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The ICC and ISIS: Be Careful What You Wish For

Should the International Criminal Court (ICC) take action against the so-called Islamic State, as it has been widely asked to do? Mark Kersten doesn't think so. He argues that any referral by the Security Council to the ICC would be disastrous for international justice and the security of the Middle East.

By Mark Kersten for ISN

Over the last few months, a growing number of voices have called for the International Criminal Court (ICC) to investigate the mass atrocities and human rights violations committed by the Islamic State. In a *New York Times* op-ed John Bellinger III, a former official in the George W. Bush administration, [insisted](#) that an ICC investigation of ISIS was warranted and that the Court was the best venue for bringing ISIS combatants to justice. On the very same day, the *New York Times* editorial board [declared its support](#) for a United Nations Security Council referral of ISIS to the ICC. More recently, the U.S. Commission on International Religious Freedom has added its voice, [recommending](#) that the ICC investigate and prosecute ISIS members in Iraq and Syria.

ISIS is precisely the type of terrorist organization that proponents of international criminal justice had in mind when the ICC became a functioning entity in 2002. For many, putting senior ISIS figures on trial - rather than venturing into additional and legally questionable military forays or expanding an already nefarious drone programme - would be a great victory for international justice.

Indeed, so many groups and figures have thrown their support behind an ICC intervention against ISIS that the Court's chief prosecutor, Fatou Bensouda, felt compelled to publicly [clarify](#) that her office 1) did not have jurisdiction to investigate senior ISIS leaders in Iraq or Syria, and 2) would not do so without a referral from the UN Security Council.

But the reality is that a UN Security Council referral of ISIS to the ICC would be disastrous - for both the interests of international justice and the prospects for peace in the region.

Bad for international justice

Few things have hobbled the ICC's reputation as much as the perception that it is selective. Critics of the Court point to the fact that the ICC has only ever [intervened in African states](#). But even if one believes, as many do, that all of the situations in which the Court has intervened warrant ICC investigation, the Court has also shown [a propensity](#) to only target one side of a conflict and not the other.

Consider, for example, the case of northern Uganda. In 2004, the President of Uganda, Yoweri Museveni, met with then-ICC Chief Prosecutor Luis Moreno-Ocampo in London to finalize the terms of Uganda's self-referral. Despite a twenty-year civil war in which both government and rebel forces had committed mass atrocities, the end product was a [declaration](#) that referred only the Government's adversaries, the Lord's Resistance Army (LRA), to the ICC. This was eventually amended in order to cover all alleged crimes committed in northern Uganda but, in many respects, the damage had already been done. By meeting publicly with Museveni and initially accepting a referral that exclusively focused on the LRA, the ICC was seen as biased against the rebels and partial towards the Government. This is a reputation that it has never been able to shake in the affected areas of northern Uganda.

The example of northern Uganda has inspired an ongoing [debate](#) regarding the legality of restricting the ICC's jurisdiction to groups like ISIS or the LRA. But irrespective of its legality, accepting a referral of ISIS – or of any group for that matter – would do nothing but undermine the Court's legitimacy and independence. [Such a referral](#) would have to reflect UN Security Council politics to the point of making a mockery of international criminal justice.

Here it is also important to note that the ICC is not in a position of strength. In recent years, it has been rocked by a) high-profile cases reinforcing the above-noted perception that it has an institutional bias against African states and b) an international community that is itself [extremely selective](#) in lending its support and cooperation to the Court. At the moment, what international justice needs, above all, is for the ICC to get some wins on the board – i.e. the surrender of high-profile suspects to The Hague and successful trials. Exclusively targeting a group, entrenching selectivity, and affirming the widespread belief that the Court only investigates and prosecutes the enemies of the Security Council would undermine that goal.

Bad for peace and security

States too should think twice before proposing that the ICC should intervene against ISIS in Syria and Iraq. According to one [recent analysis](#), states debating the matter at the United Nations seem genuinely confused as to what such a referral would entail. During meetings at the end of March,

“confusion seemed to reign over what should be referred to the ICC. While most States appealed for a referral of the situation in Syria, some urged a referral of the situation in Iraq, others called for a referral of the situation in both States, and, finally, a few remained purposefully vague by calling for a referral of ‘the situation’, ‘the matter’, and even ‘the cases’ to the ICC.”

If this confusion serves to prevent a one-sided referral of ISIS to the ICC, then it should be welcome. Referring only ISIS to the Court could substantially disrupt the chances for peace in the region. First, such a referral would send a message to other groups that have committed mass atrocities, including the regime of Syrian President Bashar al-Assad, that they can continue to do so with impunity because only their adversaries can or will be targeted. One can imagine two atrocities of equal magnitude taking place simultaneously with ICC investigators forced to turn a blind eye to the victims of one of them because they could only investigate atrocities perpetrated by ISIS. This would not only be a miscarriage of justice; it might encourage further violence and atrocities by convincing other warring factions that they will be shielded from prosecution. Second, rather than acting as a deterrent, there is a real risk that ISIS itself would welcome an ICC intervention against it as a twisted badge of honour legitimating its brutality – as well as enhancing its ability to recruit.

Of course, none of the above is to suggest that ISIS should not be investigated or prosecuted. States like Iraq and Syria could join or refer themselves to the Court. While the prospects of that occurring remain dim at present, states and international organizations could encourage both to do so. For its

part, if the UN Security Council is serious about achieving justice and accountability in the region, it could return its focus to referring either Syria or Iraq to the Court – without limiting jurisdiction to crimes committed by the ISIS.

In other countries where the ICC already has jurisdiction, prosecutions may already be feasible. Indeed, the ICC Prosecutor has [signaled](#) her willingness investigate and potentially prosecute ISIS members active in Libya. At the same time, private non-governmental organizations like the Commission for International Justice and Accountability, have been [investigating](#) crimes committed on the territory of Syria for years and have expanded their mandate to include atrocities committed by by ISIS. Such groups can and should continue to gather evidence that could be used in the future.

In an ideal world, groups like ISIS would face their day of reckoning, if not in domestic courts, then at the ICC. But the UN Security Council's selective cooperation with the Court and its [manipulation of the institution](#) should be enough to warn against any referral of ISIS to the ICC. Champions of international criminal justice hope that, in the future, the ICC will have the resources and political support to effectively, independently, and impartially investigate and prosecute the likes of ISIS. At present, however, referring ISIS to the ICC would only complicate the pursuit of peace and security in the region and make the prospect of that day arriving less, rather than more, likely.

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