

# How is the ICC supposed to work?

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# Disclaimers and Objective

I am

- ▶ NOT a international legal scholar.
- ▶ NOT an expert in any sense on ICC or developments in the sphere of int'l justice.
- ▶ An IR theory/int'l conflict scholar who is kind of puzzled and confused about the ICC on normative grounds, based on what little I do know about it.

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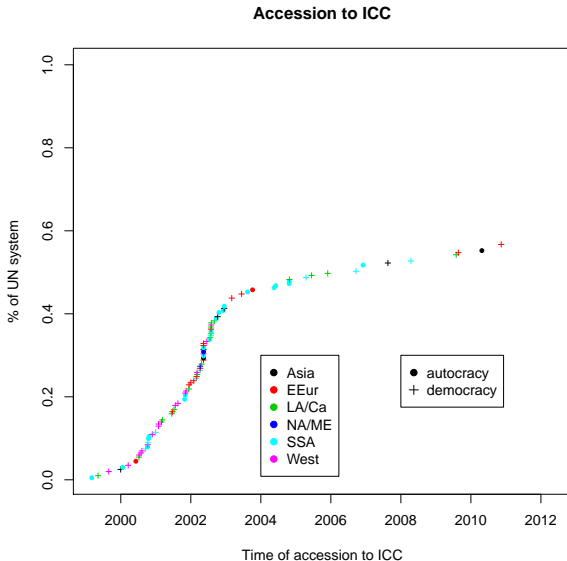
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Today: Want to explain why I find it puzzling and see if this leads to an interesting conversation.

# The International Criminal Court: Background

- ▶ 1990s initiative developed through UN system, series of multilateral meetings/negotiations.
- ▶ July 1998 Rome Statute approved and opened for signatures.
- ▶ Comes into force with 60 states having ratified by 2002.

# The International Criminal Court: Background



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	autocracy	democracy	total
not ICC party	78%	22%	
	49	14	63
ICC party	32%	68%	
	30	65	95
total	50%	50%	
	79	79	158

note: regime type measured in year 2000.

note: Missing democ data on 37 micro-states, omitted.

# The International Criminal Court: Background

region	# countries	% not in ICC	% in ICC
West	27	7	93
LA/Ca	33	18	82
EEur/FSU	28	32	68
SSA	48	33	67
Asia	38	63	37
NA/ME	20	85	15
World	194	38	62

# The International Criminal Court: Background

	Accession year	Share of world pop.	Cumulative share
China		21.2	21.2
India		16.7	37.9
USA		4.6	42.5
Indonesia		3.5	46.0
Brazil	2002	2.8	48.8
Pakistan		2.5	51.3
Russia		2.5	53.8
Bangladesh	2010	2.1	55.9
Japan	2007	2.1	58.0
Nigeria	2001	1.8	59.9
Mexico	2005	1.6	61.5
Germany	2000	1.4	62.9
Vietnam		1.3	64.2
Philippines	2011	1.2	65.4
Egypt		1.1	66.5
Iran		1.1	67.7
Turkey		1.1	68.7
Ethiopia		1.0	69.8
Thailand		1.0	70.8
France	2000	1.0	71.8



# The International Criminal Court: What does/can it do?

- ▶ Creates an int'l prosecutor position with broad latitude to investigate and issue indictments of any person guilty of ordering or committing major human rights abuses of sufficient gravity, "atrocities."
- ▶ Jurisdiction and admissibility:
  1. Crimes in countries where domestic courts system is unlikely to function properly to administer and execute justice (in view of ICC, prosecutor);
  2. occurred in states party to treaty, and after entry into force (2002);
  3. in other states if case referred to ICC prosecutor from UNSC.
- ▶ Heads of state, high state officials and their actions in official capacity are subject to review by the ICC prosecutor.

# The International Criminal Court: What does/can it do?

- ▶ List of crimes pursuable under Statute is long and broad.
- ▶ Many, many states arguably guilty of some crimes listed (eg, torture, “wilful killing,” forcible population transfers, “persecution” of “identifiable groups”, “outrages upon personal dignity,” etc.)
- ▶ Thus, ICC prosecutor (and court) given *enormous discretion* in deciding which meet the criterion of “most serious crimes of international concern.”
- ▶ Judgement of admissability (is state in question capable of or undertaking “genuine” prosecution?) is also subject to broad discretion.
- ▶ ⇒ An unprecedented, extraordinary delegation of formal authority by states.

# The International Criminal Court: What does/can it do?

However:

- ▶ **The ICC has no independent powers to apprehend those for whom it issues arrest warrants.**
- ▶ Rome Statute is kind of odd here:
  - ▶ It is meant to apply precisely to countries where domestic legal systems are corrupt or dysfunctional, and to heads of state/powerful people.
  - ▶ But later enjoins these very same countries/people to enforce ICC judgements/warrants for arrest! Seems contradictory.
  - ▶ Lots of articles on the obligation of State Parties to cooperate with ICC, and to the “custodial State” (where accused is) to surrender accused to ICC, or help in conveying him there.
  - ▶ Implicit theory that Bashir (eg) would be arrested if happens to wander onto grounds of some State Party?

## The International Criminal Court: Activity to date

- ▶ 30 indictments for individuals for crimes in 7 countries: DRC, Uganda, CAR, Sudan, Kenya, Libya, Ivory Coast.
- ▶ 17 on rebel/opposition side, 13 indiv's were on state side.
- ▶ 9 still fugitives (5 rebel, 4 state). 3 died (2 rebel, 1 state).
- ▶ *1 conviction, 5 charges dismissed/acquitted/released for lack of/bad evidence!*
- ▶ 3 in ICC custody, 3 arrested by a state (may not give to ICC).
- ▶ 6 have voluntarily appeared before court to begin judicial process (2 Darfur rebels, 4 Kenyan politicians).
- ▶ Worth more than \$100 million per year?

# IR/Pol Sci literature on the ICC

Two closely connected questions:

1. Why did states write and accede to this treaty, given that it seems to give an int'l lawyer stunning latitude to embarrass/harass/maybe arrest them for doing stuff they might imagine they would need to do to retain power?
2. Is the ICC likely to have any good effects, or any effects at all, on rate of commission of atrocities?

Questions are linked because reasonable anticipation of good effects might explain why they created/signed it.

# 1. Why did states do this?

1. Int'l lawyers: Domestic crime model. "End impunity" → ↑ prob of punishment or cost of committing crime → deter crimes.
2. Danner/Simmons (2010): Rulers/regimes tying own hands against abuses → reduce violent abusive opposition/rebellions. (implausible)
3. Hashimoto (2012): Rulers see it as potentially useful instrument to be used against their domestic enemies; they themselves don't have to worry about it much.
4. Gilligan (2006): Gives states credible option to refuse exile when bad, criminal leader is in very bad straights and willing to voluntarily surrender.
5. Various: Constrain the US, other powerful states. "Soft balancing."
6. NGOs/lawyers etc persuaded or tricked states into it. (In negotiations, shift of concern of small/poor states from worrying about prosecution of their leaders to seeing it as an alliance of weak against great power interventionism.)

## 2. How is the ICC supposed to work?

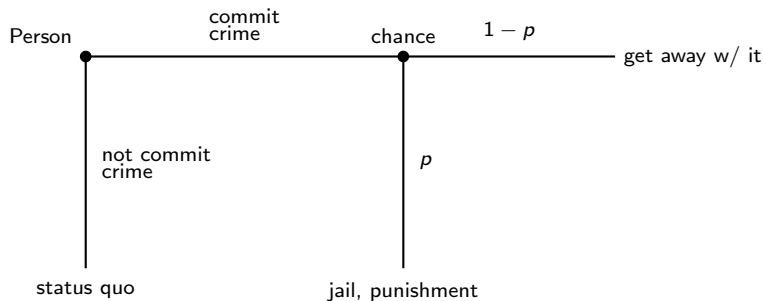
- ▶ The lawyers' domestic crime model.
- ▶ But ICC can't forcibly arrest a guy with an army.
- ▶ This makes for VERY different implications from what the lawyers' seem to expect/assume.

## 2. How is the ICC supposed to work?

- ▶ A hypothetical eg: Suppose Syria was a State Party, and Bashar al Assad was indicted.
- ▶ Either
  1. ICC is better than likely domestic fate, in which case Bashar can (maybe) turn himself in.  $\Rightarrow$  ICC actually *limits* liability ex ante  $\Rightarrow$  it *weakens*, not strengthens deterrence of atrocities.
  2. Or, ICC is seen as worse than continuing in power by Bashar, in which case either
    - 2.1 ICC has no effect if it does not constrain Bashar's options for amnesty or exile. Or
    - 2.2 If it does constrain ex post options for amnesty or exile, then it could have deterrence value ex ante, but has bad effect of prolonging or worsening conflict ex post.
- ▶ Analytical result: Bad effect of prolonging/worsening conflict could outweigh value of deterrence.

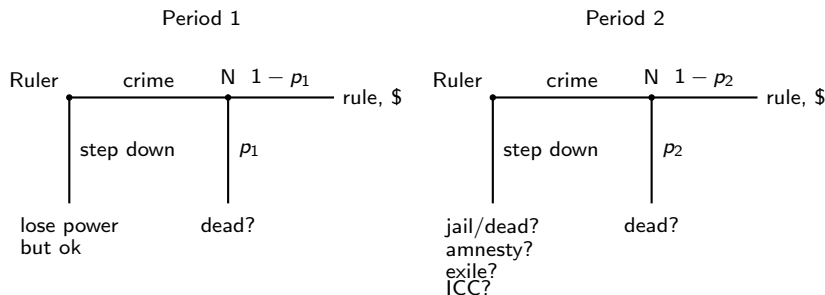


# The domestic crime model



Crime more likely to be deterred if  $\uparrow p$  or  $\uparrow$  punishment.

# The bad ruler's problem



- ▶ Let expected value of step down in period 2 be  $x$ .  $\rightarrow$  step down if  $p_2$  is high enough.
- ▶ If ICC makes  $x$  bigger on average (better)  $\rightarrow$  increase P1 atrocities but maybe reduce P2 atrocities. (limited liability effect)
- ▶ If ICC makes  $x$  smaller on average (worse)  $\rightarrow$  deter P1 atrocities but increase P2 atrocities. ("no bargaining with terrorists" effect)

## The bad ruler's problem

- ▶ How is it even possible that ICC could make P2 step down option worse, if ruler can choose whether to step down? (ie, do it only if better than alternative of continuing)
- ▶ Perhaps: Can see ICC as a way that *state parties try to commit to each other not to offer amnesty/exile to bad ruler that wants to exit.*
- ▶ Thus, ex ante, bad rulers think they are less likely to end up in southern France.
- ▶ Maybe, but note that there are lots of countries not party to treaty that could potentially offer exile!

# The bad ruler's problem

- ▶ Could it be that effect of greater deterrence in P1 necessarily outweighs conflict-increasing effect in P2?
- ▶ Analytical result: No.
- ▶ If give “int'l community” preferences here, IC/world can be better off not having ICC at all.

# Possible saves?

1. What if ICC indictment makes life worse for bad ruler even if not caught? Call this *infamy effect*. Could increase deterrence without increasing conflict in P2 (reduces value of even continued rule after committing crime).
  - ▶ Is it plausible that these are really strong? Also, will this lessen what with experiences of Sudan and Kenya, and repeated failures of prosecution?

## Possible saves?

2. What if you could have a more “political” ICC that bargains away indictment for ruler stepping down or rebel giving up?
  - ▶ This doesn't help.
  - ▶ If policy, it undercuts any ex ante deterrence. (In fact, undermines the deterrence rationale behind institution: “no bargaining with terrorists.”)
  - ▶ And doesn't add to incentive for leader to step down any more than a world with no ICC.

## Possible saves?

3. Forget deterrence/impunity argument for rulers. Maybe ICC can be justified as instrument for states to lower odds that rebels can take over (Hashimoto 2012).
  - ▶ A rebel who gains power by force + atrocities more likely to be shunned/cut out by int'l community if ICC indicted. → lowers value of forcible attempts to win power.
  - ▶ Or, ICC is a good tool for leader to prosecute opponent while making it look foreign and impartial. Eg, Ouattara vs Gbagbo in Ivory Coast.
  - ▶ Maybe, though this gives up on the core purpose/rhetoric justifying the court (“end impunity” for leaders who commit crimes).

## Possible saves?

4. ICC threat increases likelihood of refusal by subordinates to carry out criminal commands of superiors?
  - ▶ Here, threat of ICC indictments might have ex ante deterrence value for subordinates if previously they would have been anonymous.
  - ▶ But conceivably doesn't have conflict-prolonging effect if head of state not indicted?
  - ▶ Not so clear. But worth doing research on.



# Summary

- ▶ Hard to see a clear justification for ICC as a means for reducing/detering large-scale human rights abuses.
- ▶ Possible, but as plausible that ICC will make things worse on average (on this score) as better, due to conflict prolongation and limited liability effects.
- ▶ → may be a force for fewer human rights abuses, less violent conflict, in some cases, but a cause of more of this in others.
- ▶ Note: Haven't considered how to value retribution, and question of satisfaction for victims. Very little work on what people in affected areas actually think about this, though.

# Examples

- ▶ Do we see evidence of any of the dynamics discussed in current ICC cases?
- ▶ Let's consider some examples.

# Kenya

- ▶ ICC indicts six Kenyan leaders and a radio journalist in connection with major violence at time of 2007-08 elections, after Kenyan parliament chooses not to move on recommendations of a Kenyan commission of inquiry. (They may have expected ICC process would be slower and less efficient!)
- ▶ Two have charges dismissed already. Two of remaining four – Ruto and Kenyatta – are major political figures currently *running for president* in March elections. They were on opposite sides of the 2007 violence.
- ▶ ICC drove them into coalition with each other! An ironically good effect?

# Kenya

- ▶ They have a serious chance of winning in March (!), though current polls marginally unfavorable.
- ▶ Whether win or lose, ICC trials for both start in April. Expected to last *three years*, maybe more, and require their attendance.
- ▶ A major effect of ICC indictments: The stakes for winning for these two are much higher.
  - ▶ Could make for more violence in marginal districts, and greater chance of contested election and post-election civil war.
  - ▶ Or, could be that electoral violence will be less because of fear of more indictments or lowering chance of getting off?
  - ▶ Anyway, have spectacle of int'l figures like Kofi Annan effectively threatening Kenyans with int'l punishment if they vote a certain way!

# Kenya

- ▶ If they win, seems this would be just a disaster for Kenya, and probably the ICC.
  - ▶ They might reject authority of court, leading to major int'l problems for Kenya (shunning, aid cut offs, pariah status, internal conflict, greater civil war risk).
  - ▶ If they accept the court's authority, how can they run the country from the Hague?
  - ▶ Re ICC, note that the communities most subject to violence in 2007-08 are the biggest supporters of Ruto and Kenyatta and their alliance.
- ▶ If they lose . . .
  - ▶ Maybe they go to the Hague get tried for years.
  - ▶ Maybe they kick up trouble in Kenya, risk of war, or threaten this to get some sort of protective deal from Odinga.
  - ▶ Maybe contest election if it's close, using threat of war to try to get some kind of dispensation on ICC.

# Ivory Coast

- ▶ Here there is a case that peace prospects for country are marginally better due to Gbagbo being taken to Hague and prosecuted there rather than in Ivory Coast by current president's regime.
- ▶ The political division/conflict is still sharp and return to war entirely possible.
- ▶ Had Ouattara prosecuted him in country, might have led to more fighting.
- ▶ Or, having him in country might have led Ouattara to cut a better deal with opposition → better peace prospects. Hard to say.

# Sudan

- ▶ Recent ICG report, “Sudan: Major Reform or More War,” November 2012. Argues that without a transition plan that involves Bashir leaving office, major risk of escalation to big civil war.

*Such cooperation [with Bashir and his party, the NCP] might be unpalatable to many who hold Bashir responsible for atrocity crimes, but it would be necessary to prevent further conflict and continued humanitarian crises in Sudan as well as South Sudan.*

*President Bashir is a key impediment to resolving the crisis, though certainly not the only one. He cannot step down or cede too much power, in part for fear he will end up in The Hague, where he has been indicted by the ICC.*

- ▶ Recommends that as part of an exit/transition deal for Bashir, UNSC tell ICC to defer prosecution on an annual basis while Bashir and his party are being good. (hard to implement!)

- ▶ Violence and near-civil war in eastern DRC in November 2012 plausibly caused in part by conflict-inducing effects of ICC.
- ▶ ICG report from October 2012:

*Under international pressure, the Congolese authorities ordered the arrest of Bosco Ntaganda after having publicly refused to arrest him for three years on the pretext that he was a key element in the peace process in the Kivus. This U-turn by Kinshasa, which seems to call into question the amnesty granted to the CNDP, led to a mutiny and the formation of a new political-military movement, the M23, in May.*

*The first Western minister to visit Joseph Kabila since the fraudulent November 2011 elections, Didier Reynders, the Belgian foreign minister, went to Kinshasa on 27 March 2012 and pleaded for Bosco Ntaganda's arrest. The U.S. ambassador expressed support for this position a few days later. With electoral fraud having seriously undermined his international credibility and with Thomas Lubanga having just been convicted, Joseph Kabila saw a chance to regain legitimacy with Western partners by handing over Ntaganda, who has been wanted by the ICC since 2006.*



# Uganda

- ▶ Plausible, though far from certain, that in 2003 Museveni invited ICC investigation of LRA/Kony in order to undermine a peace negotiations, tie his hands against an amnesty deal.
- ▶ Reuters, October 8, 2005:

*A mediator between the Ugandan government and the rebel group known as the Lords Resistance Army said Saturday that international arrest warrants for five leaders of the rebel group had ended any chance of negotiating an end to 19 years of civil war in Uganda. . . . the Ugandan mediator, Betty Bigombe, a former government minister, said the indictments were a blow to efforts to persuade Joseph Kony, the leader of the [LRA] and one of those cited in the arrest warrants, to end his revolt. He previously had been offered amnesty and resettlement in northern Uganda. Amnesty is not an option following the indictments.*

*“There is now no hope of getting them to surrender,” Mrs. Bigombe said. “I have told the court that they have rushed too much.”*

*Mr. Kony’s insurgency has devastated northern Uganda and uprooted more than 1.6 million people. His rebels have reportedly abducted more than 20,000 children.*

# Uganda

- ▶ Here, state leader possibly using ICC as an instrument to tie his own hands against making a deal that would end a war that he found convenient for domestic reasons.
- ▶ Another version of conflict prolongation effect.

## Summing up on these cases

- ▶ Plausible that ICC has/had a conflict prolongation or exacerbation effect: Uganda, Sudan, DRC, Kenya.
- ▶ Possible that ICC reduces conflict by taking punishment of a political leader out of current leader's hands, or by sidelining an opponent: Ivory Coast, DRC (Bemba case re CAR).
- ▶ If ICC is prolonging conflicts, it may also be deterring some that we don't see. But how assess, and is it worth it?