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BOOK REVIEW

Book Review Essay: The International Criminal Court and Its Effects on Active Armed Conflicts

The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace–Justice Divide by Patrick S. Wegner. Cambridge: Cambridge University Press, 2015. pp. ix + 333 + bibliography + index. ISBN 978-1-107-06947-3.

Justice in Conflict: The Effects of the International Criminal Court’s Interventions on Ending Wars and Building Peace by Mark Kersten. Oxford: Oxford University Press, 2016. pp. xv + 202 + bibliography + personal interviews + index. ISBN 978-0-19-877715-1.

Historically, international criminal tribunals tend to have been convened after the end of armed conflicts in order to serve the primarily retributive purpose of punishing individual perpetrators for their involvement in genocide, war crimes, crimes against humanity, wars of aggression, and/or crimes against peace. The permanent International Criminal Court (ICC), however, is different. The ICC was deliberately designed so that it could intervene in ongoing armed conflicts in order to deter atrocities and promote peace. Since the ICC became operational in July 2002, most of its examinations, investigations, and proceedings have occurred in the context of active violence: the ICC, in short, is ‘a player in ongoing conflicts’ (Wegner, 3). But what exactly are the effects of this shift from post-conflict justice to in-conflict justice? Do ICC interventions deter criminal atrocities and promote peace, reconciliation, and the rule of law, or are they a hindrance to peace negotiations that can prolong, or even cause an increase in, deadly violence? This is an important and highly policy-relevant question that the so-called *peace versus justice* debate has long grappled with (note that this debate, by and large, equates ‘justice’ with individual criminal accountability). One camp in this debate is convinced that there can be ‘no peace without justice’; the other camp is certain that there can be ‘no justice without peace’.

A deep frustration with the binary and dichotomous nature of the peace versus justice debate provides the starting point of the two books under review. Patrick Wegner’s work, *The International Criminal Court in Ongoing Intrastate Conflicts*, seeks to transcend the peace–justice divide 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’ (Wegner, 2). Likewise, *Justice in Conflict* by Mark Kersten aims to ‘contribute to a more sophisticated and nuanced understanding of the ICC’s impact on the complex dynamics of peace, conflict, and justice processes’ (Kersten, 2). Wegner and Kersten are both political scientists, and both attempt to demonstrate that the extreme positions in the peace versus justice debate – that the ICC is only helpful for peace, on the one hand, or only a hindrance to peace, on the other – are overly simplistic, and conceal a more complicated and nuanced picture.

Interestingly, the two books not only share this central motivation, but also a common history. The authors met in Uganda during fieldwork for their Ph.D. theses and continued to collaborate in the context of Kersten’s *Justice in Conflict* blog. They were ‘brothers-in-arms’ (Wegner, xii) in the project to inject nuance into the debate on the effects of ICC interventions on ongoing armed conflicts, and their intellectual influence on each other is instantly recognizable: while Kersten and Wegner employ slightly different methodological tools –

Kersten draws mainly on personal interviews whereas Wegner traces causal mechanisms and uses quantification – the overall structures and research design approaches utilized in the two books are remarkably similar. Both essentially proceed in four steps.

Both authors start by drawing on insights from peace and conflict studies scholarship to generate frameworks to guide the empirical study of the effects of ICC interventions on active armed conflicts. What is more, they suggest that this is how one *should* study the ICC's effects on peace, conflict, and justice processes (Kersten, 9–11). Kersten draws on conflict resolution and negotiation theory to derive an analytical framework that focuses on the ICC's impact on the conflict narrative, the incentives of the conflict parties to negotiate, the pre-negotiation phase, the negotiation phase, and the post-negotiation phase (Kersten, 37–63). Wegner draws on a cross-case overview and Ohlson's (2008) work on the causes of war and peace in order to derive 15 causal mechanisms – nine peace-promoting and six peace-hindering – that ICC interventions can set in motion (Wegner, 23–47). These causal mechanisms fall into five broad categories: (1) strengthening the rule of law; (2) facilitating reconciliation; (3) helping to isolate and deter criminals; (4) blocking conflict resolution; and (5) heightening tensions.

In the second step, both authors then employ their frameworks to look empirically at two cases of ICC interventions in ongoing conflicts. Wegner traces the presence of the 15 causal mechanisms in the cases of Darfur and Uganda, while Kersten employs his analytical framework as a lens to explore the cases of Uganda and Libya. These empirical case studies form the core of the two books, and are extremely rich and insightful. Kersten finds that claims about the negative effects of the ICC interventions in Uganda and Libya are exaggerated; while neither conflict was resolved diplomatically, he attributes this failure to the lack of a 'true interest in peace' amongst the main conflict parties – an examination of the willingness of conflict parties to negotiate in good faith is an important component of his case studies (Kersten, 101–8, 135–42). Kersten suggests that the ICC's main impact on the conflicts in Uganda and Libya was to bolster conflict narratives that focus on particular individuals, distinguish between 'good' and 'evil', and obscure the structural root causes of conflict. Wegner's examination of the Darfur and Uganda cases reveals the presence of some causal mechanisms that support peace (limited deterrent effect, capacity-building, and international isolation of perpetrators) and some causal mechanisms that hinder peace (block negotiations, block rapprochement, trigger spoiler retaliation, and further hardliner support). He thus concludes that peace and justice are sometimes reinforcing, and sometimes at odds (Wegner, 277). What is noteworthy is that Wegner's Uganda case study confirms the conventional narrative that the ICC arrest warrant against the leader of the Lord's Resistance Army (LRA) Joseph Kony ultimately prevented him from signing a peace deal (Wegner, 271), whereas Kersten challenges this narrative by suggesting that the LRA and the Government of Uganda never intended to negotiate an end to the conflict, regardless of the ICC's stance (Kersten, 101–8). Overall, however, the empirical research of both Kersten and Wegner shows that the effects of ICC interventions in Uganda, Darfur, and Libya are not as 'black or white' as the sharply dichotomous framing of the peace versus justice debate suggests.

In the third step, both books look at the ICC's internal decision-making processes in order to illuminate why ICC interventions have had the effects that are identified in their research. Kersten purports that the effects of ICC interventions – mainly the bolstering of partial conflict narratives – are determined by which side of a conflict is targeted for prosecution and which is not (Kersten, 193). He thus enquires into why the ICC tends to conduct one-sided interventions and develops an argument that will sound familiar to readers of David Bosco's *Rough Justice* (Bosco 2013). Kersten argues that the ICC has an institutional interest in siding with powerful actors and intervening against the 'weaker' side in a conflict, as it needs to secure support and cooperation for its investigations and the enforcement of arrest warrants. He suggests

that the ‘referral type’ signals to the ICC which side to target for prosecution. If the United Nations (UN) Security Council refers a case then the ICC interprets this as an invitation to prosecute the government side, whereas if ICC States Parties refer themselves then the ICC interprets this as a mandate to target non-state actors (Kersten, 163–7). Wegner, likewise, identifies the ICC’s prosecutorial decisions as a key variable that influences whether ICC interventions help or hinder peace-building efforts (Wegner, 290). However, his discussion brings out more succinctly that the choice of which specific individuals the ICC decides to target and when it decides to target them are factors that are even more important. For example, Wegner posits – rightly in the opinion of this reviewer – that the ICC’s Darfur investigation ‘might have rendered completely different results if the OTP [office of the prosecutor] had applied for an arrest warrant for the Sudanese Defence Minister in July 2008 instead of directly going for President al-Bashir’ (Wegner, 291). Ultimately, both authors show that the ICC is not an apolitical institution that impartially implements the law, but a political body whose choices influence its effects on active armed conflicts.

In the final step, both studies draw conclusions that are almost identical. First, both authors conclude that the effects of ICC interventions in ongoing conflicts are manifold, complex, and diverse (Wegner, 277; Kersten, 202). The ICC is neither just a hindrance for conflict resolution nor just an ally of peace. According to both books, it is impossible to determine – on the whole – whether the ICC is a help or hindrance in relation to peace-building and conflict resolution. Second, both authors stress that the impact, especially the negative impact, of ICC interventions on conflict dynamics on the ground is often overestimated and overstated. Negative developments on the ground, e.g. a failed peace process, are often wrongly attributed to the presence of the ICC (Wegner, 11; Kersten, 193). Third, Kersten and Wegner stress that the ICC’s prosecutorial decisions influence the effects that it has on peace, conflict, and justice processes. Both authors recommend, therefore, that the ICC should strengthen its capacity to analyse the conflicts that it intervenes in and assess the potential effects of such interventions on international conflict-resolution efforts (Wegner, 12; Kersten, 197–8).

Both books are well researched, and advance – theoretically as well as empirically – the debate on the effects of ICC interventions on active armed conflicts. In particular, they start filling the lacuna of systematic, empirically rich, book-length studies on the subject. Moreover, given the very similar structure and research designs of the books, one can read them in a comparative and cumulative way, which strengthens the confidence in the almost identical conclusions that both authors draw. Like all human products, however, the books are not without flaws, and five issues worthy of criticism are highlighted herein.

First, while the frameworks inspired by peace and conflict studies that the books develop are novel and interesting, they are somewhat limited in scope. Kersten’s analytical framework is modelled around official peace negotiations as the primary conflict-resolution strategy, which makes it difficult to utilize the framework to examine the effects of ICC interventions on other conflict-resolution strategies such as, for example, peace operations, humanitarian action, sanctions, ad hoc deals (e.g. exile), and military measures. This problem becomes evident in Kersten’s Libya case study, where the analytical framework can do very little work given the absence of official peace talks. It seems that the framework is unsuitable for studying cases that do not involve formal peace negotiations. Wegner’s approach of tracing how ICC interventions can potentially impact upon the resources, reasons, and resolve (the 3 *Rs* of Ohlson 2008) of conflict parties to fight is more broadly applicable, but only draws on insights from one journal article out of the vast peace and conflict studies literature.

Second, both books have a tendency to overstate and generalize their conclusions. While it might be tempting to generalize findings from two in-depth case studies, one simply cannot come to general conclusions about the effects of ICC interventions on ending wars and

building peace on the basis of two case studies. What both books successfully do is identify some possible effects of ICC interventions in active armed conflicts, and this is a very important contribution. However, based on their research designs, the authors cannot exclude the possibility that there might be cases where the ICC is clearly only a help or hindrance for peace and conflict resolution. Quite simply, more empirical case studies are needed.

Third, while Kersten's Libya case study is generally well informed, it has some shortcomings. First, it fails to discuss the UN mediation effort that was initiated in early March 2011 and headed by the Jordanian diplomat Abdelilah al-Khatib. Members of the UN mediation team stress that the ICC's involvement – amongst other factors such as the bombing undertaken by the North Atlantic Treaty Organization (NATO) – complicated their peacemaking efforts, as the arrest warrants targeted key interlocutors, made Gaddafi reluctant to relinquish power, and disincentivized the opposition from negotiating (e.g. Bartu 2014; Hayner 2013). Moreover, the case study does not discuss the Turkish effort to negotiate Gaddafi's exit in March 2011, which – according to the Turkish foreign minister – was hindered by the fact that ICC States Parties were unable to offer Gaddafi refuge (Tanner and Taylor 2011). Second, and this also applies to Kersten's Uganda case study, the discussion on whether 'the Libyan civil war could feasibly have been settled through peace negotiations' remains speculative (Kersten, 135). The epistemic challenge of truly knowing the intentions of the main actors seems insurmountable. Is it really possible to know that there was no chance of reaching a peace agreement between Gaddafi and the National Transitional Council in June and July 2011, when a stalemate generated renewed interest in a political solution? The African Union (AU) argues that there was such a chance, and that the ICC arrest warrants undermined it. What Kersten's argument also overlooks is the possibility that ICC arrest warrants might make it harder for international actors to coerce unwilling conflict parties to engage in negotiations. After all, what international sanction can be worse than spending the rest of your life in a prison cell in The Hague? To posit one counterexample, Kenya's post-election crisis in 2007/8 shows that conflict parties which are reluctant to negotiate can be coerced to do so and sign a power-sharing agreement. Would that have been possible if the ICC had indicted President Kibaki and/or opposition leader Odinga?

Fourth, the argument that the ICC has an institutional interest to side with powerful actors and intervene against the 'weaker' side of a conflict in order to secure support for its investigations and the enforcement of arrest warrants is persuasive, but not really supported by the case study findings. Given the lack of the ICC's enforcement capabilities, it would make sense for it to work towards maximizing national and international cooperation for its activities. However, as both books point out, the ICC has received little to no support and cooperation in all three interventions examined in the two books – thus, if the ICC is aiming to primarily design its interventions so as to maximize support and cooperation, it is doing a poor job and needs to urgently rethink its approach. In particular, it seems that indicting sitting heads of state in ongoing conflicts is a strategy destined to decrease support for an ICC investigation in the affected country, and in the wider region.

Fifth, and lastly, while both books demonstrate that the effects of ICC interventions on active conflicts are complex and diverse, they provide little evidence for clearly positive effects of ICC interventions in conflict settings. Kersten speculates that the ICC arrest warrants might have been a reason for the LRA to agree to participate in the Juba peace talks. Otherwise, however, his case studies produce only limited evidence suggesting that the ICC interventions in Uganda and Libya had positive effects (see Kersten, 186, 190). In fact, he suggests that the ICC's primary effect is to bolster individualized and partial conflict narratives, which makes conflict-resolution efforts harder. Wegner suggests that the ICC catalysed judicial capacity-building in Uganda and exerted a limited deterrent effect. However, he also argues that 'it is difficult to

claim a linear connection between accountability (or justice), embodied through the activities of the ICC, and peace, as a reduction of violence, in any of the case studies' (Wegner, 277). Both authors stress, moreover, that the impact of the ICC is very often exaggerated and overstated. It should also be remembered that the conflict-resolution efforts ultimately failed in all three cases examined in the books. To put it provocatively: do these findings not instead suggest that the ICC is, at best, an irrelevant player in ongoing conflicts and, at worst, a hindrance to conflict-resolution efforts? Self-awareness about this potentially counterproductive role might partly explain the ICC's reluctance to initiate interventions into active conflicts. As Kersten shows, ICC States Parties and the UN Security Council have asked the ICC to intervene in active armed conflicts, but the ICC's Office of the Prosecutor has not yet used its *proprio motu* powers to initiate an investigation during an active conflict. Based on the insights generated by the two books, this seems to be a prudent policy on the part of the ICC.

These criticisms notwithstanding, Kersten and Wegner have written fascinating books that provide important new insights into the effects of ICC interventions on active armed conflicts. One can only hope that other researchers will follow their example, and produce additional in-depth case studies of other ICC interventions in conflict situations.

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