, 2003, p.2). International order has subsequently been defined as "minimum condition of coexistence" by Raymond Aron

(Hurrell, 2003, p.2), who assumed states as the principal agents of international life characterized by anarchy. And while Hedley Bull, a few years later, set out to define order as more of a purposive pattern that leads to particular results or promotes certain goals or values, it can be argued that 'order' was for a long time defined in minimalist terms (Hurrell, 2003). However, these minimalist terms were due to a realist understanding of the world in which, as Gilpin (1986) coined it, "anarchy is the rule; order, justice and morality are the exceptions." More recently, and with the end of the Cold War, however, order has come to be tied to a more normative debate on what order should achieve, what kind of order should be pursued, and who should be at the centre-stage of it as agents (Hurrell, 2003). From a cosmopolitan perspective, individuals ought to take the centre-stage, whereas realists resort to states as their principal agents. This distinction, as it will become clear in what is to follow, results in vastly different conceptions of the usefulness of the ICC in terms of making international order more just.

Historically, the establishment of the ICC in 2002 forms the end-product of a long line of events following from the first calls for an internationalized system of justice at the end of the First World War. Back then, the drafters of the Treaty of Versailles laid out their ideas for an ad hoc international court able to try the Kaiser as well as the German war criminals (ICC, 2013; Popovski, 2000; Sadat, 2010). However, their ideas never saw the light of the world. With the end of the next gruesome war, the project of achieving international criminal justice gathered pace when the Allies set up the Nuremberg and Tokyo Tribunals. Despite their flaws, the Tribunals set important precedents since, for the first time, war criminals were tried before international tribunals (Economides, 2003). Only three years after the end of the Second World War, in 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly (Sadat, 2010). In this document, the International Law Commission (ILC) was called upon to "study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide" (CICC, 2013). However, despite an available draft statute in the early 1950s, progress on the issue stalled completely due to the Cold War that deadlocked most negotiations on progressive matters (CICC, 2013; Economides, 2003; Sadat, 2010). Hence, given this line of events, the following must be asked: what triggered the renewed process of negotiations and finally the establishment of the ICC in 2002? What had changed?

The answer, from a cosmopolitan perspective, is very clear: cosmopolitans argue that individuals ought to be at the center of our concern and that shared norms and values heavily impact on structures and behavior in all arenas. Hence, as the cosmopolitan argument goes, with the end of the Cold War, important changes have occurred in the international scene: norms and values have emerged that can be shared across a wider spectrum of actors, or are accepted universally (Moreno-Ocampo, 2007). Indeed, the events of the 1990s triggered outcries of indignation at the mass atrocities committed in Rwanda, Kosovo, Cambodia, or Sudan, to name just a few (The Economist, 2010). Faced with the atrocities committed in Rwanda and Yugoslavia, the United Nations Security Council (UNSC) established two temporary ad hoc tribunals (Amnesty USA, 2013; Nagy, 2008). However, though only ad hoc tribunals that had their own strengths and weaknesses, they did much to revive the debate around the establishment of a more permanent body that would be able to deal with the worst crimes and that would have a stronger deterring function (Nagy, 2008).

These debates and the resulting negotiations at UN level were accompanied by an international civil society and numerous non-governmental organizations which shared a vision of a more just society. In their vision, gross crimes committed time and time again would once and for all not go unpunished, irrespective of the country they were committed in or the status of the culprit (CICC, 2013). At the end of five weeks of intense negotiations amongst 160 participating countries and 200 participating NGOs, 120 nations voted in favor of the adoption of the Rome Statute of the ICC.[2] Only seven nations, including the United States, Israel, China, Iraq and Qatar, voted against, and 21 nations abstained. However, membership to the ICC has increased from the necessary 60 to more than double that figure, with 122 states officially being state parties to the ICC as of May 2013. This clearly indicates that the institution is of value to the international community and to those who join it (Moreno-Ocampo, 2007). Their perceptions of criminal justice overlap in that they all perceive crimes against humanity, war crimes, genocide, and the crime of aggression as crimes that cannot go unpunished.

Having established that there are thicker patterns of shared norms and understandings on justice in the 21st century, can one move on to conclude that the ICC illustrates a movement towards a more just international order? To

examine whether shared norms alone lead to more justice, this essay will now contrast the cosmopolitan narrative on norm development over the course of history with a more pragmatic, status-quo approach. In doing so, it will look at the Court's jurisdiction, the enforcement mechanisms available, its track record up until 2014, and its influence on the international order.

For some, it remains a conundrum why states would limit their sovereign right to exercise jurisprudence in their own territory (Danner and Simmons, 2010). And yet for realists, the answer is obvious and lies in the effectiveness and the jurisdiction of the Court: the ICC remains only complementary to national courts, has jurisdiction only when the state where the crime was committed or where the accused stems from has ratified the Rome Statute, or, in rare cases, when the UNSC has brought the case to the court (ICC, 2013). The principle of complementarity is important because it significantly limits the number of cases that come before the court: the ICC will not proceed if a state is or has investigated the crime concerned unless the state has proven to be unwilling or unable to proceed with the investigation itself (Gegout, 2013). Moreover, the Court will only investigate crimes committed after 2002 (Gegout, 2013).

Taken together, these preconditions limit the scope of the ICC significantly, and one can, therefore, argue that the ICC does not present a real danger to sovereign states with functioning judicial systems. Yet the principle of complementarity indicates that one aim of the Court is indeed to spur the construction of national courts functioning to a high standard and able of trying war criminals in fair processes (The Economist, 2010). This also refutes the criticism that the Court would be too removed from the victims, who have often never even heard of it, and also mirrors the communitarian argument that justice is best achieved in close proximity to the victims of the injustice and in a timely manner (Glasius, 2009). This 'timely manner', however, is a feature only of referrals by the UNSC to the ICC–and the special relationship between both bodies again begs questions as to whose just ideals are served by the ICC.

So far, the Court has received a vast number of complaints about alleged crimes, but it has only opened investigations in eight out of twenty-one situations, which arguably puts its efficiency into question (ICC, 2013). The geographic location of the Court's investigations has also spurred some criticism and ironic queries as to whether the ICC should, indeed, be renamed. For example, African Criminal Court (ACC) appears appropriate in the face of its disproportionate focus on the continent—the Democratic Republic of the Congo, Uganda, the Central African Republic, Darfur, Sudan, Kenya, Libya, the Republic of Côte d'Ivoire, and Mali form the court's eight cases at present. This has led to calls to end the obvious bias and Western imperialism. However, four of the eight cases were referred to the Court by the concerned state parties, which hints at a less conspiratorial cause for the fact that all cases are African: the judicial system in this vast continent may simply not be up to international standards (Annan, 2013). Still, it begs the question of whether the Court does, indeed, mirror the all too familiar picture found in the majority of the international institutions: a bias towards the West at the expense of the Global South. Moreover, the selectivity that accompanies the Court's initiation of investigations limits its potential to be seen as a universal force for justice (Glasius, 2009).

However, despite its focus on Africa, the Court could still spearhead an effort to render international order more just, if it were effective, proved to have a trickle-down effect, or incorporated strong enforcement mechanisms. Unfortunately, none of these elements can be seen, 11 years after its establishment. It was only ten years into business that the Court rendered its first verdict in the case against Thomas Lubanga Dylio, who was found guilty of war crimes and has since launched an appeal against the verdict (ICC, 2012). While a Human Rights Watch report (n.d.) claimed that there have been implementations of ICC legislation into national law in more than 40 countries, clearer and broader data on this issue is needed to analyze the Court's impact. Moreover, the Court clearly lacks an enforcement mechanism, as it was founded based on a two-pillar system in which it has judicial and state operational capacity (ICC, 2013). That system proves the realist notion that states are still principal agents and limits the ICC's impact on international order.

The sheer absence of enforcement mechanisms became all too visible when the ICC issued an arrest warrant against Omar al-Bashir for crimes against humanity and war crimes on March 4, 2009. Four years have passed since, and Bashir remains at large. This points to another problem: if the Court has no enforcement mechanisms,

then it relies on the international community to comply with its verdicts and cooperate. Clearly, national interests in the end dominate a state's decision for or against compliance. The numbers of warrants issued contrasted with the number of indictees paints an all-too clear picture: however thick the pattern of shared norms may be at the international level, a change towards a more just international order will not be spearheaded by an ICC that relies on states (not individuals) to comply with its verdicts. Still, the logics of power dominate the international realm.

In conclusion, this essay shows that over the course of history, patterns of shared norms have become thicker and have even translated into institutions such as the ICC. And, in part, thanks to the court, almost every country now pays lip service at least to the idea that some crimes can never be justified. It cannot be denied, therefore, that there is a moral force to the Court which, in turn, signifies progress towards a more just international order. Yet, as this essay demonstrates, moral force without enforcement measures is worth very little; at best, the Court's proceedings are slow and expensive and have, so far, only led to one verdict. Only time will tell how much of an impact the Court has on judicial systems within states, but eleven years after its establishment, the Court is – while not without potential for the future – far from transforming international order. As Hurrell (2003, p.22) puts it, global justice is "a negotiated product of dialogue and deliberation and therefore always subject to revision and re-evaluation." Hence, while the Court only sets out to end impunity for four gross crimes, there remain crimes outside its jurisdiction that are committed by the more powerful players in the game, and there remain far more distributive injustices to be resolved to make international order more just.

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[1] The crime of aggression will be part of the list of crimes tried, thereby making it four crimes that fall under the jurisdiction of the Court. (ICC, 2013)

[2] The Rome Conference took place from 15 June to 17 July 1998.

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Written by: Valerie Luensmann
Written at: University of Westminster
Written for: Thomas Moore
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