



UN-ICC Cooperation: Walking A Tightrope

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Executive summary

United Nations (UN) peacekeepers are frequently in a position to assist the International Criminal Court (ICC) in its efforts to prosecute war criminals in conflict zones. This research note discusses the conditions under which UN peacekeepers assist the ICC and the potential costs and benefits of assistance for both the ICC and the UN. It argues that the UN may offer unique assets to assist the ICC, that cooperation may help improve synergy in international conflict interventions, and that the ICC's efforts may undergird the UN's efforts to promote reconciliation and build sustainable peace. However, the UN's assistance to the ICC may also undermine peace operations' key operating principles of consent, impartiality and limited use of force; introduce peace and justice dilemmas; and politicize justice.

Introduction

The International Criminal Court (ICC) has an enforcement problem. It was designed to be reliant on states for the successful implementation of its mandate, but these same states have frequently proven to be unreliable allies. Without cooperation, the ICC has a very hard time conducting investigations, collecting evidence, or arresting suspects. One of the potential remedies for this enforcement problem is for the ICC to solicit assistance from United Nations (UN) peace operations. These instruments of international conflict management are frequently active at the same time in the same area as the ICC. In fact, in five out of 13 ICC situation countries – and in five of the eight where the Court has actually indicted someone – a UN peace operation has (had) an active presence on the ground. And indeed, the UN has provided logistical support to Court investigators, shared significant amounts of relevant information, offered political support to the Court's anti-impunity message, and even in some rare cases assisted in the arrest of Court suspects. Despite the empirical importance of this phenomenon, very little research has been done on when and why UN peace operations decide to assist.

Between 2016 and 2020, research was conducted on the conditions under which UN peace operations will operations lend this assistance, with particular attention to the patterns of this assistance, the motivations behind it, and the conflicting obligations that it generated for the peace operations (Buitelaar 2020). The focus was on the decision-making of the leadership of UN peace operations in the DRC (MONUC/MONUSCO), the Central African Republic (CAR, MINUSCA), Mali (MINUSMA), Côte d'Ivoire (UNOCI), and Darfur/Sudan (UNAMID). For this purpose, 130 semi-structured interviews were conducted with UN and ICC staff to query them about their experiences with cooperation and their assessments of its consequences, along with a comprehensive analysis of UN and ICC records. This research sheds light on how the UN navigates the terrain of conflict mediation and punitive accountability and provides insights into the collaborative but contingent relationship between the UN and the ICC. It shows that the UN encountered serious dilemmas when being asked to assist the UN, frequently having to weigh their willingness to assist against potential negative repercussions on stability, consent, and impartiality. It highlights the role of international support for assistance, the potential risks of assistance to stability and local legitimacy, and the impact that individuals can have in navigating structural constraints and responding to risks.

In the first two sections, a short background of UN-ICC cooperation is presented before findings on the costs and benefits of assistance by UN peace operations to the ICC – both from the perspective of the ICC and the UN – are discussed. This is crucial information when deciding

whether and how to pursue an expansion of such assistance. On the basis of this discussion, an analysis follows of several levers that can be used by those who want to strengthen or weaken the constraints to assistance imposed on leaders of UN missions.

Background

Over the past three decades, peace operations have become increasingly involved in international criminal justice efforts (Lyck 2007). In the 1990s, NATO's Stabilization Force SFOR arrested a total of 27 suspects on arrest warrants issued by the International Criminal Tribunal for the former Yugoslavia (Kalinauskas 2002; Zhou 2006). Similarly, in 2006, the UN Mission in Liberia was responsible for ensuring the safe delivery of the most important suspect of the Special Court for Sierra Leone (SCSL), Liberia's former President Charles Taylor. In the meantime, a contingent of Mongolian blue helmets provided protection for the SCSL's premises throughout its operations. Over the next decade, MINUSCA, MINUSMA, MONUC/MONUSCO, and UNOCI, provided considerable assistance to the ICC by providing transport and protection to the Court's personnel, sharing evidence, identifying and protecting witnesses, and making attempts to arrest ICC fugitives (Buitelaar 2020; Hamilton 2016; Venigandla 2021). In CAR, moreover, the UN mission has been mandated to help establish a part-domestic, part-international Special Criminal Court (SCC) that should prosecute perpetrators of atrocity crimes in the country, and even has the mandate to take "Urgent Temporary Measures" to apprehend the SCC's suspects.

At the same time, assistance by peace operations to international criminal tribunals has been inconsistent, selective and sometimes reluctant, and has varied both between and within such operations. Assistance has at times been marred by mutual frustration and misunderstandings, and in some cases a fundamental misalignment of priorities and interests. This is exacerbated by the fact that the two actors often have different role conceptions, the one primarily pursuing international security and the other emphasizing international justice. Indeed, one can easily find negative examples of interactions between peace operations and international criminal justice mechanisms. For instance, in contrast to NATO's SFOR, the UN mission in the former Yugoslavia did next to nothing to assist the ICTY, while the UN mission in Kosovo tried to protect the Kosovar politician Ramush Haradinaj from indictment (Lyck 2007). In Sierra Leone, the UN mission at first refused to give any assistance to the SCSL, even forbidding SCSL personnel suffering from malaria to enter the UN's medical clinic. Moreover, the UN's refusal to disclose confidential documents to the ICC's Prosecutor led that Court to stay procedures against the first suspect on trial, Thomas Lubanga, and it was only the threat of his imminent release that swayed opinion in New York. Finally, the UN mission in CAR has encountered significant challenges in implementing its Urgent Temporary Measures-mandate, due to a lack of both willingness and capacity. Consequently, it has so far failed to break the cycle of impunity in the country (Cinq-Mars 2017, 33).

This research note focuses on the interactions between the ICC and UN peace operations. However, before moving on to the research project's findings, it is worth inquiring what the primary legal instruments governing UN-ICC interaction are. First, UN peace operations will look to their mandates for guidance on whether and how to assist the ICC. The provisions authorizing assistance to the ICC have varied strongly, from explicitly telling peace operations to assist, to not including any language on countering impunity at all. Second, the UN and the

ICC have signed a broad Relationship Agreement in 2004 which governs the overall interactions. This Agreement has several important provisions, which amongst others guide information-sharing and arrange that all costs of assistance are to be borne by the ICC. But, importantly, the parties also agreed to a general and mutual “obligation to cooperate.” Third, to implement the Relationship Agreement, UN peace operations and the ICC have signed several Memoranda of Understanding (MoUs). Such MoUs exist or existed for MINUSCA, MINUSMA, MONUC/MONUSCO, and UNOCI. These include very specific details on how assistance is to be legally fit within the UN’s work, but also gives them much freedom to decide on whether and how to assist on a case-by-case basis.

Research findings

The first important finding from the research is that a pattern is emerging whereby UN peace operations tend to be forthcoming in their assistance to the ICC. They share substantial amounts of information, provide logistical and security assistance, and sometimes publicly support and associate with the ICC. In some cases, they even attempt to execute the ICC’s arrest warrants. This assistance occurs despite the fact that every mission encounters challenges and dilemmas when assisting the ICC. The leadership of such missions has to figure out how to keep peace while fighting impunity, how to maintain good relations with the host state when there are tensions between the ICC and the government, how to remain impartial while supporting the ICC’s prosecution mandate, and how to share information while protecting staff and witnesses. The UN Secretariat, moreover, had to balance its commitment to the ICC’s anti-impunity message with the limited support among a number of powerful UN member states for the ICC. Although some UN peace operations sometimes resolve these dilemmas by refusing to assist, they more often seek to place limits and conditions on support where necessary, thus making the decision not about whether to assist the ICC but about how to do so.

To understand under which conditions this assistance occurs, I tested for a variety of factors, including: mandates; international support (from both states and the UN Secretariat); capacity; precedents; risks to stability, local legitimacy, and force protection; and the value frameworks of mission leaders. Of this rather long list of conditions, I found that it is particularly important that there is a moderately permissive mandate, that there is at least a moderate degree of international support for assistance, and that assistance to the ICC generates little risks to stability and the mission’s local legitimacy. Finally other factors were found to be less important, UN peace operations are more likely to assist when they are led by individuals who are more tolerant of risk, prioritize peace and justice equally, and feel that the ICC will efficiently deliver on its mandate to fight impunity. This support, however, is frequently conditioned on the existence of host state support. Most mission leaders insist on the necessity of host state consent, especially when undertaking potentially risky operations such as providing accommodation to ICC investigators or executing arrest warrants. The research also demonstrates that ICC-specific factors play an important role in explaining whether assistance takes place. In particular, the likelihood of the ICC receiving assistance varies by what kind of assistance it asks for, who the ICC targets for investigation and prosecution, and when it asks for this assistance.

These findings have a number of key policy implications. In the following sections, the potential costs and benefits of assistance are discussed first, after which the potential ways that the

likelihood of assistance can be influenced are considered.

The benefits of assistance

The first key benefit of assistance by UN peace operations to the ICC is that assistance by peace operations might be a “viable solution” – sometimes even the only solution – to the Court’s enforcement problems (Lyck 2009). Over the past two decades, the ICC has frequently operated in situations of ongoing conflict where the UN is the only reliable security and logistical presence. The UN’s peace operations have at various times remedied the challenges that the ICC would have faced were it to rely on states alone. The presence of peace operations thus allowed the Court to diversify its support base and reduce its dependence on states.

UN peace operations furthermore often dispose of unique assets which are of great utility to the ICC: evidence of human rights violations collected by specialized investigators; important information on the background and potentially criminal activities of armed groups; large amounts of troops to provide security to ICC staff; armored cars, fixed and rotary wing aircraft and other mobility assets; special forces trained in seize and capture operations; and the capacity to bestow international legitimacy on particular justice initiatives. At the same time, the fact that many UN peace operations have made their support conditional on host state consent limits the applicability of this benefit to situations where non-cooperation by the host state is caused by a lack of capacity instead of a lack of political will.

A second benefit of figuring out the appropriate modalities of assistance is that, as Majbritt Lyck (2009) argues, peace operations and the ICC are (or should be) ingredients of the same response by the international community to armed conflict, a response which should maximize synergy. In theory, the activities of the ICC and those of peace operations can reinforce each other, as peace operations are active on the ground to stabilize the country and rebuild it, while the ICC provides post-conflict justice to support the country’s reconciliation efforts.

Finally, on a more consequential note, assistance to the ICC might help a peace operation in stabilizing the mission area or even establishing a sustainable peace. ICC intervention might contribute to countering impunity, building the rule of law, removing spoilers from the battlefield, and providing justice to the victims of atrocities (for more on this, see: Kersten 2016).

The costs of assistance

While there are clearly (potential) benefits of assistance by peace operations to the ICC, there are also important (potential) costs to consider. First, one could argue that when a peace operation assists the ICC in the prosecution of a particular conflict party, this has the potential to violate all three aspects of the holy trinity of peacekeeping principles: it may negatively affect the consent of the targeted party; the targeted party may downgrade its perception of the peace operation’s impartiality; and peace operations may have to use substantial and proactive force to assist (Hamilton 2016). These problems are exacerbated when the ICC is not prosecuting all sides to the conflict. While some may argue that these peacekeeping principles are outdated and already frequently violated anyway, it is argued here that they continue to serve as an important source of peace operations’ local and international legitimacy (Buitelaar and Hirschmann 2021). When peace operations are not seen as warfighters or taking sides in a conflict, this facilitates international consensus on their deployment and preserves their credibility as neutral interveners who try to bring conflicts to an end in a fair way (Howard 2019).

A second important cost of assistance is that peace operations and the ICC will frequently have diverging interests and priorities. In short, peace operations will usually prioritize stability, while the ICC will usually prioritize justice thus introducing peace vs. justice-dilemmas (Lyck 2007, 419; Hayner 2018). If the ICC is prosecuting individuals who have been identified as spoiling a peace agreement, the interests of the peace operation and the ICC overlap. But, when the Court is targeting parties to a peace agreement or government agents, a peace operation's support to the Court's prosecution efforts could thwart the implementation of its mandate to keep the peace with the consent of the host state.

For the ICC, which has an institutional interest in preventing the appearance of politicization, being overly dependent on peace operations may similarly present problems. These problems have gained increased relevance with the growing involvement of peace operations in stabilization, counterinsurgency, and counterterrorism (Karlsruud 2019). If peace operations mirror the behavior of states to only support the ICC when it is in their interests, the ICC may become just another tool in states' conflict management toolbox, activated when convenient and just as easily deactivated when there are other priorities (Peskin and Boduszynski 2016). Such a situation would be a far cry from the initial hopes that the ICC could somehow stand above the fray of competing state interests.

A third potential downside of assistance is that UN peace operations and the ICC often have different approaches to the collection and preservation of evidence of atrocity crimes (May and Wierda 2002). Whereas human rights investigators generally want to use the information to advocate for accountability, the ICC wants to use this information in open court to convict the perpetrators of these crimes. Therefore, the ICC should be careful not to fully outsource its investigations to peace operations, whose human rights investigators are generally not trained to collect and preserve evidence in a way that lives up to judicial scrutiny. The problems that the ICC faced in building cases against its suspects on the basis of UN and open source information (see the Lubanga and Gbagbo trials, to name but two examples), should be a clear warning to everyone involved that the Court should develop its own investigative lines and do in-depth investigations itself (Bouwknegt 2019; de Vos 2013).

Clarifying these pros and cons should provide important information to those who are considering whether or not to expand UN-ICC cooperation. Once they have made up their mind, they could turn to the next section, where it is suggested that there are a number of mechanisms through which the likelihood of assistance can be influenced.

Influencing the likelihood of assistance

In this section, recommendations are offered, targeted at the most important actors involved in deciding whether or not UN assistance to the ICC is expanded. Each of the following sections starts with an introduction, after which a set of more specific recommendations follow.

States

States, especially those in the UN Security Council, are the first important actor in determining the likelihood that UN peace operations will assist the ICC. Their most important avenue for influence are the Security Council mandates that Council members write, in which they have

the opportunity to authorize various degrees of assistance. Although this research note finds that minimally permissive Security Council mandates are crucial in creating opportunities for mission leaders to assist, it did not uncover evidence that more specific and clearer mandates lead to more assistance. In other words, it is more important *that* the mandate refers to assistance than whether it explicitly mentions the modalities of it. This is crucial because the inclusion of the ICC in Security Council resolutions has been very controversial among states critical of the Court (such as the US, China, and Russia). In addition to these mandate-related activities, states can also help create supportive environments for UN peace operations to provide assistance to the ICC and enhance their capacity to do so.

- Instead of focusing on including explicit references to the ICC in peacekeeping mandates, focus on allocating higher priority to tasks related to fighting impunity or making them more expansive.
- Issue public statements that support the fight against impunity and refrain from comments that appear to acquiesce in impunity (i.e. do not provide unconditional support to peace deals that provide de facto amnesty for war criminals).
- Focus on increasing the capacity of UN peace operations to assist, especially with specialized resources such as human rights investigators, mobility assets, and special forces.

UN Secretariat

The second actor germane to enhancing the likelihood of assistance by UN peace operations, is the UN Secretariat, which - as the organization that recruits staff, writes doctrine, and organizes peacekeeper training - has important influence over peace operations as the organization that recruits staff, writes doctrine, and organizing peacekeeper training. It also provides important support to the legal review of documents to be shared with the ICC through its focal points for ICC cooperation, which have proven to be a major asset in enhancing assistance. In this system, the ICC pays for a number of focal points with the UN coordinate cooperation with the ICC.

- Improve the legal framework for assistance by developing doctrine that clarifies peace operations' obligations to assist and provide guidance on how to balance this assistance against some of the other key peace operation goals.
- Signal international support for assistance by continuing to maintain positive relations with the ICC and taking such symbolic actions as hosting ICC conferences and participating in Assemblies of States Parties.
- Improve the training of UN peacekeepers, focusing on enhancing understanding of the ICC's mandate, bolstering the capacity to respond to atrocity crimes and preserve evidence, and improving the recognition of indicted war criminals so as to minimize association with them.
- Select mission leaders with a proven track record of supporting the fight against impunity and who have demonstrated a willingness to take risks to support this goal.
- Sustain or even consider expanding the deployment of focal points for ICC cooperation to facilitate assistance.

The ICC

The ICC does not have to be a passive entity in these efforts to enhance the chance it will receive assistance from UN peace operations. However, the ICC's interests in maintaining judicial impartiality and preventing the politicization of its procedures, make it difficult for the Court to engage in these efforts in an unrestrained way. For example, factoring in the political status of the accused when deciding who to prosecute when, may easily lead to accusations of bias. Moreover, following up on these one-sided prosecutions later may pose significant obstacles too, as demonstrated by the ICC's travails in Côte d'Ivoire (Rosenberg 2017). In the end, obtaining cooperation is nothing more than a means to achieve its end of fighting impunity. The following should therefore only be read as ideas about specific actions that the ICC could take to improve this particular aspect of its operations, not as advice for a general prosecution strategy. The ICC should thus weigh the benefits of cooperation against its other organizational interests.

- Carefully consider the timing of judicial actions and focus efforts on those identified as spoilers
- Increase the use of sealed warrants to be unsealed at the most opportune moment
- Frame efforts to prosecute war criminals as part of the international community's broader strategy to neutralize armed groups
- Improve mission leaders' attitudes towards the Court by maintaining a more permanent presence in the country and develop relationships with the key mission decision-makers
- Enhance the UN's support by further improving the effectiveness of its liaison office in New York (for example by increasing its staff size) and allocating budget to pay for additional focal points for ICC cooperation in the UN system.

Conclusion

The above sections suggested a number of important avenues for states, the UN, and the ICC to improve the likelihood that the ICC receives assistance from UN peace operations. By enhancing capacity, improving international support and clarifying legal frameworks, as well as by fostering constructive relationships between the UN and the ICC, these actors all have opportunities to strengthen UN-ICC cooperation. However, it is important to keep in mind that even as the UN aligns itself with the anti-impunity message of the ICC, the ongoing cooperation between the two poses important dilemmas for both sides. The politicization of justice and the inclusion of criminal justice into the essentially political mandate of UN peace operations face criticism that is not without grounds. It is an open question whether UN peace operations should become more deeply involved in the ICC's coercive prosecution mandate while the ICC may wonder what a close association with UN peace operations, which receive increasingly partial mandates, means for its own impartiality. Given these challenges and dilemmas, both the UN and the ICC would do well to carefully consider their cooperation and ensure that they maximize its potential while safeguarding their respective interests.

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Endnotes

¹Telephone interview with David Crane, former Chief Prosecutor of the Special Court for Sierra Leone, 20 September 2018.

²UN Security Council Resolution 2448 (2018), paras 40(e)(v)-(ix) and 40(e)(xi).

³Telephone interview with Alan White, former Chief Investigator of the Special Court for Sierra Leone, 2 October 2018.

⁴This research note builds on the findings of my PhD dissertation. Buitelaar, T. (2020). *Blue Helmets and Black Robes: Cooperation Between UN Peacekeepers and the ICC*. PhD Diss.: European University Institute.

⁵Compare f.e.: UN Security Council Resolution 1565 (2004), para 5(g) and UN Security Council Resolution 2211 (2015), para 9(d).

⁶UN General Assembly, "Relationship agreement between the United Nations and the International Criminal Court," A/58/874 (2004).

⁷See, for example: United Nations, "Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and the International Criminal Court," United Nations Treaty Series II-1374 (2014).

⁸Indeed, in the DRC, the ICC's OTP often preferred to rely on UN peace operations instead of the Congolese government because it viewed "the former as more impartial" (Clark 2018, 75).

⁹Even if this dilemma is often overblown, it is argued that it remains relevant to take the dilemma seriously and pursue innovative solutions to address it. A report by Mallinder and Slye (2020) makes a series of important suggestions for how to realistically deal with the dilemmas that peacemakers face when trying to integrate justice considerations into peace negotiations.

¹⁰The emphasis on leadership and Secretariat support to mission officials who face difficult decisions, was a key message of former UN Secretary-General's Ban Ki-moon's Human Rights Up Front initiative (Paddon Rhoads 2019)

¹¹Here, it started by prosecuting Gbagbo and his former supporters first, but then did not manage to take the next step and also investigate alleged crimes by Ouattara supporters

¹²In recent years, the ICC has already bolstered its presence in situation countries by appointing higher-ranking leaders of field offices to represent the ICC: Telephone interview with senior ICC OTP official, 16 October 2017. It is suggested that this effort should be continued to enhance the likelihood that the ICC receives cooperation, both

About the author

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