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Introduction

> *A new era of international law has dawned in which national leaders can no longer be sure that they can get away with mass murder. It is about time. The long dark age when war lords and dictators could commit atrocities with impunity is coming to an end.*
>
> (Greg Stanton in de Waal and Stanton 2009, p. 339)

> *Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the weak and vulnerable amounts to a cruel joke.*
>
> (John Bolton, former US Ambassador to the UN, cited in IRIN 2006)

When armed conflicts break out anywhere in the world today and cost the lives of innocent civilians, calls to stop the violence and hold perpetrators to account are raised faster than ever (albeit often still too late). As a consequence, human rights bodies as well as international criminal tribunals and courts start to investigate these crimes in ever shorter periods after they have been committed. The International Criminal Court (ICC) is at the vanguard of this development and is nowadays even investigating crimes in conflicts that are still ongoing. Yet, little is known about the effects that international investigations have on conflicts. No one has systematically examined the effects of these interventions. Opinions and general observations on the performance of courts and tribunals in conflicts abound, while in-depth empirical research is lacking (also Hannum 2006, p. 586, Meernik et al. 2010a, p. 103, van der Merwe et al. 2009, p. 4). This book will take a first step towards closing this gap by focusing on the ICC investigations in Darfur and Uganda.

The hope that delivering justice could play a role in preventing crimes in future conflicts was born sixty-five years ago, in Nuremberg, Germany, when the Allied Forces brought some of the worst perpetrators of crimes committed by the Nazi Regime and its followers to trial. This hope was abandoned for several decades as Cold War disagreements rendered the

establishment of further international criminal tribunals all but impossible. Today, the work of institutions like the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC has reinvigorated this approach. While ensuring accountability for these crimes is the principal mandate of these bodies, many scholars and practitioners do believe that tribunals and courts can help to further peace in conflict-ridden areas and prevent future conflicts. This ongoing discussion about whether it is possible to further peace or to prevent conflict escalation by implementing retributive justice through international criminal trials is the overall context of this book. In many ways, this discussion is still led along a peace-justice divide. While some authors claim that trials pose additional dangers to conflict resolution efforts, others claim there can be no lasting peace without justice through trials. The book aims to transcend this divide in the academic debate and look at the grey zones, the difficult compromises that need to be struck between peace and justice when an international court investigates in a conflict situation. There is no better institution than the ICC to serve as an 'object of study' for this purpose.

The Court, established in 2003, recently celebrated its tenth anniversary. But while the ICC started its operations amongst great expectations, it has witnessed tumultuous times. It has opened investigations in eight countries at the time of writing, namely, the Central African Republic (CAR), the Democratic Republic of Congo (DRC), Uganda, Kenya, Côte d'Ivoire, Libya, Sudan and Mali. It has been drawn into highly politicised internal conflicts in Sudan, Libya and Côte d'Ivoire. Its investigations have sparked national controversies in Kenya and Uganda. The ICC's first Chief Prosecutor, Luis Moreno Ocampo, has been heavily criticised by African politicians and diplomats as well as by NGOs and aid workers. His tenure, which ended in June 2012, was marred with controversy, and leaves behind a Court that is conducting active investigations in a host of complicated conflict settings. While the scope of the ICC's activities is a success in itself – few would have thought such an active role possible when the Rome Statute was passed in 1998 – the Court has also been drawn into an ongoing political controversy with many African governments and the African Union at large. Some of the African Member States, which were important pillars of support for the ICC in its founding phase, have become its fiercest critics. This development culminated in the declaration of Ethiopian Prime Minister Hailemariam Desalegn, Chairman of the African Union, during the meeting on the fiftieth anniversary of the AU, that the ICC system is flawed and biased against 'Africans' (Lough and Maasho 2013).

This clearly shows how the debate surrounding the ICC has become emotionalised. For some it is the story of a Court that has defied its critics by becoming fully operational in a remarkably short time-frame and by becoming a factor to be reckoned with in international politics. For others it is the story of a Court that has only managed to finish one trial in its first ten years of existence, delivering a controversial sentence that ended a trial stricken by delays and a feud between the Office of the Prosecutor and the Trial Chamber. In any case the debate revolves around a Court that has started operating in ongoing conflicts with results that are hard to predict. And this novel role for a Court, to become a player in ongoing conflicts, is posing a host of unanswered questions to politicians, diplomats, aid workers, and academics alike. The following sections will throw some light on these questions that will be subject to intense scrutiny for the rest of the book. Since the discussions surrounding the ICC are already emotionalised, it is important to point out that it is not the objective of the book to judge the work of the ICC from a normative standpoint. It is rather a neutral assessment of the impact of its investigations on ongoing conflicts.

1.1 The ICC in ongoing conflicts

How did a Court whose main mandate is to ensure accountability for international crimes become a player in ongoing conflicts? The development of the ICC in its first ten years of existence is not a self-evident result of its establishment in 2003. The aim of the ICC is first and foremost to counter impunity for crimes that go beyond the scope of domestic legal systems. The institutional requirements for punishing these crimes are either not in place at the domestic level, or the perpetrators are (former) wielders of power who can ensure their impunity through their influence on the national legal system. In some cases the state in question is also simply unwilling to tackle the issue of crimes committed in the past.

But latest when these perpetrators – with an international arrest warrant to their names – become leaders of conflict parties negotiating for peace, the influence of the Court on conflict resolution efforts becomes visible. The main reason the ICC became an actor in conflict contexts is its institutional design. The ICC is a permanent court with a relatively broad and potentially global jurisdiction. It therefore has more possibilities to become active in ongoing conflicts than the international

criminal tribunals created before.[1] The jurisdiction of these tribunals primarily lies with ensuring accountability in post-conflict phases. The ICC will in all likelihood increasingly investigate in conflict situations, especially when taking the rising number of ratifications of the Rome Statute into consideration. The Office of the Prosecutor of the ICC openly embraces this development, stating that:

> *[t]he ICC's mandate to select the most serious crimes committed after July 1, 2002, requires that we engage in judicial proceedings in relation to conflicts even before they have ended . . . My Office is part of a new system dealing with a complex new reality: transitional justice during ongoing conflicts.*
> (Moreno Ocampo 2007b, p. 9)

If this involvement of the ICC in conflict situations proves to be a consistent trend, it will lead to a systematic global relevance of the question whether international trials and investigations can broker peace in conflicts (see Akhavan 2009, p. 625). While the increasing influence of international courts and tribunals in conflict contexts has been acknowledged by academics as well as practitioners in the last decades, there is little systematic assessment of its effect on conflicts. The opinions of how important this effect is – and whether it is helpful or harmful – differ. In order to understand this effect, we need to conceptualise the impact of international investigations in conflicts. In other words, we are in need of a theory.

One school of thought claims that future conflicts can be prevented through establishing (criminal) accountability, since a fair and just outcome is needed for successful conflict resolution (see Ambos et al. 2008, p. viii, Jeong 2008, p. 243, Wallensteen 2007, p. 295). These approaches tend to equalise accountability for the most serious crimes with a just outcome of a conflict. According to this school of thought, promoting international criminal justice in conflicts follows two ideas: (1) to deter future crimes by the threat of punishment everywhere and (2) to shape the future of post-conflict societies through addressing issues of guilt and retribution, thus avoiding that they contribute to renewed violence in post-conflict societies(Bassiouni 1996, p. 28, Unger and Wierda 2008, p. 246).

While equalising accountability with justice would surely be a simplification, accountability does clearly contribute to justice as a

[1] In fact, the ICTY was so far the only criminal tribunal that had started investigations while the conflict was still active.

compensation of wrongdoing through punishment. Much of the literature tends to discuss the question of how accountability measures and conflict resolution efforts influence each other along the lines of the relationship between peace and justice. The 'justice through accountability' school of thought claims that it is necessary to tackle justice in order to ensure a sustainable peace (e.g. Crowley 2010, du Plessis and Ford 2008b, p. X, Lederach 1995, Thony and Schneider 2003, p. 33, Van Acker 2004, p. 356), while others claim that pacifying measures at the cost of justice may be preferable (Kritz 2009, p. 21, Mamdani 2009c, Mendeloff 2004, Snyder and Vinjamuri 2003, Thakur 2006).

This debate has also reached the ICC. Its supporters believe it can contribute to peace through its investigations and trials. For example, Luis Moreno Ocampo, Chief Prosecutor of the ICC, claims that the ICC brings warlords to the negotiation table, focuses the debates surrounding the conflict on accountability issues, helps reduce crimes, weakens the support of spoilers by de-legitimisation and ensures harmony in post-conflict situations through dealing with past atrocities (Moreno Ocampo 2008a, p. 13).

Critics of the Court, on the other hand, suggest that investigations and prosecutions in conflicts could lead to an impasse in peace negotiations and other forms of peaceful conflict resolution efforts. Their main argument is that parties might reject a compromise out of fear of being tried after the conflict (Akhavan 2009, p. 625, Ambos et al. 2008, p. v, Sriram 2008, p. 306). Some authors go as far as claiming a connection between criminal prosecutions in conflicts and rising tensions or conflict intensity (Mendeloff 2004, p. 374, Osiel 2000). Roy Licklider, author of the Civil War Termination Database at the Rutgers State University of New Jersey, points out the risks of enforcing retributive justice in conflicts:

> *We are not just engaged in academic debates now; we are talking about other people's countries and other people's lives. And we do not know, in such a manner as to persuade others, what is true, what will work.*
>
> (Licklider 2008, p. 385)

Taking this debate as a starting point, this book will use theoretical frameworks from peace and conflict studies in order to analyse ICC investigations in conflicts as a concrete example of the relationship between peace and justice.

A number of crucial questions emerge from this approach. Some of them have been discussed extensively, others are relatively new: can quick and determined judicial reactions to human rights abuses in

conflicts help to end them faster or to stop them from escalating? Can the application and enforcement of international criminal law from the outside help to defuse or even transform a conflict? Can the prosecution of leaders resorting to brutal methods of warfare help to isolate them by increasing the pressure on their external supporters?

Both critics and proponents have tried to answer some of these questions, but most of them lack empirical evidence to support their theses (also Akhavan 2009, p. 627, Hazan 2006, p. 19, Ryngaert 2009, p. VII). Some of the effects they claim directly contradict each other. Research on these claims is therefore urgently needed. The impact of investigations in *ongoing* conflicts in general remains under researched.[2] In fact, investigations of international crimes have often even been discussed without distinguishing between transition contexts (the aftermath of a transition from authoritarian rule) and conflict contexts. Yet, it is highly unlikely that these investigations will have similar consequences under these vastly different circumstances.

But analysing the impact of international investigations in the context of ongoing conflicts is difficult since it may take years until the final results of these investigations are clear. Nevertheless, the stakes of enforcing accountability in conflicts are high, and these questions are too pressing to ignore them due to methodological difficulties. The fact that the current stage of the research does not offer reliable advice on how investigations and trials affect conflict dynamics is a serious problem. The limits, the effectiveness, as well as the costs and utilities of international criminal tribunals are not understood at a crucial moment when the system is definitely entering its practice phase. The share of trials among transitional justice mechanisms conducted in conflicts or directly afterwards has risen to nearly 30 per cent since 1997, while it moved between 7 and 17 per cent in the fifteen years before. At the same time, the share of international and hybrid trials among trials in conflict contexts is steadily increasing. Both trends are clearly illustrated in the following graphs.

The graph (Figure 1.1) shows the number of different transitional justice mechanisms that have been implemented in conflicts or directly after the signing of a peace agreement. Each mechanism is included in

[2] Exceptions include (Kuovo 2009) on transitional justice during the conflict in Afghanistan, (Akhavan 2009) and (Kastner 2007) for cursory case studies on deterrence in ongoing conflicts and (Unger and Wierda 2008) for a more general approach. More recently, a blog has been started to tackle issues of justice in conflicts (JIC 2012).

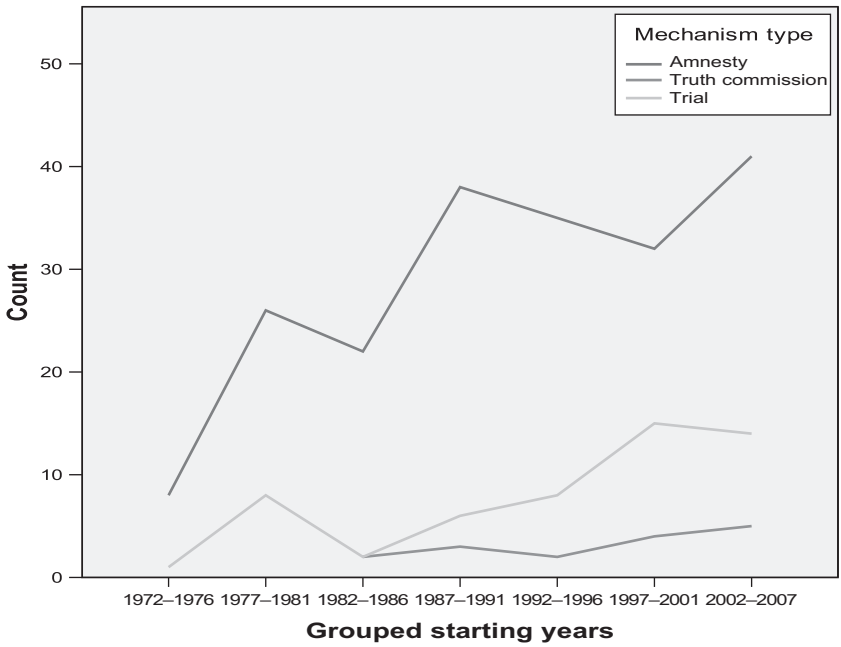

Figure 1.1: Transitional justice mechanisms in conflicts

the year in which its implementation started. The data is from the Justice in Conflict Database introduced in Chapter 3.

The graph (Figure 1.2) shows the number of domestic, hybrid and international trials that started each year in conflict contexts. The trend towards more international trials in conflicts is clearly visible.

Arguably this is the case because holding trials has become a mainstream demand of some Western civil society groups and NGOs in reaction to atrocities (e.g. Human Rights Watch, Amnesty International, Save Darfur, Invisible Children, to name a few). Additionally, some diplomats and practitioners are increasingly eager to use international trials and investigations as peacemaking instruments in international crisis management, even though furthering conflict resolution is not a mandate of these institutions.

1.2 Analysing the role of the ICC in ongoing conflicts

The following section will introduce the methodology applied in analysing the role of the ICC in ongoing conflicts.

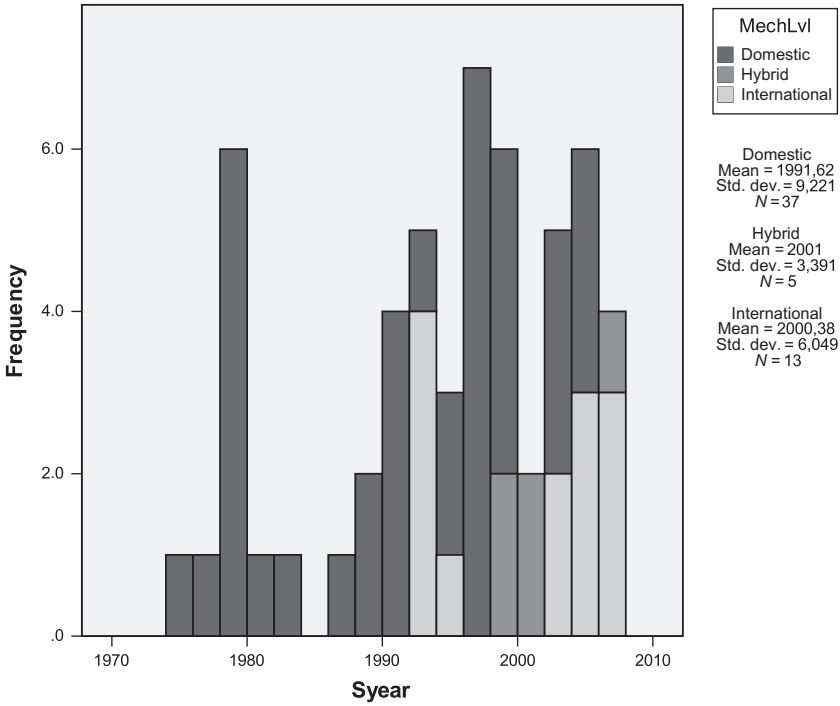

Figure 1.2: Type of trials started in conflict contexts

The approach combines a cross-case analysis of transitional justice measures implemented in conflicts with two in-depth case studies of ICC investigations during the LRA conflict in Uganda and the Darfur conflict in Sudan. The case studies rely on field research, expert interviews and a day-to-day analysis of the conflicts with the LexisNexis Database. LexisNexis was systematically analysed for both cases until 31 December 2011.

The idea is to compare theoretically informed cross-case findings (part 1) and empirical findings (part 2) in order to challenge both and highlight unresolved issues. The aim is to explain the mechanisms at work when the ICC investigates conflicts and shed some light on the complexities and pitfalls of criminal justice interventions in conflicts.

The cases chosen for the analysis in both parts of the book are armed intrastate conflicts. The term 'intrastate conflict' is a rather broad category. It includes classic civil wars fought between a state actor and a well organised rebel group vying for power in the central government.

But intrastate conflicts also include internationalised conflicts, in which external actors have intervened in a civil war (Bussmann et al. 2009, p. 13), or transnational conflicts in which several state and non-state actors fight each other across multiple state borders.[3] Focusing on intrastate conflicts is a logical choice because the ICC is mainly active in these conflicts. Additionally, the potential relevance of international criminal justice interventions is most obvious in contexts of weakened judicial systems often found in states afflicted by intrastate conflict.[4]

The respective strengths and weaknesses of cross-case and case study approaches make a combined approach most suitable to analyse the impact of ICC investigations in conflicts. For example, the results of some statistical and deductive research conducted so far have led to contradicting conclusions, pointing towards success (Kim and Sikkink 2009, 2010, Lie et al. 2007, Olsen et al. 2010), or failure (Meernik et al. 2010b, Snyder and Vinjamuri 2003, p. 5)of international trials to contribute to durable peace. This is largely due to the fact that the number of cases of international trials in conflicts is still too low to generate reliable statistical results.

On the other hand, most of the case studies conducted so far focus on specific aspects of transitional justice measures. For example, there have been case studies on the needs of victim groups in a single conflict area (ICTJ & HRC 2005, Wyrzykowski and Kasozi 2010), case studies on the implementation of traditional justice measures (Komakech and Sheff 2009) and cursory comparative case studies of several conflicts (Akhavan 2009). Yet, the method has rarely been used to present a comprehensive picture of the relationship between accountability measures and conflict resolution in one or more cases.

The comprehensive case studies informed by cross-case findings conducted here deliver a holistic analysis of ICC investigations in conflicts

[3] An example of an internationalised conflict would be the US intervention in the Afghan civil war in 2001, while the LRA conflict in northern Uganda is a good example for a transnational conflict. In the case of transnational conflicts, it might at times be difficult to distinguish them from international conflicts, as regional involvement and spill-over effects may involve several states (Busumtwi-Sam et al. 2004, p. 320, Omeje 2008, p. 68).

[4] The reason for this is twofold: first, there is often no other institution that could guarantee accountability; second, the potential contribution of accountability measures to justice is greatest here because grievances described as injustice are root causes for most intrastate conflicts.

rather than focusing on a specific effect. The analysis draws from the detailed information of specific but 'partial' case studies already available as well as from the contextual information of the cross-case overview conducted in Chapter 3. Cross-case and case study information is combined to paint the full picture of the impact of ICC investigations in conflicts. Finally, effects traced in the case studies are firmly rooted in conflict resolution theory, thus ensuring that the effects observed are relevant for furthering peace.

The main weakness of this approach is that the case studies have to rely on the findings of past research and develop creative indicators that allow measuring the effects identified in the cross-case section as precisely as possible with limited resources. It also restricts the book to two case studies because of the huge amount of information that has to be analysed. The results for the causal mechanisms are also not as precise as findings of case studies that focus on a single mechanism, but in return, they offer a much more comprehensive picture of the impact of ICC investigations in conflicts.

1.3 Structure of the book

The introduction is followed by a short chapter describing the institutional structures of the ICC and the Court's role in international relations. This is followed by the three main chapters of the book, namely the cross-case overview and the two case studies. The cross-case overview in Chapter 3 introduces the theoretical approach for the case studies and the causal mechanisms identified in the literature. The chapter then ends with a section that explains the reasons for selecting the LRA and Darfur conflicts as case studies. This leads to the second part of the book, in which the case studies are conducted. The Darfur and Uganda case studies are introduced subsequently in Chapters 4 and 5. Both start with a conflict analysis based on the conflict assessment guidelines developed by the UK Department for International Development (DFID) (Goodhand et al. 2002). The following sections of the case studies attempt to trace the causal mechanisms developed in the cross-case chapter. Chapter 6 introduces the conflict spectrum as a means to understand the potential impact of ICC investigations on peace by furthering justice through accountability. It also presents the most important third variable identified in the case studies. Chapter 7 then summarises the findings of the book and offers an outlook.