



Dismas Nkunda
Co-Director, International Refugee Rights Initiative

Is it appropriate for the Court to be involved while armed conflict is occurring? Or, in the effort to prioritize the peaceful resolution to a conflict first, should the ICC only be involved post-conflict? Please feel free to draw on country-specific examples.

I would want to believe that the court's mission was for judicial purposes, which means that its first action is to remain focused on the committal of crimes that are clearly spelt out by the Rome Statute. Its also true that given that the three crimes that the court is interested in are mainly committed during an armed conflict; which by extension would mean that the court would have an interest in the particular conflict with a view to keeping a watch on whether there are crimes being committed. That is the unsaid political role of the court. What however complicates matters is when the court uses its clout to "try and solve" the conflict by use of threats. That can have both positive and negative consequences.

The positive is that pronouncements of the court can act as deterrent of continued committal of crimes for fear that the court was watching. Thus the engagement of the court can have that powerful effect of neutralizing the adversaries.

In the example of DRC, engagement during conflict can have some impact in limiting crimes. For example, the charges against Thomas Lubanga for conscription of child soldiers in the conflict in DRC raised awareness in the country that this widespread practice was contrary to international law and militia leaders expressed concern about this behavior possibly landing them in the Hague.

The reaction of the Sudanese government when the ICC issued arrest warrants against President Omar al-Bashir is a clear indication that the action of the Court is taken seriously by those active in the conflict.

The negative though is that ICC's involvement could have serious negative consequences. In Sudan the unintended but expected consequences of the court's decision was the expulsion of humanitarian organizations, which heavily impacted on the lives of the very people (victims) whom the court was trying to protect. It did also as we had anticipated put in jeopardy the lives of the people who had helped the court and many human rights activists soon became targets of the now scared government.



In sum total, with only a seven-year lifespan, it would be too early to make judgments of the impact of the court during and after a conflict. This is made more complex by the nature of the conflicts itself; the conflict in Libya; its genesis and response is quite different say to the one in Darfur or indeed Ivory Coast. Thus the need of the OTP to be able to clearly understand what would be the political ramification of getting involved in conflict without making the court seem a tool of wider international politics. In this case it would be best that matters of politics be left to the United Nations, while judicial matters are the strict domain for the court.

Touching on the situations in Libya and Cote d'Ivoire, has the involvement of the ICC been helpful or detrimental to preventing further atrocities, prosecuting perpetrators and securing peace?

In Ivory Coast the problem, more like in Kenya was the contestation of electoral victory that, if the past was a good teacher, helped the court for early intervention. What this did was to forewarn potential perpetrators of the consequences of committing crimes that the ICC would be interested in. Such veiled monitoring can have positive impact since then the top leaders in the conflict realize that time might come for individual criminal liability, even when the conflict has more actors. In other words the leadership gets weary.

However, the singling out of individuals, particularly at such an early stage of the situation may have reinforced notion that the Court, and perhaps by extension the international community generally, were biased in favor of one group, which could actually insulate the other groups to become more deadly "since they have nothing to lose".

In the Libya case, the arrest warrants before even the fall of the Gaddafi regime played well into the discourse that was being propagated by the Africa Union that the ICC was more interested in trying "Africa leaders". And that was at the backdrop of the involvement of NATO which many African leaders began juxtaposing with the involvement of France in Ivory Coast and the perceived notion of the UN being a tool for re-colonization of Africa. Matters were not helped when African countries on the Security Council distanced themselves from resolution 1970 on Libya. No one was more adamant about this than former South African President Thabo Mbeki which has lent credence to those who question the independence of the ICC from influence of the Security Council as being used by some states such as the USA which are not party to the Rome statute. The fear being that such "pick and chose" means of referral could be used anywhere in the guise of R2P.



Secondly in the Libyan case the court was seen to be biased against one side of the conflict yet there were reports by human rights organizations about the rebels against Gaddafi equally committing crimes. Thus questions of impartiality of the court came into the open and it then open the scrutiny of the continued use of R2P as a tool that is selectively being used at the behest of the west.

As a non-governmental organization working on the ICC and RtoP, how can the Court become more effective as a tool within the RtoP framework? What measures can be taken by states, the Court itself and the United Nations Security Council to ensure this? What are the common challenges faced by the Court and the norm in the effort to prevent the four RtoP crimes and punish their perpetrators?

I believe that the ICC was always intended to function as a deterrent to potential perpetrators by offering a forum within which they could be tried and punished for these actions and acts as a warning to others.

It is clear that the Court and the Security Council more recently, have been exploring ideas about what role the Court can play in a more short term context, and monitoring the conflict to see if there are crimes that benefits the court's intervention.

My held view is that the court should divorce itself from politics. The UN Security Council can play the political and guidance role of intervention to end a conflict; by issuing resolutions or even intervening under the ambit of R2P but the court should only come in when they have studied the situation well and know that it will pursue judicial and not political roles. That done the confrontation between responsibility to protect and justice during a conflict will not cloud the ending of the conflict.