



**UNIVERSITY of the
WESTERN CAPE**

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Title:

**A CRITIQUE OF THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL
JUSTICE IN THE PREVENTION OF MASS ATROCITIES**

A Mini-thesis submitted to the Faculty of Law in partial fulfilment of the requirements for the award
of Master of Laws (LL.M) in Transnational Criminal Justice

BY

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DECLARATION

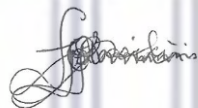
I, Renyakaletse Morake, declare that ‘A critique of the deterrent effect of international criminal justice in the prevention of mass atrocities’ is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.’

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Date: July 2024

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DEDICATION

I am dedicating this thesis to my two beautiful daughters, Cebile Tshimollogo and Sinehlanhla Tshiamo. Thank you for being my daily motivation. I pray when you are young black women you too get to see the importance of academic excellence.



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“It takes a village to raise a child” is a well-known proverb, and I strongly believe that completing a degree also requires the support of a village. Therefore, I would like to express my sincere gratitude to the people who played a significant role in my LL.M journey.

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ABSTRACT

The International Criminal Court was established to prevent and deter persons from committing mass atrocities. The Court's founding has marked the start of a new era in international justice. The Statute of the Court, unlike other international legal instruments such as human rights treaties, gives the Court the ability to investigate and prosecute individuals suspected of committing genocide, war crimes, and crimes against humanity. Despite its ability to do so, the issue remains, whether the ICC has helped to prevent gross human rights violations. This is a contentious issue among academics and policymakers. There are several scholars that have written on the International Criminal Courts deterrence effect on the prevention of mass atrocities, however this paper will look at the costs that the court can inflict on perpetrators of mass atrocities as a deterrent impact of the ICC. In so doing, the paper will in turn look at whether the court has carried out its mandate and prevented grave human right violations. Deterrence is based on both normative pressure and material punishment, and the combination is more effective than either one alone. ICC prosecutions may also have a normative effect. One of the classical purposes of criminal punishment is deterrence, severe punishments and certainty of punishment affect deterrence. The deterrent effect of the ICC may therefore be minimized by its reduced probability of prosecution, or confined to certain types of situations and individuals, but not eliminated. The ICC has the potential to become a productive participant in local political interactions. The effect of the Court relies on civil society actors who support accountability and monitoring of ICC interventions in both cases, ceasing hostilities or reducing civilian targeting. State parties should therefore support the ICC prosecution to increase the consistency and credibility of the ICC prosecution so that this potential deterrent impact becomes more real than theoretical.

KEYWORDS: mass atrocity crimes, ad hoc criminal tribunals, deterrence, human rights, international criminal court, international crimes, Libya, Kenya

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ABBREVIATIONS

AU- African Union

CCP- Concerned Citizens for Peace

CEC- Cambodia's Extraordinary Chambers

DiD- Difference-in-Difference

ECHR- European Convention of Human Rights

ICA- International Crimes Act

ICC- International Criminal Court

ICCPR- International Convention for Civil and Political Rights

ICL- International Criminal Law

ICI- International Commission of Inquiry

ICJ- International Commission of Jurist

ICJ- International Criminal Justice

ICT- International Criminal Tribunal

ICTR- International Criminal Tribunal for Rwanda

ICTY- International Criminal Tribunal for the Former Yugoslavia

KEC- Kenyan Electoral Commission

KHRC- Kenyan Human Rights Commission

KPTJ- Kenyan for Peace with Truth and Justice

LFSL- Lawyers for Justice in Libya

LNA- Libyan National Army

NCHR- National Commission on Human Rights

NTC- National Transitional Council

ODMP- Orange Democratic Movement Party

ODPP- Office of the Director of Public Prosecutions

OTP- Office of the Prosecutor

PNU- Party of National Unity

SC- Security Council

SCSL- Special Courts for Sierra Leone

TJRC- Truth Justice and Reconciliation Commission

UN- United Nations

UDHR- Universal Declaration of Human Rights

UNSC- United Nations Security Council



CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

The idea of setting up International Criminal Tribunals (ICT) to punish perpetrators of mass atrocities dates back to the end of World War I, when the victorious Allies promised to undertake international war crimes trials for Germany's defeated Emperor Wilhelm II and other alleged German war criminals.¹ Although Holland's refusal to deliver the exiled Kaiser and Germany's post-war resistance derailed the plan, it was during this time that the idea that severe international atrocities deserve an international rather than a local criminal process was first established.² The victorious Allies vowed at the end of World War II to build on their previous efforts by creating international trials for German and Japanese war criminals. One of the most renowned international trials took place in Nuremberg, Germany and one of the primary prosecutors was U.S. Supreme Court Justice Robert Jackson, and all of the judges were from the victorious Allies.³ According to many international law scholars, the Nuremberg trials set important precedents for the recognition and implementation of international law rules against significant war crimes and atrocities such as genocide by international, rather than domestic, tribunals.⁴ In 1993, the United Nations Security Council agreed to establish the world's first ICT to prosecute individuals for war crimes and atrocities, based on the Nuremberg precedent and in response to demand from international human rights organizations.⁵

Following the establishment of this tribunal, known as the ICTY, a second ICT was established in 1996 to punish perpetrators of atrocities committed during the 1994 Rwandan civil war; similar tribunals were also established to punish atrocities committed in Sierra Leone and Cambodia.⁶ All of these tribunals are ad hoc tribunals with limited authority, mainly limited to atrocities resulting from a specific conflict, and whose mandates were to expire at some point.⁷

¹ Griffin JB 'A Predictive Framework for the Effectiveness of International Criminal Tribunals' (2021) 34 (2) *Vanderbilt Law Review* 407.

² Dadriant VN 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 (2) *Yale Law School Scholarship Reciprocity* 361.

³ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 784.

⁴ Dadriant VN 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications' (1989) 14 (2) *Yale Law School Scholarship Reciprocity* 226.

⁵ Teitel R 'Transitional Justice: Postwar Legacies' *Cardozo Law Review* (2006) 1615.

⁶ United Nation 'United Nations Security Council Resolution 808' Available at: <http://www.un.org/Docs/scres/1993/scres93.htm> (accessed 27 June 2021).

⁷ The Rome Statute of the ICC (2002) Preamble.

However, in 2002, a set of nations agreed to establish a permanent ICC with extensive jurisdiction over crimes committed on the territory of any state member to the Rome Statute.⁸ Although they differ, all of the ICT's share a few common traits.⁹ There is no doubt that the ICT's are international organizations rather than national ones.¹⁰ ICT's are maintained by nationalities who sign an oath of "independence" and are not accountable to their home country as a result of an international agreement or a UNSC decision.¹¹

The ICC commenced operations in The Hague, the Netherlands in 2002.¹² Many supporters were 'hopeful' when the court was established, that it would improve international criminal justice (ICJ) and reduce atrocities.¹³ The Preamble to the Rome Statute, reflects those high hopes.¹⁴ The court's aim, according to the Preamble, is to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured'.¹⁵ Furthermore, the Preamble expresses the desire to 'end impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes'.¹⁶ The ICC is intended to be a permanent international body for the adjudication of atrocity crimes.¹⁷ The crimes that the ICC adjudicates are grave crimes, which include genocide, war crimes, crimes against humanity, and the crime of aggression and the Court does not rush into investigations or indictments. In addition to bringing perpetrators of war crimes and crimes against humanity to justice, the ICC also hopes to serve as a deterrence to future war criminals and perpetrators of crimes against humanity.¹⁸

However, critics are split on whether the ICC and the ad hoc established before the ICC can help combat international crime.¹⁹ On the other hand, ICJ supporters argue that international

⁸ The Rome Statute of the ICC (2002) Preamble.

⁹ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 785.

¹⁰ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 785.

¹¹ The Rome Statute of the International Criminal Court Preamble 1998.

¹² The International Criminal Court 'About' Available at www.icc-cpi.int/about (accessed 29 June 2021).

¹³ Sadat LN 'The Establishment of the International Criminal Court: From the Hague to Rome and Back Again' *Journal of International Law and Practice* (1999) 73.

¹⁴ The Rome Statute of the International Criminal Court (2002) Preamble.

¹⁵ The Rome Statute of the International Criminal Court (2002) Preamble.

¹⁶ The Rome Statute of the International Criminal Court (2002) Preamble.

¹⁷ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 616.

¹⁸ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 617.

¹⁹ Paternoster R 'How Much Do We Really Know About Criminal Deterrence?' *Journal of Criminal law and criminology* (2010) 766.

criminal courts can and do deter mass atrocities.²⁰ The ICC is no exception, with advocates emphasizing the court's role in preventing international crimes and putting an end to impunity for mass atrocities.²¹ One example of such support is then United Nations Secretary-General Kofi Annan's words on the day the Rome Statute went into effect, he said, 'We hope the ICC will deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity'.²²

Since the Rome Statute's main aim is to ensure a reduction in atrocities, this raises the question of whether the ICC or ICT prevent atrocities. This paper will seek to examine the deterrent effects of the ICC, using various country studies.

1.2 PROBLEM STATEMENT

This paper seeks to examine whether the ICC help in preventing atrocities. The ICC offers a challenging opportunity to investigate how international law can help decrease human suffering in interstate and intrastate conflict.²³ The ICC serves as a primary source of justice for those who commit the most serious crimes of concern to the international community, thereby preventing future crimes.²⁴ People are being brought to justice for crimes committed within the jurisdiction of the ICC. Whether the Court can help end impunity and prevent genocide, war crimes, and crimes against humanity, or even achieve justice for those victims, a successful record of investigations and convictions, through fair and credible processes, is crucial. Over the course of its existence, the ICC has built a substantial track record, despite having a slow start. Though it does not have its own police force and must rely on domestic law enforcement or other parties to apprehend those accused of crimes under its jurisdiction, the court has 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions', according to Article 1 of the Rome Statute.²⁵ The court's objectives are ambitious, including the building of peace and security, as well as the pursuit of justice for

²⁰ Klabbers J 'Just Revenge? The Deterrence Argument in International Criminal Law' (2001) 12 *Finnish Yearbook of International Law* 251.

²¹ Klabbers J 'Just Revenge? The Deterrence Argument in International Criminal Law' (2001) 12 *Finnish Yearbook of International Law* 251.

²² United Nations 'The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law' Available at: <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (accessed 29 June 2021).

²³ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 448.

²⁴ International Criminal Court 'Understanding the International Criminal Court' (2020) 7.

²⁵ The Rome Statute (2002) Preamble.

those who perpetrate atrocities.²⁶ The question is whether or not the court is helping to achieve these objectives, as its drafters intended. The influence of the ICC is significant because it has the power to enforce ICL against those who commit the most serious and systemic crimes.²⁷

In spite of its challenges, the ICC is beginning to have positive effects - including the development of a record of justice, catalysing domestic accountability processes, empowering civil society advocates for justice, and potentially deterring atrocity crime and preventing it. What happens if the ICC has no effect on the protection of human rights?²⁸ The international community invests a lot of political and financial capital in the ICC, and if its efforts are in vain, that money and political capital could be better spent on alternative initiatives that are more effective in preventing human rights violations.²⁹ The international community has stated repeatedly that it is committed to ending impunity for the gravest crimes, and cooperation with the ICC is a specific method to achieve that goal.³⁰ However, the worst case scenario would be if the ICC had a perverse effect on the defence of human rights.³¹ Will perpetrators of human rights violations fight harder and dirtier today if they knew they will be held accountable tomorrow?³² This is an important question to address in light of the growing number of international and domestic accountability mechanisms for human rights violations. By evaluating the effects of the ICC, this paper aims to answer these questions.

1.3 SIGNIFICANCE OF RESEARCH PROBLEM

It was not until recently that suspected war criminals and human rights violators were brought to justice for systematic atrocity crimes.³³ The cases of Augusto Pinochet and Hissène Habré, as well as the ICTY, ICTR, SCSL and ECCC, began to chip away at the shroud of immunity

²⁶ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 448.

²⁷ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 44.

²⁸ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 617.

²⁹ International Criminal Court 'Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report"' (2021) Preliminary Analysis of the Recommendations and information on relevant activities undertaken by the Court 65.

³⁰ United Nations 'The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law' Available at: <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (accessed 29 June 2021).

³¹ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 617.

³² Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 617.

³³ Sikkink K *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011) 11.

that human rights abusers had enjoyed for so long.³⁴ Furthermore, governments have been seeking accountability for human rights violations in domestic courts all around the world.³⁵ Now, the question is whether the heightened likelihood and prospect of punishment is enough to deter atrocity crimes from being committed.

1.4 RESEARCH QUESTIONS

Is there effectiveness in the deterrence effect of international criminal court?? In answering this question, the study will address the following sub-questions:

- (1) What amounts to acceptable standards of deterrence effect?
- (2) What capacity does the ICC have in deterring mass atrocities?
- (3) Has the ICC implemented its mandate and prevented mass atrocities?
- (4) How has the ICC deterred atrocities in some specific countries?

1.5 LITERATURE REVIEW

The ICC's establishment and the ongoing functioning of the ad hoc tribunals are enormous victories for supporters of an ICJ system.³⁶ Academic advocates nearly always assert that ICT's can avert or prevent future humanitarian atrocities, to the degree that they have bothered to present arguments for the formation and support of ICTs in general, and the ICC in particular.³⁷ The deterrence rationale for ICTs is frequently expressed as a generalized argument in favour of justice and against impunity for perpetrators of humanitarian atrocities.³⁸ Not only do ICTs give retribution for victims of war crimes and atrocities by punishing perpetrators, but the pursuit of justice itself can help prevent future atrocities.³⁹ 'The search of justice and accountability fulfils fundamental human needs and conveys vital values necessary for the prevention and deterrence of future conflicts,' says Bassiouni, one of the prominent advocates

³⁴ Roht-Arriaza N *The Pinochet Effect: Transnational Justice in the Age of Human* (2006) 26.

³⁵ Sikkink K *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011) 11.

³⁶ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 787.

³⁷ Amann DM 'Assessing International Criminal Adjudication of Human Rights Atrocities' *Third World Legal Studies* (2003) 174.

³⁸ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 787.

³⁹ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 787.

of ICTs.⁴⁰ The preamble to the Rome Statute establishing the ICC reflects the broad belief that justice will deter future atrocities or that failing to bring justice will encourage them.⁴¹

The advocates of the Court argue that the 'culture of impunity,' which has permitted human rights violators to commit crimes without fear of punishment, has ended.⁴² Others doubt the Court's ability to prevent such crimes since it lacks the legal authority and enforcement resources to apprehend and detain wanted individuals.⁴³ Despite both sides' arguments, the current discussion is concerned with two fundamental issues that make determining whether the Court has improved human rights standards difficult.⁴⁴ First, by underestimating the costs that the Court can inflict on individuals, scholars have failed to adequately theorize the Court's potential deterrent impact, with this being the standard for deterrence in criminal case.⁴⁵ Secondly, empirical study on whether the Court has carried out its mandate and prevented grave human rights violations is lacking.⁴⁶ "Few social scientists have given this innovative institution close scrutiny," Simmons and Danner write.⁴⁷

By acknowledging that the ICC has the power to enforce consequences on individuals other than arrests and incarceration, the ICC may be able to dissuade suspects by imposing alternative consequences, even if it lacks the resources to enforce all warrants and summonses.⁴⁸ As a result, even with limited enforcement tools, the ICC can dissuade individuals from violating human rights by increasing the penalties of doing so.⁴⁹

Several transitional justice scholars believe that prosecuting previous human rights violators sets an important precedent, emphasizes a normative commitment to human rights, and can

⁴⁰ Bassiouni MC 'Justice and Peace: The Importance of Choosing Accountability over Realpolitik' *Case Western Reserve Journal of International Law* (2003) 192.

⁴¹ The Rome Statute (2002) Preamble

⁴² Benjamin JA 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' *Journal of Conflict Resolution* (2018) 4.

⁴³ Benjamin JA 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' *Journal of Conflict Resolution* (2018) 4.

⁴⁴ Akhavan P 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 (1) *The American Journal of International Law* 8.

⁴⁵ Schabas W *An Introduction to the International Criminal Court*, 4th (2011) 97.

⁴⁶ Benjamin JA 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' *Journal of Conflict Resolution* (2018) 4.

⁴⁷ Simmons BA and Danner A 'Credible Commitments and the International Criminal Court.' *International Organization* (2010) 226.

⁴⁸ James FA 'The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact' *Villanova Law Review* (2009) 55.

⁴⁹ James FA 'The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact' *Villanova Law Review* (2009) 55.

operate as a deterrent for future abuses.⁵⁰ In many cases, responsibility is justified based on the fact that it sets precedents and deters others from doing the same thing in the future.⁵¹ That is because it shows the rule of law and human rights protections are viable, which, in turn, should discourage future human rights abusers from thinking they are above or outside the law.⁵² The possibility of international criminal accountability should also reduce the amount of violence and human rights abuses if a war does break out in the future.⁵³ However, research demonstrates that the international criminal law regime can have significant and observable effects on governments' behaviour, contrary to the claims of critics.⁵⁴ Because of the expectation of responsibility, Beth Simmons and Allison Danner believe, certain countries will never ratify the Rome Statute in the first place, because in other countries, the idea of high-level political leaders being held accountable at the ICC scares them away from ratifying.⁵⁵ Evidence suggests the ICC has had a deterrent impact in some countries, however, the extent of this impact is still debated.

The deterrent effect of criminal accountability is becoming more widely accepted in the criminal justice literature.⁵⁶ Criminal activity is deterred more by the increased chance of accountability than by harsh punishments, according to research.⁵⁷ A growing body of research on the deterrent effects of international trials supports this hypothesis, although some researchers argue that the ICC lacks direction, capacity and judicial authority to fully realize its deterrent potential, and that such a deterrent effect is dependent on prosecutorial strategy and social pressure imposed on states.⁵⁸ Identifying a set of specific criteria that are likely to contribute to the ICC discouraging state-sponsored civilian killings during war if we start with the notion that the possibility of responsibility, not the severity of the punishment, creates

⁵⁰ Sikkink K and Walling CB 'The Impact of Human Rights Trials in Latin America' *Journal of Peace Research* (2007) 433.

⁵¹ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 623.

⁵² Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 623.

⁵³ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 623.

⁵⁴ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 623.

⁵⁵ Simmons BA and Danner A 'Credible Commitments and the International Criminal Court' (2010) *International Organization* 440.

⁵⁶ Du Preez N & Muthaphuli P 'The deterrent value of punishment on crime prevention using judicial approaches' (2019) *Just Africa* 37.

⁵⁷ Du Preez N & Muthaphuli P 'The deterrent value of punishment on crime prevention using judicial approaches' (2019) *Just Africa* 37.

⁵⁸ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 44.

deterrence.⁵⁹ The desire and ability of domestic and international entities to hand over suspected war criminals to the ICC is critical to international criminal accountability.⁶⁰ While the international community has the power to refer situations, start investigations, and issue warrants, it lacks the power to apprehend alleged war criminals. The threat of prosecution does not appear to be very frightening if war criminals believe that political leaders in other countries would provide them with refuge and protection, the number of countries willing to host wanted war criminals is dwindling.⁶¹

The effect of the ICC on the dynamics of peace-making is one of the most vehemently debated aspects of the court. International prosecutions, according to Snyder and Vinjamuri, might prevent realistic negotiating between warring parties and prevent the use of amnesty, which could lead to peace.⁶² Similar to Goldsmith and Krasner, they warn that "the ICC could launch prosecutions that aggravate violent armed conflicts and prolong political instability in the affected regions."⁶³ Another study revealed a correlation between the ratification of the Rome Statute by the government and a halt of civil war hostilities or a decrease in human rights violations.⁶⁴ Human rights advances have been shown to be connected with domestic prosecutions, based on research on domestic trials.⁶⁵ It is true that the history of impunity has not produced a particularly impressive record in terms of peace.⁶⁶ If the ICC can deter specific crimes, which is a separate but connected issue, then it will be a success.⁶⁷ The ICC does not criminalize war, but it does outlaw certain violations of the laws of war, including genocide, crimes against humanity, and war crimes.⁶⁸ Since ICC deterrence rests on governments' willingness to cooperate and cannot impose the death sentence, Ku and Nzelibe believe that it is undercut.⁶⁹ Cronin-Furman also thinks that the ICC's deterrent effect is minimal due to the

⁵⁹ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 44.

⁶⁰ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 624.

⁶¹ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' *International Interactions* (2016) 624.

⁶² Snyder J and Vinjamuri L 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' *International Security* (2003) 28.

⁶³ Goldsmith J and Krasner SD 'The Limits of Idealism' *Daedalus* (2003) 55.

⁶⁴ Mitchell S and Powell EJ *Domestic Law Goes Global: Legal Traditions and International Court* (2011) 21.

⁶⁵ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 46.

⁶⁶ Sikkink K *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011) 31

⁶⁷ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 46.

⁶⁸ Rome Statute (2002) Article 5

⁶⁹ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 784.

lack of severe punishment and low possibility of arrest.⁷⁰ Criminal justice experts point out that the ICC does not have the resources to make punishment a serious risk for the perpetrators.⁷¹

Prosecutions of persons who commit international crimes by ICT's are justified on the grounds that they foster reconciliation and deter future actors from committing such atrocities.⁷² Wide scholarly support for permanent rather than ad hoc ICT highlights the importance of this rationale for the pro-ICT movement.⁷³ A permanent ICC, as opposed to ad hoc ICTs, is more likely to deter future international crimes, according to ICT supporters.⁷⁴ Despite the fact that deterrence of future humanitarian crimes is an obvious reason for constructing ICTs, the issue of deterrence has been addressed almost entirely in the context of scholarship examining the institutional design and effectiveness of ICTs.⁷⁵ The majority of research examines whether ICTs are useful in bringing justice to war-torn communities and deterring future perpetrators of crimes, generally from a very normative standpoint, given particular institutional design aspects.⁷⁶ Professor David Wippman argues that the ICC's institutional restrictions, such as the need for a Security Council referral if a state refuses to accept jurisdiction, render it improbable that the ICC will be able to try perpetrators of crimes in many internal conflicts.⁷⁷

We can see that there are several scholars that have written on the ICC's deterrence effect on the prevention of mass atrocities. However, this paper will look at the costs that the court can inflict on perpetrators of mass atrocities as a deterrent impact of the ICC. In so doing, the paper will in turn be looking at whether the court has carried out its mandate and prevented grave human right violations.

1.6 RESEARCH METHODOLOGY

The study was conducted mainly through desktop research. It mainly focused on primary sources including statutes and treaties. The research also was library based using secondary

⁷⁰ Cronin-Furman K 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' *International Journal of Transitional* (2013) 444.

⁷¹ Mullins CW and Rothe DL 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' *International Criminal Law Review* (2010) 782.

⁷² Scheffer DJ *Staying the Course with the International Criminal Court* (2002) 328.

⁷³ Ku J & Nzelibe J 'Do international criminal tribunals deter or exacerbate humanitarian atrocities?' *Washington University Law Review* (2006) 790.

⁷⁴ Ku J & Nzelibe J 'Do international criminal tribunals deter or exacerbate humanitarian atrocities?' *Washington University Law Review* (2006) 790.

⁷⁵ Sadat LN & Carden SR 'The New International Criminal Court: An Uneasy Revolution' *GEO Law journal* (2000) 384.

⁷⁶ Drumbl MA 'Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda' *New York University Law Review* (2000) 75.

⁷⁷ Rome Statute (2002) Article 15

sources such as books, law reports, also journal articles and other sources that may be of relevance to the research. Secondary data analysis also was used in this research, which is studying and assessing research that already exists. This also included other scholars' qualitative studies. There are some scholars that have answered the question of whether the ICC helps prevent atrocities. I used these articles from scholars to analyse and gather information.

1.7 ETHICAL CONSIDERATIONS

There was acknowledgement of the work of other authors used in any part of the dissertation with the use of the UWC Law handbook. Throughout the research, the highest level of objectivity was maintained in discussions and analyses.

1.8 CHAPTER OUTLINE

CHAPTER ONE: INTRODUCTION

This chapter provides an overview of the entire thesis. It gives a background to the study and explains the problem statement, the research question, the significance of the study the literature review and the methodology. This chapter looks at the history of both ICC and ICJ and how they intertwine. The chapter also investigates how the research question goes hand in hand with the history.

CHAPTER TWO: THE COSTS THAT THE ICC CAN INFLICT ON PERPETRATORS

This chapter looks at theory of deterrence and some costs/punishments that the ICC can inflict on the perpetrators of mass atrocities as a deterrence impact.

CHAPTER THREE: THE CAPACITY OF THE ICC AND DETERRENCE.

This chapter looks at the ICC's capacity to intervene in active war circumstances. This chapter will also look at the types of deterrence including general, specific prosecutorial and social deterrence. This chapter will also look at the ICC's capacity to prevent atrocities and how likely perpetrators are to be punished.

CHAPTER FOUR: SELECTED COUNTRIES THAT THE ICC HAS HAD A DETERRENT IMPACT ON.

This chapter will look at the countries that the ICC has had a deterrence impact on. The countries of focus will be Libya and Kenya.

CHAPTER FIVE: CONCLUSION

This chapter will provide a conclusion.



CHAPTER TWO

THE COSTS THAT THE ICC CAN INFLICT ON PERPETRATORS

2.0 INTRODUCTION

In July 1998, 120 countries ratified the Rome Statute which established the ICC.⁷⁸ Following the entry into force of the Rome Statute on July 1, 2002, states for the first time in human history decided to accept the jurisdiction of a permanent ICC for the prosecution of perpetrators of the most serious crimes committed in their territories or by their nationals. Every State is required by the Rome Statute to exercise its criminal jurisdiction over people who commit international crimes because the ICC is not intended to be a replacement for national courts.⁷⁹ The ICC, on the other hand, can only intervene if a State is legitimately incapable or unwilling to conduct an inquiry and prosecute the perpetrators.⁸⁰ As stated before, the ICC's fundamental objective is to help end impunity for those who commit the most heinous crimes that affect the international community as a whole, and as a result to contribute to the prevention of such crimes. The Court will try the most serious offenses that the international community is concerned about.⁸¹

When the ICC Statute came into effect, the ICC was established as an international criminal court of justice.⁸² In addition to the Nuremberg International Military Tribunal, a more modern version, the ICTY and the ICTR, the ICC is a pioneering attempt to establish a permanent judicial body.⁸³ A court's system of justice encompasses everything from a trial that establishes guilt to the mechanism that is used to sentence an offender.⁸⁴ Although a guilty finding can itself be a punitive sanction, a court's ability to do justice is as much dependent upon a court's ability to determine the appropriate sentence in a case in a fair and just manner as it depends upon fair and just processes for determining criminal liability. Beresford notes that passing sentences on criminals is probably the most visible aspect of the ICJ system, particularly in the

⁷⁸ United Nations 'Rome Statute of the International Criminal Court' available at <http://www.icc-cpi.int/library/officialjournal/RomeStatute/20704-EN.pdf> (accessed 23 November 2021).

⁷⁹ International Criminal Court 'Understanding the International Criminal Court' (2020) 11.

⁸⁰ International Criminal Court 'Understanding the International Criminal Court' (2020) 11.

⁸¹ International Criminal Court 'Understanding the International Criminal Court' (2020) 9.

⁸² United Nations 'Rome Statute of the International Criminal Court' available at <http://www.icc-cpi.int/library/officialjournal/RomeStatute/20704-EN.pdf> (accessed 23 November 2021).

⁸³ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 37.

⁸⁴ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 38.

context of the ICTY and ICTR.⁸⁵ There is considerably more guidance provided by the ICC Statute and ICC Rules of Procedure and Evidence on how to determine appropriate punishment than there was in previous tribunals.⁸⁶

This chapter will focus on the jurisdiction of the ICC and the various penalties that the ICC can inflict on perpetrators.

2.1 JURISDICTION OF THE ICC.

The Court was established to investigate and prosecute cases when states are unable or unwilling to do so.⁸⁷ In addition, it may only hear cases that occurred after the Rome Statute entered into force on 1 July 2002 and after a state ratified it.⁸⁸ According to Article 12 of the Rome Statute one of three conditions must be met in terms of the location of the crime for a case to fall within its jurisdiction.⁸⁹ First, the crimes must have been committed either on the territory, or territory controlled by a State Party, a vessel, or an aircraft, or by nationals of that State.⁹⁰ Additionally, a state may choose not to be a state party to the Court but accept its jurisdiction.⁹¹ As a third alternative, if neither of the conditions above have been met, the United Nations Security Council (UNSC) may recommend the case to the Court and declare the matter to be within the Court's jurisdiction.⁹²

When the states that signed the Rome Statute chose to approve the Statute establishing the ICC, they reached an agreement with the international community and the ICC. In exchange for their support and cooperation with The Hague, each state party would retain presumptive jurisdiction to prosecute offenses that would otherwise fall under the jurisdiction of the ICC.⁹³

The Security Council may only mandate an investigation of perpetrators operating in non-signatory states. In spite of the fact that the Security Council can suggest an investigation, veto-power states or countries with strong alliances with them are virtually immune from such investigations.⁹⁴ Consequently, the court cannot deter effectively when state parties and their

⁸⁵ Beresford S 'Unshackling the Paper Tiger - the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda' 1 *International Criminal Justice Review* (2002) 38.

⁸⁶ Rules of Procedure and Evidence of the International Criminal Court (2002).

⁸⁷ Rome Statute Article 1.

⁸⁸ Rome Statute Article 11.

⁸⁹ Rome Statute Article 12.

⁹⁰ Rome Statute Article 12 (a).

⁹¹ Rome Statute Article 12 (3).

⁹² Rome Statute Article 87 (5) (b).

⁹³ Kourabas MN 'The Rome Statute, Penalties & the Spectrum of Severity' *Penalties & the Spectrum of Severity* (2008) 1.

⁹⁴ Mullins CW& Rothe DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law Review* 777.

operatives are not subject to its jurisdiction because certainty is weakened, which is key to effective deterrence.⁹⁵ In addition, states with veto power have historically engaged in widespread human rights violations during conflicts with states of lesser power.⁹⁶ Crimes will be less deterred by leadership that believes an ally will use its veto to protect them.

While states parties are central to the ICC's functioning, limiting analysis of deterrence to their jurisdictions would provide an incomplete picture. The ICC's jurisdiction extends beyond member states in certain cases, and its deterrent impact is shaped by factors like complementarity, selectivity, and enforcement challenges that transcend state borders. A more holistic approach is needed to assess the court's deterrent effect. The ICC's jurisdiction is a key factor in evaluating the court's deterrent impact. The extent to which the ICC can credibly threaten prosecution for serious international crimes within its jurisdiction is central to whether it can effectively deter such atrocities.

There are issues of enforcement and legitimacy that are lacking in the eyes of some countries and leaders, regardless of whether the Security Council refers a case to the Court.⁹⁷ When the court stands its ground, it demonstrates that it intends to complete the cases that it begins.⁹⁸ A regime cannot use symbolic legal actions to protect offenders, nor can it be influenced by attempts to undermine its authority.⁹⁹ The Court must take this position in order to establish itself as an apolitical source of international justice and to increase its deterrent potential.¹⁰⁰ It might add to the overall deterrent effect that it generates if this poise is maintained over time. Furthermore, deterring crimes from occurring would be a nightmare if it were the opposite.¹⁰¹

⁹⁵ Mullins CW& Rothe DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law Review* 777.

⁹⁶ Mullins CW& Rothe DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law Review* 777.

⁹⁷ Accord 'The Politicisation of the International Criminal Court by United Nations Security Council Referrals' Available at: <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/> (accessed 01 March 2023).

⁹⁸ Mullins CW& Rothe DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law Review* 786.

⁹⁹ Mullins CW& Rothe DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law Review* 786.

¹⁰⁰ Accord 'The Politicisation of the International Criminal Court by United Nations Security Council Referrals' Available at: <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/> (accessed 01 March 2023).

¹⁰¹ Mullins CW& Rothe DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law Review* 786.

2.1.1 The ICC's temporal jurisdiction

According to Article 11 (1) of the Rome Statute, crimes committed after July 1, 2002, are subject to the jurisdiction of the ICC.¹⁰² This means that the Court has jurisdiction over offenses committed after the Rome Statute took effect on July 1, 2002, and because of this, the Court will not prosecute crimes committed before that date. According to Article 29 of the Rome Statute, if a matter falls under the jurisdiction of the ICC, the statute of limitations does not apply.¹⁰³ In law, this principle is known as non-retroactivity, which states that a law may not be applied to acts committed prior to its enactment.¹⁰⁴ In criminal law, there is an explicit recognition of the principle of non-retroactivity in most, if not all, domestic jurisdictions¹⁰⁵ A criminal law prohibition on retroactivity prevents criminal penalties from being applied to acts that occurred before the relevant rule was enacted. Additionally, several international human rights instruments explicitly state that a law cannot be applied retroactively. It is prohibited under the Universal Declaration of Human Rights (UDHR) to be convicted for conduct that did not constitute a crime at the time of its commission, under national or international law.¹⁰⁶ As part of the European Convention of Human Rights (ECHR), acts or omissions not constituting criminal offenses at the time cannot be punished as criminal offenses.¹⁰⁷ Similar provisions can be found in the International Covenant for Civil and Political Rights (ICCPR).¹⁰⁸

2.1.2 Natural persons

According to Article 26 of the Rome Statute, when a matter involves an alleged offence against a natural person, the ICC has jurisdiction over the matter if the offence occurred when the natural person was over 18 years of age.¹⁰⁹ According to the ICC's Constituent Documents, it is the first ICT to expressly limit its jurisdiction to adult offenders, previous tribunals not explicitly stating how age might affect the jurisdiction.¹¹⁰ A person who was under the age of eighteen at the time of the alleged conduct of a crime is not subject to prosecution under the Rome Statute.¹¹¹

¹⁰² Rome Statute (2002) Article 11 (1).

¹⁰³ Rome Statute (2002) Article 29.

¹⁰⁴ Brogini G 'Retroactivity of Laws in the Roman Perspective' (1996) 1 *Irish Jurist* 168.

¹⁰⁵ Gallant KS 'Legality as a Rule of Customary International Law Today & Conclusion: The Endurance of Legality' in *The Principle of Legality in International and Comparative Criminal Law* (2010) 231.

¹⁰⁶ Universal Declaration of Human Rights (1948) Resolution 217A Article 11(2).

¹⁰⁷ European Convention on Human Rights (1953) Article 7.

¹⁰⁸ International Covenant on Civil and Political Rights, (1966) Article 15(1).

¹⁰⁹ Rome Statute Article 26.

¹¹⁰ Rome Statute Article 26.

¹¹¹ Rome Statute Article 26.

In light of their long history of participation in violations of international law, it is noteworthy that the ICC does not have jurisdiction to hear cases against corporate bodies.¹¹² The ICC can impose pecuniary as well as non-pecuniary sanctions, as opposed to merely punishing with imprisonment and forfeiture, it would seem that corporate bodies would be justified in being able to appear before the ICC.¹¹³ Many domestic jurisdictions recognize corporate criminal liability, for example in Victorian¹¹⁴ and Commonwealth legislation¹¹⁵, if corporations are found to have engaged in an offence, a court may impose a pecuniary sanction, except when the offence provides for other punishment.¹¹⁶ As a result, corporate offenders can be charged with a wider range of offenses that would have otherwise been reserved for natural persons.¹¹⁷ A rudimentary method of increasing penalties payable by corporations is even provided under the Victorian and Commonwealth legislation, where courts have discretion in sentencing, and can impose penalties up to five times higher than the maximum sentence for natural persons.¹¹⁸ Prior to the drafting of the ICC Statute, the idea of corporate liability was discussed, although all states recognize criminal responsibility for natural persons, some lack a criminal liability mechanism for corporations.¹¹⁹ As the ICC would be established in accordance with the principle of complementarity, it was deemed inappropriate to include a judiciary for bringing criminal charges against corporations in those states that do not provide for criminal sanctions against corporations.¹²⁰ While numerous attempts were made to revisit this issue, at the end of the day, the idea was abandoned.¹²¹

2.1.3 Crimes under the ICC's jurisdiction

Article 5 of the Rome Statute tells us the crimes that are within the jurisdiction of the ICC. The article states that, 'The jurisdiction of the Court shall be limited to the most serious crimes of

¹¹² Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 47.

¹¹³ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 48.

¹¹⁴ Victorian Legislation Sentencing Act 49 of 1991.

¹¹⁵ Commonwealth Coat of Arms of Australia Crimes (1914) Article 12.

¹¹⁶ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 48.

¹¹⁷ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 48.

¹¹⁸ Fox R & Freiberg A *Sentencing state and federal law in Victoria* (1999) 367.

¹¹⁹ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 48.

¹²⁰ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 48.

¹²¹ Schabas WA 'Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute' (2000) 2(3) *Punishment & Society* 80.

concern to the international community. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression'.¹²²

The Court's jurisdiction expressly includes rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and other types of sexual abuse, gender-based persecution and enslavement, including trafficking in women and girls.¹²³ If these acts are committed as part of a systematic or widespread attack on civilian population, they are considered crimes against humanity.¹²⁴ Sexual violence can also be punished as a war crime if it occurs in the context of and is linked to an international or domestic armed conflict.¹²⁵ 'Conscripting and recruiting children under the age of fifteen years into armed forces or using minors to participate actively in hostilities' constitutes a war crime, according to the Rome Statute, and this applies to both internal and international conflicts.¹²⁶ Although the Rome Statute does not address the recruitment of children aged fifteen to eighteen, states may be forbidden from recruiting children aged fifteen to eighteen.¹²⁷

If a country ratifies the Rome Statute after July 2002, the Court will be able to prosecute only crimes committed after that date.¹²⁸

Penalties against the ICC are also provided for in the ICC Statute. According to Article 70 of the ICC Statute, it is prohibited to falsely testify, corruptly influence a witness, corruptly influence or be corruptly influenced as an officer of the ICC, impede the administration of the ICC, and retaliate against witnesses or officers of the ICC.¹²⁹ In terms of Article 70 (3) of the Rome Statute, if you are found guilty, you may face a penalty of up to five years in prison, a

¹²² Rome Statute (2002) Article 5.

¹²³ Gallant KS 'Legality as a Rule of Customary International Law Today & Conclusion: The Endurance of Legality' in *The Principle of Legality in International and Comparative Criminal Law* (2010) 231.

¹²⁴ Rome Statute (2002) Article 7.

¹²⁵ Rome Statute (2002) Article 8 (2) (xxii).

¹²⁶ Gallant KS 'Legality as a Rule of Customary International Law Today & Conclusion: The Endurance of Legality' in *The Principle of Legality in International and Comparative Criminal Law* (2010) 233.

¹²⁷ Gallant KS 'Legality as a Rule of Customary International Law Today & Conclusion: The Endurance of Legality' in *The Principle of Legality in International and Comparative Criminal Law* (2010) 233.

¹²⁸ Rome Statute (2002) Article 11.

¹²⁹ Rome Statute (2002) Article 70.

fine or both.¹³⁰ If more than one offence occurs, each offence may be fined cumulatively, but the cumulative fine may not exceed 50% of the person's liquid assets and property, after deducting the financial needs of the person and any dependents.¹³¹ As per the ICC Rule 164 (2), Article 70 offences are subject to a five-year limitation period from the date they occurred.¹³² Disruption of ICC proceedings and a deliberate refusal to comply with its directions are included in Article 71 of the ICC Statute.¹³³ An administrative action may be taken by the ICC instead of or in addition to a fine upon conviction.¹³⁴ In terms of Rule 1671 (4) of the ICC Statute, there may be a fine of no more than 2,000 Euros or an equivalent amount for each violation, however cumulative fines may be imposed for each day the violation continues.¹³⁵ Article 71 offences are not subject to a limitation period.¹³⁶

2.2 PART II OF THE ROME STATUTE

Once one or more of the criteria in Article 17 of the Rome Statute are met the ICC will intervene and transfer the case from the state's domestic proceedings, with the defendant being tried in The Hague.¹³⁷ In this approach, both parties made sacrifices, respecting each state party's national sovereignty while acknowledging that a state's unwillingness or inability to prosecute a case otherwise within the ICC's purview would allow the ICC to investigate and eventually punish the alleged offender.¹³⁸ In addition to the complementary limitation imposed by Article 17, Article 20 of the Rome Statute imposes yet another fundamental limit on the Court's authority.¹³⁹ The *ne bis in idem* article, often known as Article 20, protects potential defendants from double jeopardy.¹⁴⁰ This effectively means that a defendant who has been tried in line with 'internationally recognized standards of due process'¹⁴¹ and whose procedures otherwise meet with Articles 17 and 20, will be exempted from prosecution for the same conduct.¹⁴² Articles 17 and 20 are the principal obstacles to a case being heard by the ICC.

¹³⁰ Rome Statute (2002) Article 70 (3).

¹³¹ ICC Rules Rule 165(3).

¹³² ICC Rules Rule 164.

¹³³ Rome Statute (2002) Article 71.

¹³⁴ Rome Statute (2002) Article 71.

¹³⁵ ICC Rules Rule 1671(4).

¹³⁶ Rome Statute (2002) Article 71.

¹³⁷ Kourabas MN 'The Rome Statute, Penalties & the Spectrum of Severity' (2008) *Penalties & the Spectrum of Severity* 1.

¹³⁸ Rome Statute (2002) Article 17 (1) (a).

¹³⁹ Rome Statute (2002) Article 20.

¹⁴⁰ Meyer F 'Complementing Complementarity' (2006) *International Criminal Law Review* 549.

¹⁴¹ Rome Statute (2002) Article 20 (2) (b).

¹⁴² Kourabas MN 'The Rome Statute, Penalties & the Spectrum of Severity' (2008) *Penalties & the Spectrum of Severity* 2

Due process is not necessarily an obstacle to the ICC's exercise of jurisdiction, but rather a key consideration in how the court functions. The Rome Statute requires the court to consider principles of due process recognized by international law when determining issues of unwillingness or inability of states to prosecute. This suggests due process is a factor, not an obstacle, to the ICC's jurisdiction.

Part II of the Rome Statute lays out the framework for determining admissibility in a specific case and in this part Articles 17 and 20 are the key provisions in determining when the ICC must defer to the state party and when the ICC may assume jurisdiction.¹⁴³ Any textual inquiry into whether inadequate penalties could allow the ICC to prosecute a previously tried defendant must begin with these two articles. Article 17 states that the ICC shall determine that a case is inadmissible where:

- (a) 'The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.'¹⁴⁴

The various criteria for what constitute unwillingness to prosecute are set out in Article 17(2) of the Statute.¹⁴⁵ The Article states that, 'In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as

applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

¹⁴³ Kourabas MN 'The Rome Statute, Penalties & the Spectrum of Severity' (2008) *Penalties & the Spectrum of Severity* 4.

¹⁴⁴ Rome Statute Article 17 (1).

¹⁴⁵ Rome Statute Article 17 (2).

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.’¹⁴⁶

The preparatory commission's definition of ‘unwillingness’ was contentious, with numerous delegations having differing views on the term's definition and scope.¹⁴⁷ In terms of the definition of ‘unwillingness’, one of the major concerns was that the Court would end up becoming an appeal court, passing judgment on decisions and proceedings of national judicial systems, consequently, the Commission attempted to rid the Article of all subjective criteria¹⁴⁸ According to Article 20 of the Rome Statute, where a state's subjective motive in punishing an accused is objectively to ‘shield’ them from criminal responsibility, the ICC must have the right to try the accused at The Hague if the state has that objective motive.¹⁴⁹

2.3 JURISDICTIONAL LESSONS FROM AD HOC CRIMINAL TRIBUNALS

2.3.1 International Criminal Tribunal for the former Yugoslavia

In 1993, the UNSC established the ICTY, which has been prosecuting crimes committed in the former Yugoslavia since 1991.¹⁵⁰ Croats, Serbs, Bosnian Muslims, and Albanians took part in multi-ethnic violence in Bosnia-Herzegovina, Kosovo, and Croatia, in which approximately 250,000 people died.¹⁵¹ The ICTY's mandate has no end date, this allows it to bring proceedings over events that occurred after it was formed, such as the 1998-1999 violence in Kosovo.¹⁵² In its mandate, the Tribunal prosecutes individuals who have committed serious violations of international humanitarian law since 1991 in the former Yugoslavia. By halting and effectively redressing such violations, putting an end to such crimes, bringing their perpetrators to justice, and restoring peace, these crimes should be resolved. A tribunal's jurisdiction is based on Article 1 of its Statute, which covers "serious violations of international humanitarian law"

¹⁴⁶ Rome Statute Article 17 (2).

¹⁴⁷ Kirsch P & Holmes JT ‘The birth of the international criminal court: The 1998 Rome conference’ (1999) *Canadian Yearbook of International Law/Annuaire canadien de droit international* 48.

¹⁴⁸ Holmes JT *The Principle of Complementarity in the International Criminal Court: The making of the Rome Statute* (2003) 49.

¹⁴⁹ Rome Statute (2002) Article 20.

¹⁵⁰ Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Preamble.

¹⁵¹ United Nations International Residual Mechanism for Criminal Tribunals ‘International Criminal Tribunal for the former Yugoslavia’ Available at <https://www.icty.org/en> (accessed on 28 December 2021).

¹⁵² International Justice Resource Centre ‘International Criminal Tribunal for Rwanda’ Available at <https://ijrcenter.org/international-criminal-law/icty/> (accessed 29 January 2022).

committed by individuals in the former Yugoslavian territory since 1991.¹⁵³ These include grave violations of the Geneva Conventions, war crimes¹⁵⁴, genocide¹⁵⁵, and crimes against humanity¹⁵⁶.

Geographically, the ICTY is limited in its competence. According to Articles 1 and 8 of the Statute only crimes committed on the territory of the former Yugoslavia are subject to the jurisdiction of the Tribunal.¹⁵⁷ There is also a temporal limitation to the jurisdiction of the ICTY, as indicated in Articles 1 and 8.¹⁵⁸ The ICTY is responsible for prosecuting crimes committed in the former Socialist Federal Republic of Yugoslavia. Based on the UNSC, it has jurisdiction over all crimes committed since 1 January 1991, when hostilities began.

2.3.2 International Criminal Tribunal of Rwanda

The ICTR examined crimes committed in Rwanda in 1994, when an extremist government composed of Hutu members executed more than one 800 000 Rwandans, mostly Tutsis, though also approximately 300 000 Hutu were killed.¹⁵⁹ On 8 November 1994, the Security Council established the ICTR to prosecute those responsible for flagrant violations of international humanitarian law. According to the ICTR Statute war crimes¹⁶⁰, crimes against humanity¹⁶¹, and genocide¹⁶² fall under the jurisdiction of the ICTR. ICTR's jurisdiction extends beyond the borders of Rwanda, according to Article 1 of the ICTR Statute. This includes “persons responsible for serious violations of international humanitarian law committed on Rwandan territory, as well as Rwandan citizens responsible for such violations committed on neighbouring states’ territory”¹⁶³. The ICTR's jurisdiction demonstrates a noteworthy aspect on how the drafters of the Statute intended to address specific conflicts within the Security Council.

There was a limited period in which the ICTR had jurisdiction, namely from January 1 to December 31, 1994. As a result of the nature of this conflict, dates were chosen without

¹⁵³ Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Article 1.

¹⁵⁴ Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Article 3.

¹⁵⁵ Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Article 4.

¹⁵⁶ Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Article 5.

¹⁵⁷ Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Article 1 and 8.

¹⁵⁸ Statute of the International Criminal Tribunal for the former Yugoslavia (1993) Article 1 and 8.

¹⁵⁹ International Justice Resource Centre ‘International Criminal Tribunal for Rwanda’ Available at <https://ijrcenter.org/international-criminal-law/icty/> (accessed 29 January 2022).

¹⁶⁰ International Criminal Tribunal of Rwanda Statute (1994) Article 2.

¹⁶¹ International Criminal Tribunal of Rwanda Statute (1994) Article 3.

¹⁶² International Criminal Tribunal of Rwanda Statute (1994) Article 4.

¹⁶³ International Criminal Tribunal of Rwanda Statute (1994) Article 1.

reference to specific events, but rather to encompass all relevant acts, including the planning for the genocide that began in April 1994.¹⁶⁴

2.4 THE SENTENCING REGULATORY FRAMEWORK FOR AD HOC TRIBUNALS

Both the ICTY and ICTR were created by a Security Council Statute, which is complemented by Rules of Procedure and Evidence, sentencing is dealt with both in the Statutes and the Rules.¹⁶⁵

2.4.1 International Criminal Tribunal for the former Yugoslavia

In accordance with Article 23(I) of the ICTY Statute, those convicted of serious violations of international humanitarian law shall be sentenced and punished by the Trial Chambers.¹⁶⁶ As the Statute only permits imprisonment as punishment, the death penalty is not permitted.¹⁶⁷ A Trial Chamber may also order that property and proceeds acquired through criminal conduct, including through duress, be returned to their owners.¹⁶⁸ Restitution for property or person damage cannot be ordered by the Tribunals, except for disgorging gains from criminal conduct.¹⁶⁹ Restorative justice does not include alternative sentences, which might be a part of a more comprehensive system.¹⁷⁰ Having regard to the general practice regarding prison sentences in the courts of the former Yugoslavia, Article 24(I) states that the Trial Chambers shall determine the terms of imprisonment in accordance with the general practice regarding prison sentences in the former Yugoslavia courts.¹⁷¹ References such as this one reduce the suggestion that the ICTY is engaging in retrospective law-making additionally, and important, guidance is provided in article 24(2).¹⁷² The Article states that, in imposing sentences, the Trial Chambers must consider factors such as the gravity of the offense and the circumstances of the individual convicted.¹⁷³

¹⁶⁴ Shraga and Zacklin 'The International Criminal Tribunal for Rwanda' (1996) 7 (4) *European Journal of International Law* 509.

¹⁶⁵ The Global Campaign for ratification and implementation of the Kampala amendments on the crime of aggression 'The ICC and the UN Security Council' Available at: <https://crimeofaggression.info/role-of-the-icc/the-icc-and-the-un-security-council/> (accessed on 9 February 2022).

¹⁶⁶ Statute of the International Criminal Tribunal of former Yugoslavia (1993).

¹⁶⁷ ICTY Statute Article 24 (3).

¹⁶⁸ ICTY Statute 24 (1).

¹⁶⁹ ICTY Statute Article 24 (3).

¹⁷⁰ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 48.

¹⁷¹ ICTY Statute Article 24 (1).

¹⁷² ICTY Statute Article 24 (2).

¹⁷³ ICTY Statute Article 24 (2).

2.4.2 International Criminal Tribunal of Rwanda

The Statutes of the ICTR provide nearly identical provisions in Articles 22 and 23.¹⁷⁴ Particularly important in Rwanda is the limitation of the ICTR's ability to impose imprisonment sentences.¹⁷⁵ Rwandan law provides the death penalty as part of the general practice of its courts.¹⁷⁶ There have been several death sentences handed out against genocidal murderers in Rwanda as a result of domestic trials.¹⁷⁷ In this context, the ICTR might hand out a more lenient sentence to the high-ranking Rwanda genocide organizers it has custody over than they would to other less serious offenders that are tried by national courts.¹⁷⁸ According to Article 26 of the ICTR Statute, 'Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda'.¹⁷⁹ Article 27 of the ICTY Statute also contains a similar provision, although no mention is made of imprisonment served in the Federal Republic of Yugoslavia or any other former Yugoslavian state.¹⁸⁰

The sentencing process occurs within the judicial process, not in a separate sentencing phase as is the case in most civil law jurisdictions. 'An effort to save times and money,' which are sensitive issues for the Tribunals, may also have been involved in the decision not to proceed in two separate proceedings.¹⁸¹ On the other hand, the Rome Statute of the ICC favours a separate sentencing hearing.¹⁸² In this respect, the ICC Statute places a stronger emphasis on restorative justice than does the Statute of the ad hoc tribunals.

¹⁷⁴ Statute of the International Criminal Tribunal for Rwanda (1994).

¹⁷⁵ ICTR Statute Article 22.

¹⁷⁶ Horowitz S 'International Criminal Courts in Action: The ICTR's Effect on Death Penalty and Reconciliation in Rwanda' (2015) *Hebrew University of Jerusalem, Truman Institute for the Advancement of Peace* 38.

¹⁷⁷ Horowitz S 'International Criminal Courts in Action: The ICTR's Effect on Death Penalty and Reconciliation in Rwanda' (2015) *Hebrew University of Jerusalem, Truman Institute for the Advancement of Peace* 38.

¹⁷⁸ Horowitz S 'International Criminal Courts in Action: The ICTR's Effect on Death Penalty and Reconciliation in Rwanda' (2015) *Hebrew University of Jerusalem, Truman Institute for the Advancement of Peace* 38.

¹⁷⁹ ICTR Statute Article 26.

¹⁸⁰ ICTY Statute Article 27.

¹⁸¹ Drumbl MA & Gallant KS 'Sentencing Policies and Practices in the International Criminal Tribunals' (2002) 15(2) *Federal Sentencing Reporter*, 143.

¹⁸² Drumbl MA & Gallant KS 'Sentencing Policies and Practices in the International Criminal Tribunals' (2002) 15(2) *Federal Sentencing Reporter*, 143.

2.5 AD HOC CRIMINAL TRIBUNALS FLAWS THAT THE ROME STATUTE CORRECTED

The Rome Statute of the ICC was developed to address perceived flaws and shortcomings in the statutes and judgments of the ICTY and ICTR. Some of the key flaws and criticisms that the Rome Statute sought to correct include the following:

The ICTY and ICTR were ad hoc tribunals established for specific conflicts, which resulted in inefficiencies and a lack of permanent international institutions for prosecuting international crimes. They were established as temporary institutions, leading to questions about the lasting impact of their legal precedents. The Rome Statute established the ICC as a permanent institution to prosecute international crimes continuously, thus fulfilling the need for a consistent and long-term legal framework. The ICC was anticipated to establish a more legacy and contribute to the growth of a uniform body of legal principles in international criminal law over the years. These rulings may influence coming cases and contribute to the advancement of international law.

The UNSC established the ICTY and the ICTR for specific conflicts, leading to concerns of selectivity and perceived political influence in their establishment. In contrast, the ICC's jurisdiction is not subject to the UNSC's discretion but is based on the principles of complementarity and the ICC Prosecutor's initiation of cases. This aims to reduce selectivity and ensure accountability regardless of political considerations. Complementarity is a principle that the Rome Statute incorporates, where the ICC's jurisdiction complements national jurisdictions. As a general rule, national courts have the primary responsibility for investigating and prosecuting international crimes, and the ICC only intervenes when national courts cannot or do not want to do so. By adopting this principle, international crime concerns can be addressed without sacrificing national sovereignty.

Ad hoc tribunals had limited temporal jurisdiction, which meant that they could only investigate crimes committed within a specific timeframe related to the conflict for which they were established. Crimes committed after the Rome Statute entered into force in July 2002 fall under the jurisdiction of the ICC. As a result, the ICC can address ongoing and future international crimes without being restricted by temporal issues.

There was a limited jurisdiction of ICTY and ICTR for specific conflicts in the former Yugoslavia and Rwanda, respectively. Considering this, concerns were raised that these tribunals were not capable of dealing with crimes committed during other conflicts as well. A global jurisdiction, however, makes the ICC capable of investigating and prosecuting international crimes anywhere in the world if its conditions of jurisdiction are met. Geographically and temporally, the Rome Statute has a broader jurisdiction. In addition to crimes committed anywhere in the world after July 1, 2002, when the Rome Statute became effective, it covers crimes committed during that period. The broader scope was designed to ensure that international crimes were prosecuted wherever they occurred.

The ICTY and ICTR were established by the UNSC and limited their jurisdiction to the geographical areas affected by their conflicts, causing criticism that they were imposed on the countries involved. States were able to voluntarily become parties to the Rome Statute through a diplomatic process. Several countries have ratified the Rome Statute, making it a more universally accepted framework for ICJ.

In addition to dealing with inconsistent or incomplete precedents, the ICTY and ICTR faced challenges in prosecuting international crimes. As it addresses new cases and controversy, the ICC will have the opportunity to further develop international criminal law and to build on the jurisprudence of ad hoc tribunals.

Critics argue that the establishment of the ICTY and ICTR was influenced by political considerations and that the tribunals were primarily focused on prosecuting individuals from the losing side of the conflicts.¹⁸³ This raises concerns regarding impartiality. The Rome Statute aims to promote impartial justice by providing permanent, independent, and impartial ICC.¹⁸⁴ It is not tied to the specific dynamics of any conflict, and operates under the principle of complementarity, meaning that national jurisdictions have the primary responsibility to investigate and prosecute these crimes, with the ICC stepping in only when they are unable or unwilling to do so.¹⁸⁵

¹⁸³ Akhavan P 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism' (2009) 31 (3) *Human Rights Quarterly* 625.

¹⁸⁴ International Criminal Court 'Understanding the International Criminal Court' (2020) 32.

¹⁸⁵ Seils P 'Handbook on Complementarity An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes' (2016) *International Center for Transitional Justice* 97.

Critics argued that the statutes of the ICTY and ICTR lacked consistency in defining crimes and determining penalties, leading to varying outcomes in different cases.¹⁸⁶ The Rome Statute established a consistent legal framework for defining and prosecuting international crimes, including genocide, war crimes, and crimes against humanity.¹⁸⁷ It also provides standardized penalties to ensure greater predictability in sentencing.¹⁸⁸

It is important to note that while the Rome Statute aimed to address these perceived flaws, it also faced its own criticisms and challenges, such as issues related to enforcement, cooperation with states, and selectivity in practice.¹⁸⁹ The Rome Statute represents the international community's ongoing efforts to improve mechanisms for prosecuting individuals responsible for the most serious international crimes.

2.6 COSTS THE ICC CAN INFLICT ON PERPETRATORS

In order to combat impunity, the ICC must ensure that the punishments it imposes are proportionate to the heinous nature of the crimes under its jurisdiction.¹⁹⁰ At the same time, in order to further justice and the rule of law, it must ensure that its punishments are clearly fair.¹⁹¹ The Rome Statute makes provisions for penalties that it can inflict on perpetrator convicted of a crime as defined in Article 5 of this Statute. The Statute, however, does not specify what role sanctions may play in terms of admissibility before the ICC.

2.6.1 Various penalties that can be imposed

According to Article 77 of the Rome Statute, which deals with the applicable penalties imposed by the ICC, an offender may face one of the following penalties;

‘(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.’¹⁹²

¹⁸⁶ Hola B ‘7 Consistency and Pluralism of International Sentencing: An Empirical Assessment of the ICTY and ICTR Practice’ van Sliedregt E & Vasiliev S in *Pluralism in International Criminal Law* (2014) 186.

¹⁸⁷ Rome Statute Article 5.

¹⁸⁸ Rome Statute Article 77.

¹⁸⁹ Galand AS ‘Article 13 (b) vs State Sovereignty’ in *UN Security Council Referrals to the International Criminal Court* (2019) 90.

¹⁹⁰ Human Rights Watch ‘Section L: Penalties’ available at: <https://www.hrw.org/legacy/reports98/icc/jitbwb-14.htm> (accessed 26 January 2022).

¹⁹¹ Human Rights Watch ‘Section L: Penalties’ available at: <https://www.hrw.org/legacy/reports98/icc/jitbwb-14.htm> (accessed 26 January 2022).

¹⁹² Rome Statute Article 77.

Article 77 (2) deals with other forms of punishment other than imprisonment and states that;

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.¹⁹³

Under paragraph (a), there is no prescribed maximum or minimum punishment for the various offences falling under the jurisdiction of the ICC, so the maximum or minimum punishment is left to the discretion of the court.¹⁹⁴ A conviction under paragraph (b) is qualified by the requirement that the crime must be grave, and its severity must be demonstrated by at least one aggravating circumstance.¹⁹⁵ In light of the fact that most cases brought before the court are grave in nature, some writers have questioned the necessity of this requirement.¹⁹⁶ Despite the suggestion that the inclusion of this requirement provides a tacit signal for clemency on the part of the ICC, it does little to constrain the sentence discretion of the court.¹⁹⁷ Direct or indirect forfeiture orders are limited in size to the property that was improperly used or appropriated by the offender in the commission of the crime, or the proceeds of the crime, and are therefore based on a reasonable understanding of the facts of the case.¹⁹⁸

The ICC is the first international tribunal authorized to impose fines on offenders, there are no minimum or maximum limits on fines imposed by the ICC. According to Rule 145 (4) of the Rome Statute, in order to determine if a fine should be imposed, the ICC must determine 'whether imprisonment is a sufficient penalty'.¹⁹⁹ When determining a penalty, the court must also consider the offender's financial capacity and his or her motivation for the offense.²⁰⁰ Given that the size of any fine imposed is determined solely by the assets and financial

¹⁹³ Rome Statute Article 77 (2).

¹⁹⁴ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 50.

¹⁹⁵ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 50.

¹⁹⁶ Schabas WA 'Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute' (2000) 2(3) *Punishment & Society* 141.

¹⁹⁷ Schabas WA 'Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute' (2000) 2(3) *Punishment & Society* 142.

¹⁹⁸ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 50.

¹⁹⁹ ICC Rules 145 (5).

²⁰⁰ ICC Rules 145.

constraints of the offender, there is the potential for multiple levels of fines to be imposed for the same conduct regardless of aggravating or mitigating factors.²⁰¹

In light of the sanctions outlined in paragraph (e), the ICC is required to establish principles in respect of reparations, compensation, and rehabilitation for the victims.²⁰² There is no development of these principles in the ICC Rules or other documents of the ICC.²⁰³ These principles may limit or guide the ICC as to when reparation orders should be made and how they should be determined once they are established.²⁰⁴ Reparation orders do not carry the same limitations as fines in regards to the offender's property and dependents.²⁰⁵ According to Article 79 of the Rome Statute an order for reparations can be issued against the offender or against the Victims' Trust Fund.²⁰⁶

In accordance with international human rights standards, the ICC lacks the authority to impose the death penalty, even though some scholars believe that the death penalty is the most effective deterrent.²⁰⁷ This exclusion of the death penalty under the ICC's legal framework is seen as consistent with the general trend towards the abolition of capital punishment in international criminal law. However, the death penalty is not the only factor that influences deterrence. The entire criminal justice process, from investigation to prosecution, trial, delivering of the judgment, sentence, and punishment, serves as a deterrent. The publicity surrounding a trial will serve as an extra deterrent. After much debate at the Rome Conference, the Statute not only eliminated capital punishment from the list of available penalties, but also established a general rule of no more than 30 years in prison, with life imprisonment allowed only 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.'²⁰⁸ The Rome Statute's overall message is one of favourable acknowledgement of progressive perspectives and respect for growing trends in international human rights

²⁰¹ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 50.

²⁰² Rome Statute Article 75 (1).

²⁰³ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 51.

²⁰⁴ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 51.

²⁰⁵ Hole A 'The Sentencing Provisions of the International Criminal Court' (2005) *International Journal of Punishment and Sentencing* 51.

²⁰⁶ Rome Statute Article 79.

²⁰⁷ United Nations Department of Public Information 'Rome Statute of ICC' available at: <https://legal.un.org/icc/statute/iccq&a.htm> (accessed 18-01-2022).

²⁰⁸ Rome Statute 77 (1) (b).

legislation toward universal eradication of capital punishment and suppression of life imprisonment.²⁰⁹

2.6.2 Factors that Influence Sentencing Discretion

The Trial Chambers are not bound by the criteria contained in the Statute and Rules of Sentencing when determining the sentence, judges have a wide discretion.²¹⁰ In reviewing the case-law of the Tribunals, it is evident that they consider a number of factors in determining sentence, many of which are specific examples of the general guidelines provided by the Rules and Statutes.²¹¹ There are several factors that play a role in the assessment of guilt, including but not limited to: the position of the accused within the command structure; the attitude of the accused toward the victims; remorse; and cooperation with the Tribunals; the sheer inhumanity of the crimes; and the youth of the accused (as a mitigating factor); and the youth of the victims (as an aggravating factor).²¹² Depending on the circumstances, different motives for sentencing are invoked, including deterrence, retribution, and rehabilitation.²¹³ The open-ended sentencing structure of the Statutes has both strengths and weaknesses, but it is not yet possible to quantify exactly how much each rationale or factor contributes to sentences at large.²¹⁴ Individual sentences were derived from the opportunity to scale them according to the crime and the offender, although some of them were mild compared to punishments given for serious offenses in many national courts. Some victims and survivors have expressed concerns that the sentences do not reflect the gravity of the offense.²¹⁵ Determining whom the prosecutor will target naturally affects the deterrent effect of potential ICC prosecutions upon different perpetrators.

2.7 CONCLUSION

As the world's most serious crimes are committed in many parts of the world without repercussion, the ICC was established to adjudicate them. It is, therefore, a great achievement, and its continued development should always be encouraged. As stated in the Rome Statute,

²⁰⁹ Schabas WA 'Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute' (2000) 2(3) *Punishment & Society* 264.

²¹⁰ *Prosecutor v. Kunarac et al* (2002) IT96-23 IT- 96-23/1.

²¹¹ Drumbl MA & Gallant KS 'Sentencing Policies and Practices in the International Criminal Tribunals' *Federal Sentencing Reporter*, 15(2) (2002) 145.

²¹² *Prosecutor v. Kunarac et al* (2002) IT96-23 IT- 96-23/1.

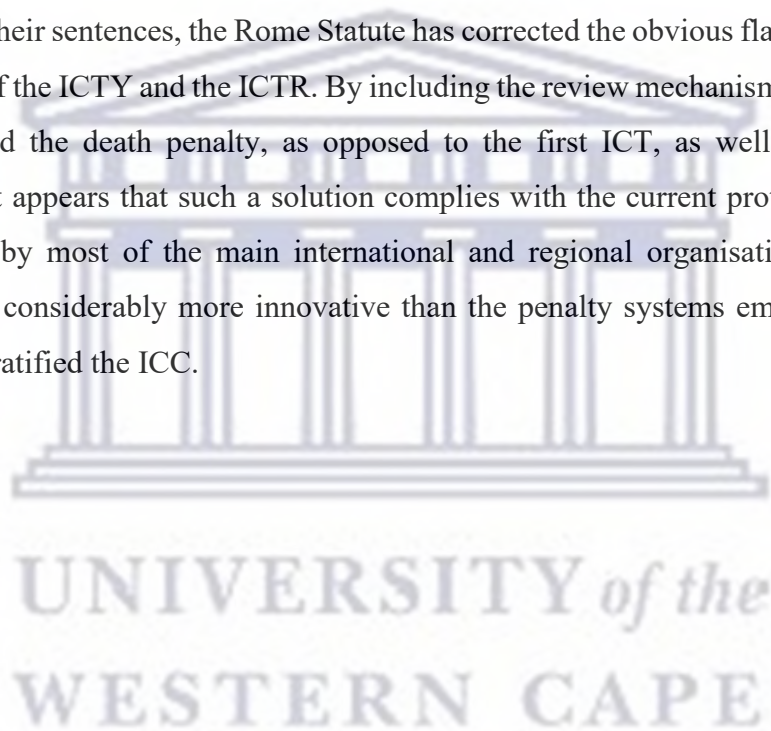
²¹³ Drumbl MA & Gallant KS 'Sentencing Policies and Practices in the International Criminal Tribunals' *Federal Sentencing Reporter*, 15(2) (2002) 144.

²¹⁴ Drumbl MA & Gallant KS 'Sentencing Policies and Practices in the International Criminal Tribunals' *Federal Sentencing Reporter*, 15(2) (2002) 145.

²¹⁵ Drumbl MA & Gallant KS 'Sentencing Policies and Practices in the International Criminal Tribunals' *Federal Sentencing Reporter*, 15(2) (2002) 145.

the institution's existence is solely dependent upon the acceptance of the states, and a big part of that success can be attributed to the compromises struck between the institution and its constituent members. Until shown that states are unable or unwilling to prosecute crimes within the scope of the Rome Statute, it remains the states' responsibility to prosecute the crimes under the Statute. The Rome Statute's Articles 17 and 20 should make it impossible for the ICC to retry a defendant who has been prosecuted for criminal conduct otherwise within ICC's jurisdiction, and who has been sentenced through that society's spectrum of severity.

By providing some additional sentencing guidance and placing final authority over parole and commutation in the hands of the ICC rather than the countries hosting the prisoners for the enforcement of their sentences, the Rome Statute has corrected the obvious flaws of the statutes and judgments of the ICTY and the ICTR. By including the review mechanism, the ICC system has both rejected the death penalty, as opposed to the first ICT, as well as softened life imprisonment. It appears that such a solution complies with the current protection of human rights expected by most of the main international and regional organisations, bodies, and courts, and it is considerably more innovative than the penalty systems employed by a few states that have ratified the ICC.



CHAPTER THREE

THE CAPACITY OF THE ICC AND DETERRENCE

3.0 INTRODUCTION

The Rome Statute creating the ICC was put in place so that the worst abuses of human rights could be investigated, prosecuted, and judged. ICC aims to provide justice for the victims, establish international rule of law, and eliminate impunity enjoyed by the architects of such violence by holding leaders accountable for violations of international law. Luis Moreno-Ocampo, former Chief Prosecutor of the ICC, said laws are the only effective way to prevent recurrent violence and atrocities in the future.²¹⁶ The ICC is intended to provide justice in the present and deter future crimes. Cases are heard by the ICC through a variety of different mechanisms, leading to investigations of many of the world's most violent conflicts. This chapter will look at the ICC limited capacity, its capacity to intervene in active war situations the ICCs impact and ultimately the ICCs capacity to prevent atrocities and how likely perpetrators are to be punished.

3.1 ICC'S LIMITED CAPACITY

Though considered a legitimate international institution with the power to prosecute serious crimes, the ICC does have certain limitations and challenges that impact its legitimacy and capacity. There remain some limitations to the role of the ICC in furthering justice and peace, including some states refusing to accept its legitimacy, certain states seeking to control it and uses it as a tool of power, and its own inability to effectively conduct its investigations. A growing number of states are, however, recognizing the ICC as a legitimate international institution. As a result of its strategy, it has gained visibility because the cases it selects usually involve all parties involved in a conflict, and the cases entailed are likely to succeed, the person or persons investigated and prosecuted are ultimately found guilty.

Any crime committed by the state's nationals or on their territory is subject to ICC jurisdiction if the state has ratified the Rome Statute.²¹⁷ The Rome Statute also provides an exception for non-State Parties to submit to the Court's jurisdiction over these three crimes.²¹⁸ In addition to jurisdiction over crimes of aggression, the Court also has jurisdiction over a special aggression

²¹⁶ Marshall KA 'Prevention and Complementarity in the International Criminal Court: A Positive Approach' (2010) 17 (2) *Inter-American Court of Human Rights* 22.

²¹⁷ Rome Statute Article 12 (1) and (2).

²¹⁸ Rome Statute Article 12 (3).

amendment, but only states that have ratified the amendment will be able to prosecute aggression crimes.²¹⁹ In addition to being criticized for selective prosecution, the ICC is only able to prosecute cases involving crimes committed by residents of states that have accepted its jurisdiction, or that are parties to the Rome Statute.²²⁰ As a result of this selective approach, bias accusations have been levelled.

When deciding which jurisdiction should prosecute, courts consider a variety of factors. These factors are designed to ensure that the prosecution is fair, efficient, and effective, while also considering the interests of all parties involved.²²¹ These factors help courts balance the various considerations and ensure that the prosecution is conducted fairly and efficiently, while also considering the interests of all parties involved.²²²

As a result of its reliance on states for cooperation in arresting and surrendering suspects, the ICC is limited in its ability to investigate and prosecute cases. An institution's power depends on how many, and which states make up its membership, despite some states not ratifying the ICC's status, an increasing number of states recognize the ICC's legitimacy.²²³ For instance, three of the United Nations Security Council's five permanent members are not parties to the ICC. Among those countries not part of the ICC are the United States, Russia, China, and India. With an estimated population of 1.45 billion, these countries are among the largest in terms of population, with India leading as the world's most populous nation in 2024.²²⁴ In spite of a complex and varied list of reasons, these countries have not ratified the Rome Statute, but concerns about national sovereignty, ICC jurisdiction, and political motives have been among the factors contributing to their non-ratification. The USA, China, and Russia, however, seem to be progressively accepting its work, since they did not refuse to refer the Sudan case to the ICC in 2005, and they agreed to refer the Libya case.²²⁵ Russia has used the Court to file a complaint against Georgia, despite not always agreeing to referrals to the ICC.²²⁶ The USA,

²¹⁹ Rome Statute Article 8.

²²⁰ Rome Statute Article 12.

²²¹ CPS 'Jurisdiction' available at: <https://www.cps.gov.uk/legal-guidance/jurisdiction> (accessed 15 July 2024).

²²² CPS 'Jurisdiction' available at: <https://www.cps.gov.uk/legal-guidance/jurisdiction> (accessed 15 July 2024).

²²³ Coleman KP *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (2007) 283.

²²⁴ United Nations 'India to overtake China as world's most populous country in April 2023, United Nations projects' available at: <https://www.un.org/en/desa/india-overtake-china-world-most-populous-country-april-2023-united-nations-projects> (accessed 08 September 2023).

²²⁵ Heyder C 'The UN Security Council's referral of the crimes in Darfur to the International Criminal Court in light of US opposition to the Court' (2006) 24 (2) *Berkeley Journal of International Law* 658.

²²⁶ Prakash B 'U.S. Sanctions on International Criminal Court' (2021) *SSRN eLibrary* 9.

China, Libya, Israel, and Qatar voted against the Rome Statute when it was adopted in 1998.²²⁷ All European Union states as well as most African states and most countries in South America have ratified the Statute.²²⁸ A total of 31 states have signed but not ratified the ICC Statute, and 40 states are not parties to the ICC.²²⁹

In terms of organizational and financial capacity, the court seems to be stretched to the breaking point.²³⁰ In order to fulfil the Court's mandate, it has faced challenges in securing adequate funding, since the Court is primarily funded by State governments. The Assembly of States Parties determines the budget of the ICC, which relies on contributions from member states. Despite inconsistencies in financial contributions, the Court has been unable to fulfil its mandate effectively due to budget constraints. The Court's activities will remain restricted if the Court's funding system does not receive an increase in contributions or more State Parties join the Rome Statute and will therefore contribute to its funding system.²³¹ The ICC had previously been able to adequately fund the trials of suspects while in custody, however if the number of suspects increases, the waiting time before trial will increase.²³² Due to the limited budget, the prosecutor can only have a limited number of cases open at one time.²³³ For example, according to Irwin; 'The ICC faces serious logistical and legal challenges in 2010 as financial constraints could force three major trials into a single courtroom. The ICC cannot currently afford to operate more than one courtroom at a time. The court based next year's budget projections on the idea that trials would run one at a time or in rotation.'²³⁴

A problem with this approach is that it may undermine the credibility of the court, especially if there is a bias or logic behind the investigations that are opened versus those that are not.²³⁵

²²⁷ United Nations, 'Rome Statute of the International Criminal Court' Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed 06 March 2022).

²²⁸ United Nations, 'Rome Statute of the International Criminal Court' Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed 06 March 2022).

²²⁹ United Nations, 'Rome Statute of the International Criminal Court' Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed 06 March 2022).

²³⁰ Mullins CW & Rothe, DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law* 780.

²³¹ Palarczyk, D 'Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment' (2023) 34 *Criminal Law Forum* 178.

²³² Mullins CW & Rothe, DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law* 780.

²³³ International Criminal Court 'Understanding the International Criminal Court' (2020) 63.

²³⁴ Irwin R 'ICC trials hit by budget cuts' Available at: <https://reliefweb.int/report/sierra-leone/icc-trials-hit-budget-cuts> (accessed on 6 March 2022).

²³⁵ Irwin R 'ICC trials hit by budget cuts' Available at: <https://reliefweb.int/report/sierra-leone/icc-trials-hit-budget-cuts> (accessed on 6 March 2022).

Prosecutors who prioritize budgetary concerns will severely impair the court's ability to fulfil its overarching mission and goals.²³⁶ Due to the court's limited capacity, its deterrent value is greatly reduced and due to the court's limited capacity to handle investigations and trials at one time, criminals will perceive a reduced certainty of prosecution and application of law to their activities.²³⁷ With the court being unable to handle more than three trials at the same time, it indicates a low likelihood that any given actor will face justice in any given situation.²³⁸

It is widely recognized that the ICC plays a significant role in ending impunity and prosecuting those responsible for mass crimes on a global scale. In addition, the ICC is an independent international organization, and its legitimacy is enhanced by its status as a treaty-based organization. States do not need to ratify the Rome Statute unless it is in their best interests. While the ICC faces challenges in terms of its capacity, it is widely recognized as an international justice institution that promotes justice and eradicates impunity.

3.2 ICC's CAPACITY TO INTERVENE IN ACTIVE WAR CIRCUMSTANCES

The Court's power to intervene in active circumstances involving the possibility or potential occurrence of atrocity crimes is one component of the ICC's preventative potential, which is closely tied to deterrence.²³⁹ A significant consideration in this regard is that the Court is an autonomous institution that does not require the approval of political entities to investigate or punish offenses under its jurisdiction.²⁴⁰ Unless a situation is referred to the ICC Prosecutor by the United Nations Security Council, the ICC's jurisdiction is confined to crimes committed on the territory or by citizens of a State Party to the Rome Statute or a state that has accepted the ICC's jurisdiction by declaration.²⁴¹ This is stated in Article 11 of the Rome Statute, which states that, 'The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12,

Mullins CW & Rothe, DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law* 781.

²³⁷ Irwin R 'ICC trials hit by budget cuts' Available at: <https://reliefweb.int/report/sierra-leone/icc-trials-hit-budget-cuts> (accessed on 6 March 2022).

²³⁸ Mullins CW & Rothe, DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law* 781.

²³⁹ Song S 'Preventive potential of the international criminal court' (2013) 3(2) *Asian Journal of International* 208.

²⁴⁰ Rome Statute Article 1.

²⁴¹ Rome Statute Article 13 (b).

paragraph 3.²⁴² Article 13 of the Rome Statute also states that, The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.²⁴³

The ICC's action might take a variety of forms, ranging from a preliminary investigation to the issuance of arrest warrants and prosecution, trials before the ICC are a last resort, not a goal in and of themselves.²⁴⁴

When tensions rise and reports emerge of impending atrocities, announcing publicly that the ICC Prosecutor is monitoring the situation can be a powerful tool, alerting potential perpetrators that they may be held liable for their actions and may be subject to arrest warrants enforceable in the Rome Statute's States Parties.²⁴⁵ The ICC's engagement could also serve to raise local and international attention to the issue, as well as encourage the relevant stakeholders to take the necessary steps to defuse tensions and prevent atrocities.²⁴⁶ If, despite efforts to prevent them, and atrocity crimes occur and national authorities are unable or unwilling to address the issue, the ICC may launch an investigation.²⁴⁷ However, this does not always have to result in an ICC prosecution. Once the ICC has opened an investigation, it will encourage national authorities to pursue the alleged crimes as soon as possible, lowering the likelihood of similar atrocities.²⁴⁸ Once the ICC issues arrest warrants, national authorities may still take action to address the crimes, and if they can demonstrate that they are legitimately prosecuting the individuals in question for the alleged offenses, the Rome Statute requires the

²⁴² Rome Statute Article 11.

²⁴³ Rome Statute Article 13.

²⁴⁴ Sikkink K *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011) 59

²⁴⁵ World Bank 'World Development Report: Conflict, Security and Development' available at: http://wdrzoi.worldbank.org/sites/default/files/IWDRzoi_iOverview.pdf (accessed on 2 March 2022).

²⁴⁶ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 444.

²⁴⁷ Rome Statute Article 17 (1) (a).

²⁴⁸ Rome Statute Article 17.

ICC to refer back to national jurisdiction.²⁴⁹ The ICC's proceedings contribute to broader efforts to criminalize and eradicate severe breaches of international humanitarian law, as well as to assist societies in overcoming the consequences of such crimes.²⁵⁰

3.3 CRIMINAL JUSTICE AND INTERNATIONAL RELATIONS DETERRENCE THEORIES

The study of deterrence in international criminal law draws from two sources, criminology, and international relations. The theory of deterrence has been used in criminology to explain both specific and general deterrence.²⁵¹ The theory of deterrence is based on the idea that individuals are rational beings who weigh the costs and benefits of their actions. An offender will commit criminal activity when the expected benefits outweigh the expected costs. There have been three aspects of legal sanctions that can be considered when assessing the cost of those sanctions - certainty, speed, and severity.²⁵² Nevertheless, empirical studies show that deterrence and perceived certainty of punishment are only causally related. There is, however, some disagreement about the strength of the relationship between perceived certainty of punishment and deterrence: some studies have concluded that although it exists, its impact is 'modest to negligible'.²⁵³ The criminal justice system does provide some deterrent effect, but it is difficult to quantify exactly how much. Accordingly, Paternoster concludes that a marginal deterrent effect exists for legal sanctions.²⁵⁴

Beyond the threat of legal sanctions, committing a crime can have a variety of negative consequences. Therefore, criminologists have examined other factors that may deter a potential offender in addition to the criminal justice system. There are two types of extra-legal sanctions: social censure, such as social isolation, a loss of social contacts, and feelings of shame, and self-disapproval, such as avoiding social situations in the future.²⁵⁵ A variety of extra-legal sanctions have been found to be more effective in deterring crime than the threat of legal

²⁴⁹ Rome Statute Article 89.

²⁵⁰ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity? (2016) 70 (3) *International Organization* 453.

²⁵¹ du Preez N & Muthaphuli P 'The deterrent value of punishment on crimes prevention using judicial approaches' (2019) 1 *Just Africa* 44.

²⁵² Nagin DS & Pogarsky G 'Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence' (2009) 39 *Criminology* 867.

²⁵³ Pratt TC et al 'The Empirical Status of Deterrence Theory: A Meta-Analysis' in Cullen FT Wright JP and Blevins KR (eds) *Taking Stock: The Status of Criminological Theory* (2006) 383.

²⁵⁴ Paternoster R 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100 *Journal of Criminal Law and Criminology* 765.

²⁵⁵ Buitelaar T 'The ICC and the Prevention of Atrocities: Criminological Perspectives' (2016) 17 *Human Rights Review* 290.

sanctions, according to empirical research.²⁵⁶ Although social censure will not necessarily result from all crimes, it is important to keep this in mind. The act of committing crimes may be celebrated in some communities and subcultures, such as criminal gangs, where it might become a benefit rather than a cost for the offender.²⁵⁷

Deterrence theories assume that individuals will act rationally. The ability of an individual to make rational decisions typically falls below this standard, assuming they do so at all.²⁵⁸ It has been suggested that deterrence theories are capable of addressing some of these issues by acknowledging that human rationality may be either bounded²⁵⁹, instrumental²⁶⁰, or limited.²⁶¹ In other words, individuals respond to incentives and disincentives differently based on their circumstances and preferences, the information they are provided with, and their own capability to process information.²⁶² In some situations, deterrence theories will be of limited use, as they are not a panacea for explaining all criminal behaviour.

State and non-state actors have been subjected to deterrence theories in the context of coercive diplomacy in international relations. The purpose of coercion is to influence an actor's behaviour by increasing the benefits of compliance, while increasing the costs or decreasing the benefits of continuing a particular behaviour.²⁶³ In the same way that criminology relies on rational actors, coercion is predicated on weighing the benefits and costs.²⁶⁴ There are two aspects to coercion: deterrence and compellence. Deterrence refers to stopping future crimes, and compellence refers to stopping ongoing behaviour.²⁶⁵ Those who are threatened with punishment are more likely to be coerced to refrain from the relevant behaviour, since the

²⁵⁶ Paternoster R 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100 *Journal of Criminal Law and Criminology* 765.

²⁵⁷ Buitelaar T 'The ICC and the Prevention of Atrocities: Criminological Perspectives' (2016) 17 *Human Rights Review* 291.

²⁵⁸ Bennett T & Brookman F 'The Role of Violence in Street Crime: A Qualitative Study of Violent Offenders' (2009) 53 *International Journal of Offender Therapy and Comparative Criminology* 619.

²⁵⁹ Jacobs BA & Wright R 'Bounded Rationality, Retaliation, and the Spread of Urban Violence' (2010) 25 *Journal of Interpersonal Violence* 1742.

²⁶⁰ Kroneberg C, Heintze I & Mehlkop G 'The Interplay of Moral Norms and Instrumental Incentives in Crime Causation' (2010) 48 *Criminology* 261.

²⁶¹ Carroll J & Weaver F 'Shoplifters' Perceptions of Crime Opportunities: A Process-tracing Study' in Cornish DB Clarke RC (eds) *The Reasoning Criminal: Rational Choice Perspectives on Offending* (2014) 23.

²⁶² Elffers H 'Multiple Interpretations of Rationality in Offender Decision Making', in Bernasco W van Gelder JL & Elffers (eds) *The Oxford Handbook of Offender Decision Making* (2017) 53.

²⁶³ Mendeloff D 'Punish or Persuade? The Compellence Logic of International Criminal Court Intervention in Cases of Ongoing Civilian Violence' (2017) 20 *International Studies Review* 402.

²⁶⁴ Wilner AS 'Deterring the Undeterrable: Coercion, Denial, and Delegitimization in Counterterrorism' (2011) 34 *The Journal of Strategic Studies* 7.

²⁶⁵ Mendeloff D 'Punish or Persuade? The Compellence Logic of International Criminal Court Intervention in Cases of Ongoing Civilian Violence' (2017) 20 *International Studies Review* 402.

benefits of engaging in the behaviour are outweighed by the consequences of not engaging in the behaviour.²⁶⁶

Therefore, both criminology and international relations recognize that criminal behaviour can be deterred by the threat of punishment. International criminal law considers both individual and organizational dimensions to develop a theory of deterrence.²⁶⁷

3.4 INTERNATIONAL CRIMINAL COURT AND DETERRENCE THEORIES

The ICC is an international institution that enforces the law, however, only limited material capacity is available. Now it needs to be determined if it can affect the course of civil war violence. Whenever a crime is committed, punishment follows. Criminals are punished to make them good-hearted people and law-abiding citizens by reforming them and turning them into good people. It is utilitarian in nature to use punishment as a deterrent.²⁶⁸ In addition to punishing someone for their illegal acts, the state ensures no similar crimes will be committed in the future. Deterrent theory aims to control crime in society by making potential criminals aware that crime is not worth it.²⁶⁹ In order to reduce crime and make societies more civilized and decent, the legal system continuously improves its laws, policies, procedures, and interpretations.²⁷⁰ It is only when society is civilized that the laws on humans will be reflected.

It is important to understand that there are many different methods of deterrence, such as deterrence through prosecution and social deterrence. Prosecutorial deterrence relies on expected legalized punishment ordered by the court.²⁷¹ An extra-legal social cost associated with breaking the law results in social deterrence.²⁷² Both of these deterrence channels can be accommodated within a framework that views the likelihood of getting caught and the cost of

²⁶⁶ Wilner AS 'Targeted Killings in Afghanistan: Measuring Coercion and Deterrence in Counterterrorism and Counterinsurgency' (2010) 3 *Studies in Conflict & Terrorism* 314.

²⁶⁷ Dancy, 'Searching for Deterrence at the International Criminal Court', (2017) 17 *International Criminal Law Review* 626.

²⁶⁸ Ellis A 'Theories of Punishment' In Bruinsma G & Weisburd D (eds) *Encyclopedia of Criminology and Criminal Justice* (2014) 5192.

²⁶⁹ Ellis A 'Theories of Punishment' In Bruinsma G & Weisburd D (eds) *Encyclopedia of Criminology and Criminal Justice* (2014) 5250.

²⁷⁰ Ellis A 'Theories of Punishment' In Bruinsma G & Weisburd D (eds) *Encyclopedia of Criminology and Criminal Justice* (2014) 5204.

²⁷¹ Hyeran, J & Simmons BA 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 441.

²⁷² The International Nuremberg Principles Academy 'The Deterrent Effect of International Criminal Tribunals' available at: <https://www.nurembergacademy.org/projects/detail/e7140dc5cd07b9838f85dfe8776074f0/the-deterrent-effect-of-international-criminal-tribunals-14/> (accessed on 24 March 2022).

punishment as determinants of the likelihood of committing a crime.²⁷³ In addition to these different methods of deterrence, there is also general and specific deterrence.

3.4.1 ICC and specific deterrence

Specific deterrence is targeted deterrence acts on a specific individual.²⁷⁴ Specific deterrence refers to the idea that a perpetrator will not commit similar crimes again if he is severely punished for his misconduct.²⁷⁵ The goal of specific deterrence is to prevent someone from committing a crime previously committed or committing a crime similar to it.²⁷⁶ It is the goal of criminal law not only to prevent members of society at large from committing crimes, but also to prevent those who have committed crimes from committing them again. Criminals may, for example, be deterred from committing further crimes by the penal system. According to specific deterrence theory, one who receives punishment will subsequently refrain from committing similar crimes.²⁷⁷ The purpose of specific deterrence is to persuade a criminal that recidivism will lead to dire consequences.

The crimes committed in accordance with the Rome Statute are rarely committed by a single individual, and there is little risk of recidivism following punishment.²⁷⁸ Because of this, general deterrence is almost always discussed here rather than specific deterrence.²⁷⁹

Evidence suggests that states that ratified the Rome Statute during conflict were slightly more likely to successfully bargain with rebels to end their fighting when it comes to compelling actors to cease engaging in armed conflict.²⁸⁰ Also, there is evidence that ICC intervention, which is accompanied by preliminary examinations and investigations, may sometimes alter the strategic environment in which conflict actors operate.²⁸¹ However, it appears that intervention by the ICC has not generally resulted in the end of wars in all cases where it has

²⁷³ Mullins CW & Rothe, DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' (2010) 10 (5) *International Criminal Law* 785.

²⁷⁴ du Preez N & Muthaphuli P 'The deterrent value of punishment on crimes prevention using judicial approaches' (2019) 1 *Just Africa* 44.

²⁷⁵ du Preez N & Muthaphuli P 'The deterrent value of punishment on crimes prevention using judicial approaches' (2019) 1 *Just Africa* 44.

²⁷⁶ LaFave WR *Substantive criminal law* 2nd ed (2003) 84.

²⁷⁷ du Preez N & Muthaphuli P 'The deterrent value of punishment on crimes prevention using judicial approaches' (2019) 1 *Just Africa* 44.

²⁷⁸ Keenan PJ 'The New Deterrence: Crime and Policy in the Age of Globalization' (2006) 91 *Iowa Law Review* 521.

²⁷⁹ Developments in the Law: International Criminal Law (2001) 114(7) *Harvard Law Review* 1963.

²⁸⁰ Dancy G 'Searching for deterrence at the international criminal court' (2017) 17(4) *International Criminal Law Review* 643.

²⁸¹ Dancy G 'Searching for deterrence at the international criminal court' (2017) 17(4) *International Criminal Law Review* 643.

intervened. Situations vary from one to another. Although this is encouraging news on one hand, it is not necessarily encouraging news because ratification is only a one-time event that cannot be used to induce rebels to bargain. In contrast, supporters of the ICC may argue that the court's ability to generate compulsive behaviour is not a good measurement of its impact since international criminal law is not intended to prevent all organized violence.²⁸² This would be an overly strict standard for ICL. The ICC should be evaluated according to its ability to prevent certain egregious acts of war that have been outlawed by the international community.²⁸³ Thus, issues of war and war crimes should be kept separate. The definition of specific deterrence is the prevention of actors from committing atrocity crimes again after having already done so.

Ratification of the ICC could deter some atrocities at the margin if it sweeps through countries around the globe and limits exile options for abusive leaders.²⁸⁴ It was suggested that atrocity criminals are so risk-averse that they would not change their decision to commit such crimes in the wake of the Rome Statute.²⁸⁵ Several studies indicate that ratification is associated with fewer cases of state violence and repression.²⁸⁶ Studies that examine specific deterrence of atrocity crimes provide convincing evidence of its effectiveness. Studies that examine specific deterrence of atrocity crimes provide convincing evidence of its effectiveness. In the first study, Benjamin Appel reports that, despite repressive violence committed by state actors prior to ratifying the Rome Statute, quantifying integrity rights protections has significantly improved.²⁸⁷ In his study, Appel compares human rights protections in ratifying and non-ratifying states before and after the Rome Statute was made ratifiable, using a simple but powerful statistical method known as the difference-in-differences model (DiD).²⁸⁸ By doing so, he is able to take into account selection effects.

²⁸² Dancy G 'Searching for deterrence at the international criminal court' (2017) 17(4) *International Criminal Law Review* 644.

²⁸³ Dancy G 'Searching for deterrence at the international criminal court' (2017) 17(4) *International Criminal Law Review* 644.

²⁸⁴ Gilligan MJ 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime' (2006) 60 (i) *International Organization* (2006) 935.

²⁸⁵ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 786.

²⁸⁶ Dancy G 'Searching for deterrence at the international criminal court' (2017) 17(4) *International Criminal Law Review* 644.

²⁸⁷ Benjamin JA 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' *Journal of Conflict Resolution* (2018) 8.

²⁸⁸ Benjamin JA 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' *Journal of Conflict Resolution* (2018) 8.

Ratifications tend to be more prevalent in high-income countries with rule of law cultures because of the selection effect. Based on the DiD model, Appel finds that ratifying states have lower abuse levels than non-ratifying states both before and after ratification.²⁸⁹ Furthermore, Appel argues that the ICC specifically deters not because it risks prosecution, but rather because it receives judgment from domestic and international rights groups. According to Appel, ICC involvement increases the likelihood that a country will be targeted by outside economic pressure and will force a change in governments. The government takes some measures to improve practices after ratification due to concerns. Thus, when the Court stigmatizes state actors, it deters them from re-committing certain repressive acts, the Court therefore acts as a premier stigmatiser in world politics.

3.4.2 ICC and General deterrence

General deterrence aims to teach the public a lesson rather than just those who have been accused of a crime.²⁹⁰ A severely punished person will dissuade the public from engaging in similar or identical activities if the public sees the severity of the punishment.²⁹¹ The purpose of general deterrence is to prevent prospective offenders from committing unlawful acts.²⁹² It is general deterrence that provides the rationale for ICJ.²⁹³ General deterrence is inevitably controversial regardless of the context in which it appears, since it is associated with questionable premises and is notoriously difficult to measure.²⁹⁴ The international court's potential for general deterrence is vociferously contested by both supporters and critics, despite the difficulty of actually validating their claims.

There is a simple formula for general deterrence. When a potential perpetrator's expected utility from the crime, taking into account his gain and the likelihood of being caught and sanctioned, exceeds his utility if he does not commit the crime, he will commit it.²⁹⁵ Therefore, the deterrent effect of a particular sanction depends on both the likelihood and severity of punishment

²⁸⁹ Benjamin JA 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' *Journal of Conflict Resolution* (2018) 8.

²⁹⁰ du Preez N & Muthaphuli P 'The deterrent value of punishment on crimes prevention using judicial approaches' (2019) 1 *Just Africa* 36.

²⁹¹ du Preez N & Muthaphuli P 'The deterrent value of punishment on crimes prevention using judicial approaches' (2019) 1 *Just Africa* 36.

²⁹² LaFave WR *Substantive criminal law* 2nd ed (2003) 84.

²⁹³ *Prosecutor v. Rutaganda* Case No. ICTR 96-3-T, (December 6, 1999).

²⁹⁴ Robinson PH & Darley JM 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* 979.

²⁹⁵ Polinsky MA & Shavell S 'The Economic Theory of Public Enforcement Law' (2000) 38 *Journal of Economic Literature* 45-76.

expected by the potential criminal.²⁹⁶ In this simple economic model, the sanction target makes a rational assessment of the rewards and risks associated with the sanctioned crime.

There may be different patterns emerging as the ICC seeks to deter violence worldwide. Over time, it is expected that organized violence will cluster in non-ratifying states. Due to their economic development and rule of law cultures, ratifying states are already less likely to experience civil war.²⁹⁷ Nevertheless, organized violence will be a greater concern to leaders in ratifying states. One of the reasons is that they understand violent internal conflicts are breeding grounds for atrocities. Having seen other investigations and knowing the ICC has jurisdiction within their own country, leaders become hyperaware that civil war entails ICC intervention. In addition, fighting civil wars is unfit behaviour for members of the ICC's normative community. Conflicts that lead to civil war will be more likely to be resolved if leaders in committed states fear international opprobrium.²⁹⁸

The ICL and the ICC will continue to develop, and the ICC's work will become more publicized, bringing a greater awareness to all countries that some violent acts now attract a good deal of stigma and condemnation. There is no doubt that atrocity crimes will never be completely eradicated from war. The ICC, however, should see an average decline in certain types of behaviour over time if it has a general deterrent effect.

3.4.3 ICC and Prosecutorial deterrence

Prosecutorial deterrence is when an act is omitted because a legal prosecution could result in sanctions.²⁹⁹ It is increasingly difficult for people to break the law when they are faced with the likelihood and severity of a legal sanction, such as a fine, incarceration, or death penalty. The likelihood of committing a crime is reduced when the risk of more severe penalties is perceived to be greater, which in turn reduces the crime rate because fewer people commit crimes. Several studies suggest that harsh punishments are not as effective as swift or likely punishment in deterring crime.³⁰⁰ Using surveys, experiments, and scenarios, researchers also find that the likelihood of punishment is key to deterring crimes like tax evasion and theft as

²⁹⁶ Keenan PJ 'The New Deterrence: Crime and Policy in the Age of Globalization' (2006) 91 *The Iowa Law Review* 509.

²⁹⁷ Dancy G 'Searching for deterrence at the international criminal court' (2017) 17(4) *International Criminal Law Review* 651.

²⁹⁸ Dancy G 'Searching for deterrence at the international criminal court' (2017) 17(4) *International Criminal Law Review* 651.

²⁹⁹ Hyeran, J & Simmons BA 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 446.

³⁰⁰ Wright V *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (2010) 42.

well as sexual assault.³⁰¹ In observational studies, increasing policing or the presence of more cell phones reduce homicides when they raise the risk of apprehension.³⁰² In a World Bank-sponsored study of developing countries, higher conviction rates were found to reduce crime even when the death penalty was controlled.³⁰³ There is a consensus in major texts on crime control in Africa that the key to controlling crime in most contexts is not punishment's severity, but the likelihood of punishment.³⁰⁴ There is increasing documentation that courts in authoritarian states can often become independent of political actors, and can thus perhaps deter some forms of lawbreaking.³⁰⁵ It has been widely accepted that the theory of raising perceived risks of prosecution has been a starting point in a wide range of contexts, even in states with less robust judicial systems where elites may have become accustomed to operating above the law.³⁰⁶

The ICC's formal role is to raise the risk of punishment when the rule of law is weak.³⁰⁷ The court was designed to fulfil this function through its own prosecutorial authority. An individual is more likely to be deterred by prosecution if the court's existence and actions raise the perception that he will be tried and punished. In a study of human rights trials in transition countries by Kim and Sikkink, prosecutorial deterrence theory suggests that investigations, indictments, and especially successful prosecutions would increase deterrence.³⁰⁸ The ICC regime, as Gilligan demonstrates theoretically, can be costly even if suspects do not get apprehended, as perpetrators have fewer asylum options, thus making them less likely to commit flagrant crimes.³⁰⁹

By complementing the Rome Statute, the ICC can also support deterrence at the national level through prosecutorial deterrence. The ICC prosecutions are not intended to replace or pre-empt

³⁰¹ Nagin DS 'Criminal Deterrence Research at the Outset of the Twenty-First Century' (1998) 23 (1) *Crime and Justice* 17.

³⁰² Klick J MacDonald J & Stratmann T 'Mobile Phones and Crime Deterrence: An Underappreciated Link' In Harel A & Hylton KN *Research Handbook on the Economics of Criminal Law* (2012) 243.

³⁰³ Fajnzylber P Lederman D & Loayza N *Determinants of Crime Rates in Latin America and the World: An Empirical Assessment* (1998) 33.

³⁰⁴ Mushanga TM *Criminology in Africa* (2011) 266.

³⁰⁵ Moustafa T 'Law and Courts in Authoritarian Regimes' (2014) 10 *Annual Review of Law and Social Science* 286.

³⁰⁶ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 446.

³⁰⁷ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 446.

³⁰⁸ Kim H & Sikkink K 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 (4) *International Studies Quarterly* 946.

³⁰⁹ Gilligan MJ 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime' (2006) 60(4) *International Organization* 936.

national prosecutions. It is possible for national courts to investigate a case domestically before the ICC can adjudicate it.³¹⁰ Although a domestic action may be taken, the ICC can nonetheless find a case admissible if it determines that ‘the state is unwilling or unable sincerely to carry out the investigation or prosecution’.³¹¹ ICC prosecutorial deterrence is enhanced by this complementary principle in so far as it encourages states to strengthen their own legal capacity.³¹² Reports to the United Nations by the ICC note a number of reforms that happened after the launch of preliminary examinations, including reforms in Guinea and Colombia.³¹³ The ICC may exert prosecutorial deterrence indirectly through stimulating national courts to act; this, in theory, creates favourable conditions for internal monitoring and law enforcement, enhancing prosecutorial deterrence.³¹⁴ A national court system has probably contributed to an expectation that impunity is no longer quietly tolerated in the legal system.³¹⁵

In addition to any condition that makes prosecution more likely in each jurisdiction, the deterrent effect of prosecution is expected to be enhanced by ratification of the Rome Statute, passage of ICC-implementing legislation, national trials, and court reforms that enhance the likelihood and credibility of trials.³¹⁶ The results of qualitative research indicate that leaders' calculations reflect such changes. Several rebel groups have begun to assess the risks posed by the ICC, for example, in Colombia, the two main rebel groups have published internal assessments of the probability of prosecution by the ICC or domestic courts.³¹⁷ The risk of punishment and the threat of indictments, convictions, and complementarity is likely to encourage actual or potential perpetrators to re-evaluate their behaviour.³¹⁸

³¹⁰ Rome Statute Article 1.

³¹¹ Rome Statute, Article 17(I)(a).

³¹² Burke-White W ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’ (2010) 49 (1) *Harvard International Law Journal* 53.

³¹³ International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005). The Hague, The Netherlands: ICC. 2011. Report of the Court on Complementarity. Report to the Assembly of States Parties. 10th sess. New York, 12-21 December 2011. ICC-ASP/10/.

³¹⁴ Clark Phil ‘Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda’ In Stahn C & Zeidy M *The International Criminal Court and Complementarity: From Theory to Practice* (2011) 1180.

³¹⁵ Sikkink K *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011) 59

³¹⁵ Roht-Arriaza N & Javier M *Transitional Justice in the Twenty- First Century: Beyond Truth versus Justice* ed (2006) 62.

³¹⁶ Rincke J & Traxler C ‘Enforcement Spillovers’ (2011) 93 (4) *Review of Economics and Statistics* 1229.

³¹⁷ O'Brien E Engstrom P & Cantor D *In the Shadow of the ICC: Colombia and International Criminal Justice* (2011) 93.

³¹⁸ Jo H & Simmons B ‘Can the International Criminal Court Deter Atrocity?’ (2016) 70 (3) *International Organization* 449.

3.4.4 ICC and Social deterrence

The ICC represents the institutional manifestation of a long-running movement aimed at punishing international crimes and putting them firmly outside the sphere of influence of the law. Additionally, the court's legal mandate provides signals about the community's norms, as well as its formal prosecutorial mandate.³¹⁹ The possibility of a social reaction to law violations increases when community norms are clearly challenged. Behavioural models in criminology have relied on social deterrence for decades.³²⁰ In the context of threatened consequences, Zimring and Hawkins noted long ago that, social reactions can contribute more to deterring potential offenders than punishments that are officially imposed as being unpleasant.³²¹ The results of experimental research suggest that proposed offenders are often deterred primarily by the anticipated social reaction, rather than the prospect of being prosecuted and punished.³²² Some studies have even concluded that, the extra legal consequences result in at least as much deterrence as the legal consequences.³²³ A key component of social deterrence is the expression of clear standards of behaviour and rigorous monitoring.³²⁴ According to Kahan, social deterrence is an indicator of what a broader community values.³²⁵ If a would-be offender is considering harming a community, he/she must take their willingness to defend their values into account.

As opposed to formal prosecution, social deterrence is characterized by its informal and extra-legal nature.³²⁶ For example, common crimes can have the social cost of making it harder to get a job, not because of legal ineligibility, but because many employers do not want to hire someone with a criminal record. There is no direct correlation between social deterrence and material or intangible sanctions.³²⁷ People with resources can potentially use material pressure extralegally to advance community values by shunning or shaming offenders.³²⁸ A criminal

³¹⁹ Kahan DM 'Social Influence, Social Meaning, and Deterrence' (1997) 83 (3) *Virginia Law Review* 349.

³²⁰ McCarthy B 'New Economics of Sociological Criminology' (2002) 28 *Annual Review of Sociology* 419.

³²¹ Zimring FE & Hawkins G *Deterrence: The Legal Threat in Crime Control* (1973) 174.

³²² Tittle CR Botchkovar EV & Antonaccio O 'Criminal Contemplation, National Context, and Deterrence' (2011) 27 (2) *Journal of Quantitative Criminology* 229.

³²³ Nagin DS & Pogarsky G 'Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence' (2001) 39 *Criminology* 865.

³²⁴ Agnew R 'Control and Disorganization Theory' In Clifton DB *the Routledge Handbook of Deviant Behaviour* (2011) 117.

³²⁵ Kahan DM 'Social Influence, Social Meaning, and Deterrence' (1997) 83 (3) *Virginia Law Review* 349.

³²⁵ McCarthy B 'New Economics of Sociological Criminology' (2002) 28 *Annual Review of Sociology* 419.

³²⁶ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 451.

³²⁷ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 456.

³²⁸ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 452.

tribunal serves as the normative focal point for the elicitation and legitimation of this range of informal social pressures.³²⁹ Among the most prominent features of research on compliance with international human rights norms is social deterrence, which can be notoriously difficult to enforce internationally. It is acknowledged in this literature that international norms are largely enforced extralegally, through transnational organizations publicize violations and work with states and international organizations to condemn them.³³⁰ Hafner-Burton emphasizes the impact of economic sanctions as well as international social pressures.³³¹ According to the human rights literature, extra-legal deterrents to law violations are of utmost importance. In compliance research, social deterrence is emphasized where rules and authority play an essential role in deterring crime and motivating compliance.³³² Specifically, when norms are strong but formal institutions of law, such as, police and courts, are weak, it may be especially relevant.

Most accounts of how and why the ICC is a potentially powerful institution have ignored the concept of social deterrence. Since one of the purposes of the ICC is to set expectations, some tactics are outside the acceptable boundary of behaviour. With the ICC being the world's first global and permanent criminal court, it is uniquely positioned to respond to crimes committed internationally. According to Koskeniemi, the formation of moral communities can be enabled by international criminal trials.³³³ However, Akhavan describes judicial stigmatization as a subtle influence on socio-pedagogical formation, which is potentially quite widespread.³³⁴ There is a bright line that the international community as a whole value and therefore wishes to be maintained when law is violated in the presence of ICC authority. Depending on their sensitivity to the values of the international community, state officials and rebel groups may well benefit from integration into global networks and their reliance on foreign actors who are critical to the ICC in the first place.³³⁵ It is well documented in the human rights literature that domestic communities can be highly relevant to social deterrence. For deterring human rights

³²⁹ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 452.

³³⁰ Risse T Ropp SC & Sikink K eds. *The Power of Human Rights: International Norms and Domestic Change* (1999) 79.

³³¹ Hafner-Burton EM *Making Human Rights a Reality* (2013) 22.

³³² Tyler T *Why People Obey the Law* (2006) 32.

³³³ Koskeniemi M 'Between Impunity and Show Trials' (2002) 6 (1) *Max Planck Yearbook of United Nations Law* 9.

³³⁴ Akhavan P 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 (2) *American Journal of International Law* 419.

³³⁵ Goodliffe J & Hawkins D 'A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations' (2009) 71 (3) *Journal of Politics* 979.

violations under ratified treaties, Simmons stresses the importance of domestic mobilization.³³⁶ Civil war parties must consider how they would maintain civilian support and the support of their own troops in the event of an investigation by the ICC. An accusation of war crimes could severely damage the relationship of a government or rebel group with its citizens. It is likely that the ICC will encourage civil societies to mobilize to seek justice, asking national courts to hear the cases or even submitting evidence to the ICC.³³⁷

It may be important to also consider the ICC's ability to mobilize extra-legal pressure in addition to the prosecutorial deterrent power of its prosecution. Through its actions, the ICC shapes social expectations beyond prosecution and what constitutes justice.

3.4.5 Theoretical perspective of both social and prosecutorial deterrence

According to the ICC, different categories of actors will experience the ICC differently, depending on whether they are exposed to the risk of prosecution and how much importance they ascribe, or how vulnerable they believe they are, to the social costs of criminal law violations. It has been established that as a primary means of establishing jurisdiction, state ratification is crucial to prosecutorial deterrence. Even though the absolute risk of punishment by the ICC remains small, it has grown significantly since the days of impunity was the norm. A government or rebel force may think that prosecution is an unlikely prospect and prefer the threat of retribution from their enemies over the possibility of ICC prosecution. Alternatively, a government may have ratified to increase the likelihood of rebel prosecution but doing so would also bring a government under ICC scrutiny.³³⁸ Numerous studies have found that ICC ratification is significantly impacted by external economic factors.³³⁹ As the court demonstrates its capacity and willingness to prosecute, prosecutorial deterrence should also increase. Within the court's jurisdiction, the government, military, and rebel leaders will be expected to consider new evidence proving the court's authority and the prosecution's determination to investigate, indict, and convict. A court's action is likely to enhance deterrence most within the context of the situation it relates to, but it may also influence actors more broadly because it demonstrates

³³⁶ Simmons BA *Mobilizing for Human Rights: International Law in Domestic Politics* (2009) 90.

³³⁷ Hillebrecht C *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (2014) 53.

³³⁸ Rome Statute Article 13.

³³⁹ Goodliffe J Hawkins D Home C & Nielson D 'Dependence Networks and the International Criminal Court' (2012) 56 (1) *International Studies Quarterly* 135.

the authority and determination of the institution globally.³⁴⁰ As the ICC begins an investigation, indicts, and convicts individuals, the number of crimes should decrease.

A prosecutorial deterrence can also be exerted indirectly by the ICC. States are encouraged to develop their own investigative and judicial capacities through the complementarity mechanism.³⁴¹ When states ratify human rights treaties that require them to prosecute violators, Dancy and Sikkink have found that domestic trials are more likely to be held.³⁴² Also, when nations implement ICC-compliant statutes, improve their courts' capacity to try war criminals, and build military capabilities to detect and punish international crimes, ICC crimes decrease.³⁴³ ICC-statutes may be incorporated into national laws by some states without the intention of enhancing their criminal justice systems. The ICC has, however, been credited for holding human rights violators accountable, according to several recent studies.³⁴⁴

International crime is also deterred by extra-legal social pressures. As a result, these mechanisms are highly conditional; they are dependent upon the presence of salient groups and networks important to the target, and capable of exerting high amounts of social pressure.³⁴⁵ State actors that rely more heavily on foreign assistance to carry out their activities are likely to be deterred from engaging in conduct that violates international criminal law through materially backed social sanctions.³⁴⁶ However, material coercion does not need to be backed by social pressure. Mobilization pressures from domestic and international human rights organizations are expected to deter state actors.³⁴⁷ A domestic group's criticism of official actions can raise legitimate questions that, at a minimum, can increase the costs of maintaining power for government actors. Government officials and military forces may feel more deterred from committing international crimes if local human rights mobilization is more intense, especially after states have ratified the ICC's statutes, which increase behavioural expectations. In contrast to state actors, rebel groups rarely have formal mechanisms by which they can participate in international law making or participate in international norm-setting.³⁴⁸ In some

³⁴⁰ Sikkink K *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011) 59.

³⁴¹ Slaughter A & Burke-White W 'The Future of International Law Is Domestic' (2006) 47 (2) *Harvard International Law Journal* 329.

³⁴² Dancy G & Sikkink K 'Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance' (2012) 44 (3) *New York University Journal of International Law and Politics* 759.

³⁴³ Morrow J *Order Within Anarchy: The Laws of War as an International Institution* (2014) 67.

³⁴⁴ Dancy G & Montai F 'Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions' (2014) *American Society of International Law Conference* 7.

³⁴⁵ Agnew R 'Control and Disorganization Theory' In Clifton DB *the Routledge Handbook of Deviant Behaviour* (2011) 117.

³⁴⁶ Hafner-Burton EM *Making Human Rights a Reality* (2013) 22.

³⁴⁷ Simmons BA *Mobilizing for Human Rights: International Law in Domestic Politics* (2009) 98.

³⁴⁸ Sivakumaran S *The Law of Non-International Armed Conflict* (2012) Oxford, UK: Oxford University Press

cases, exceptional brutality, and a vague awareness of the ICC's jurisdiction lead rebel groups to have a lower expectation of deterrence. However, theoretically, the ICC has also changed the legal environment in which rebels operate. The ICC has the authority to investigate situations involving both state and nonstate actors within its jurisdiction, so rebels may be formally subject to enhanced prosecutorial deterrence, as state officers. Approximately half of the ICC's indicted individuals are rebel-group leaders. Meanwhile, rebel groups may not be as well organized as government officials involved in court operations, which may reduce the effectiveness of prosecution deterrence.

According to the social deterrence theory, some rebels are more deferrable than others. Civil war literature suggests that the effectiveness of any deterrent effect will be determined by how well a group is able to command and control its troops.³⁴⁹

3.4.5.1 The effects of both social and prosecutorial deterrence

The study by Simmons and Jo critically examines the widespread belief that the ICC is incapable of punishing or deterring atrocity perpetrators. Whether for good or worst, the Court also is an irritant for peace-making. Their goal is to determine whether the ICC can deter civilian killings systematically. By using behavioural theories and economic models for deterring crime, they focus only on general deterrence, not specific deterrence. To measure those mechanisms' effects on government forces and rebels, they isolate three mechanisms: direct deterrence, indirect prosecutorial deterrence, and social deterrence. The dataset includes 297 government-rebel dyads from states that experienced some civil wars. In states subject to the ICC's jurisdiction, for example, civilian killings have declined after the Rome Statute came into effect, indicating positive deterrence effects.

It is interesting to note that Simmons and Jo's study identifies conditions for social deterrence. Whether the international community is mobilizing human rights groups to advocate for justice and whether government forces are dependent on foreign assistance and trade influence social deterrence for government forces. Social deterrence will only be effective against rebel groups that have governance goals. Simmons pointed out that the mechanism cannot deter criminals if they do not care about social capital.

³⁴⁹ Jo H & Thomson C 'Legitimacy and Compliance with International Law: Access to Detainees in Civil Conflicts 1991-2006' (2014) 44 (2) *British Journal of Political Science* 329.

3.5 ICC'S CAPACITY TO PREVENT ATROCITIES

The belief that the ICC can deter future atrocities by punishing and prosecuting those responsible for past atrocities is rooted in national theories of legal deterrence. The utilitarian theory of offending, derived from Beccaria, Bentham, and Feuerbach, suggests that the decision to commit a crime is based on a cost benefit analysis.³⁵⁰ Crime is only committed when the expected benefits outweigh the expected costs for the potential offender.³⁵¹ In this way, a threat of legal sanctions can deter crime by increasing these expected costs sufficiently.³⁵² As a result, the deterrent effect of a particular sanction is based on both the probability and severity of punishment expected by the potential criminal.³⁵³ Based on this economic model, the sanction's target is expected to make an informed decision about the risks and rewards of carrying out the sanctioned criminal act.

3.5.1 ICC's Independent Deterrent Impact

In its investigations and prosecutions, the ICC may reach far beyond those states that are parties to the Rome Statute. The Court has jurisdiction over alleged crimes committed by nationals of states parties and crimes committed on their territories. In addition, states are encouraged to prosecute crimes within their jurisdiction under the complementarity principle. The Court only considers involvement when the state is truly incapable or unwilling to perform its duties. The ICC's global reach, in which the threat of investigation and prosecution always looms large for many states, provides the court with a useful deterrent power that is rarely observed in the human rights regime.³⁵⁴ Unlike ad hoc tribunals, which have finite jurisdictions and timelines, the ICC is a permanent institution that will ensure those it indicts will have the sword of Damocles hanging over them for as long as they go unpunished.³⁵⁵ Therefore, there are reasons to believe that the ICC can exert a deterrent effect.

To enable national prosecutions, states parties are required to provide for individual criminal liability for crimes under the jurisdiction of the Court. In addition to demonstrating their commitment to the Rome Statute, states are expected to demonstrate their domestic courts have

³⁵⁰ Bentham J *The Principles of Morals and Legislation* (1988) 88.

³⁵¹ Paternoster R 'How Much Do We Really Know About Criminal Deterrence?' (2010) 3 *The Journal of Criminal Law and Criminology* 779.

³⁵² Bonanno A 'The Economic Analysis of Offender's Choice: Old and New Insights' (2006) 53 (2) *Rivista Internazionale Di Scienze Economiche E Commerciali* 197.

³⁵³ Keenan PJ 'The New Deterrence: Crime and Policy in the Age of Globalization' (2006) 91 *The Iowa Law Review* 509.

³⁵⁴ Alexander JF 'The international criminal court and the prevention of atrocities: predicting the court's impact' *Villanova Law Review* 54(1) (2009) 10.

³⁵⁵ Alexander JF 'The international criminal court and the prevention of atrocities: predicting the court's impact' *Villanova Law Review* 54(1) (2009) 10.

the capacity to carry out these duties.³⁵⁶ In many nations that have pledged to uphold human rights, failure to investigate allegations of these crimes could result in political backlash on the domestic and international level.³⁵⁷ By enhancing the possibility of domestic prosecution, which is much more likely than involvement by the ICC, the ICC should gain a greater deterrent effect.

If the ICC investigates and prosecutes perpetrators, not only do those accused face imprisonment, but also international condemnation and isolation.³⁵⁸ Human rights organizations, powerful members of the international community, and political isolation may pursue state leaders who commit such crimes, and especially those that refuse to cooperate with the ICC.³⁵⁹ Leaders' authority can be affected by such international sanctions on a domestic level as well. In such a situation, regime opponents might feel emboldened to challenge the leaders.³⁶⁰ Due to this, there are potentially dangerous risks inherent in a failure to cooperate with the ICC that should alter the calculus by which most leaders make their decisions.³⁶¹ The ICC deterrence should be enhanced by such risks.

Any leader who doubts the ability of international justice to prevail should consider the track record of the ICC thus far, as well as the record of ad hoc tribunals that have apprehended nearly all those they indicted. It is reasonable to assume that the establishment of the ICC will directly contribute to deterring human rights abuses, since such leaders are at risk of arrest, removal, or loss of power. It does not mean that the ICC will be successful. Although it continues to seek arrests of many of the most prominent individuals in its target states, it has significant potential that should be evaluated through use of appropriate data.³⁶² As a result, the ICC is theoretically capable of deterring human rights abuses. For the ICC to have an impact on human rights abuses, states must demonstrate both domestically and internationally their commitment to the rule of law.

³⁵⁶ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 324.

³⁵⁷ Paternoster R 'How Much Do We Really Know About Criminal Deterrence?' 3 (2010) *The Journal of Criminal Law and Criminology* 779.

³⁵⁸ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 324.

³⁵⁹ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 324.

³⁶⁰ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 324.

³⁶¹ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 324.

³⁶² Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 324.

3.5.2 Domestic rule of law

State behaviour in relation to the Rome Statute is characterized by the same tensions that exist between international law and state sovereignty.³⁶³ Ratifying the Rome Statute is the first step toward ensuring that states are compliant with its tenets.³⁶⁴ In order to prevent agents of the state from carrying out human rights abuses, states must also be committed to the rule of law within their own borders. It is the leaders of a state who must regulate the behaviour of agents who have been entrusted with implementing its policies - that is, those people who act as the interface between the government, military, or any other state actor and the public. To comply with international law and prevent abuse, state leaders must ensure that the behaviour of these individuals does not result in actions that violate it.³⁶⁵ To prevent subordinates from violating international law, leaders must show a real and verifiable commitment to the rule of law domestically.

As stated in the Rome Statute, non-punishment of such acts is a form of superior liability.³⁶⁶ By failing to punish, the Court and subordinates may well perceive that the action was condoned. Article 29 of the Rome Statute states that; 'With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, because of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.'³⁶⁷

³⁶³ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) Civil Wars 326.

³⁶⁴ Rome Statute Article 125 (2).

³⁶⁵ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) Civil Wars 326.

³⁶⁶ Rome Statute Article 28.

³⁶⁷ Rome Statute Article 28 (b).

As a result, leaders may still be held liable even if the evidence supporting their actions is indirect. If it is determined the State in question has demonstrated a genuine inability or unwillingness to carry out the investigation or prosecution, the ICC may investigate alleged crimes that have not been appropriately addressed by the proper authorities.³⁶⁸ As such, leaders have a responsibility to ensure such mechanisms are in place and implemented. The ICC is unlikely to abandon a case because of blatant attempts to evade responsibility.

For justice to be carried out, as well as seen to be done by the international community, a functional and legitimate criminal justice system and adherence to the rule of law are essential. By observing the rule of law, the government does not only imply that it takes seriously fairness, transparency, and quality in its interactions with citizens, but also that it pays attention to the principles of international agreements it has signed, like the Rome Statute.³⁶⁹ In these circumstances, merely committing to the rule of law on paper is not sufficient. Instead, states should aim to have both signed the Rome Statute and have been recognized by neutral observers as more committed to the rule of law so that they suffer fewer human rights violations.³⁷⁰

3.5.3 International law

It is apparent that many states still harbour reservations about the Rome Statute once the states are expected to align their post-ratification behaviour to the Rome Statute's tenets. For the ICC to succeed and be able to prosecute the world's worst human rights violators, more legislation needs to be passed and states must avoid actions that would undermine the Statute.

The Rome Statute embodies dual jurisdiction over international crimes, based on the concept of complementarity.³⁷¹ The ICC is a court of last resort. To protect their sovereignty, states ensured they would be the first to prosecute alleged ICC crimes.³⁷² In fact, the Rome Statute stipulates that only when states cannot or will not prosecute their own citizens or crimes committed on their soil, would the ICC take steps to initiate an investigation.³⁷³ The ICC's resources are also inadequate to handle every case that arises from the states parties as the court

³⁶⁸ Rome Statute Article 17 (1) (a).

³⁶⁹ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 327.

³⁷⁰ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 327.

³⁷¹ Solera O 'Complementary jurisdiction and international criminal justice' (2002) 84 (845) *The International Committee of the Red Cross* 148.

³⁷² Rome Statute Article 17.

³⁷³ Rome Statute Article 17 (1) (a).

of first and last resort.³⁷⁴ To ensure that such a system works as intended, it is critical for states to take their commitment to prosecute those cases over which they have jurisdiction seriously. States must enact legislation implementing the Rome Statute to apply criminal penalties to the crimes enumerated in its provisions in their domestic jurisdictions.³⁷⁵ Thus, enacting such legislation and making it possible for their criminal justice systems to prosecute the relevant offenses indicates to what extent states take their commitment to the ICC and prevention of large-scale human rights abuses seriously.³⁷⁶

To fulfil the responsibilities of the Court and its personnel, including in the field when investigating alleged violations of international law, they require the privileges and immunities accorded diplomats and UN personnel.³⁷⁷ In order to collect evidence, interview witnesses, and meet with government and non-governmental actors, ICC personnel must travel to potentially dangerous and unstable environments.³⁷⁸ The nature of such activities is very sensitive, striking at the heart of the security concerns of the state and its leaders.³⁷⁹ The end result of ICC investigators' activities could result in criminal indictments or people under investigation being detained in the Hague, which may not be welcomed with open arms.³⁸⁰ States parties have been asked to ratify an agreement on privileges and immunities for ICC personnel so that they may carry out their responsibilities safely and effectively.³⁸¹ Not all states have ratified the agreement, this is an indication of how serious a state is about the ICC.

States with independent judiciaries and democratic governments are more likely to ratify the Statute.³⁸² Nations that have a large proportion of their citizens under arms, are surrounded by conflict and unrest in neighbouring states, or that may be involved in international conflict may

³⁷⁴ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 327.

³⁷⁵ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 327.

³⁷⁶ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 327.

³⁷⁷ Akande D 'International Law Immunities and the International Criminal Court' (2002) 98 (3) *The American Journal of International Law* 426.

³⁷⁸ Akande D 'International Law Immunities and the International Criminal Court' (2002) 98 (3) *The American Journal of International Law* 427.

³⁷⁹ Akande D 'International Law Immunities and the International Criminal Court' (2002) 98 (3) *The American Journal of International Law* 427.

³⁸⁰ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 327.

³⁸¹ Akande D 'International Law Immunities and the International Criminal Court' (2002) 98 (3) *The American Journal of International Law* 427.

³⁸² Alexander JF 'The international criminal court and the prevention of atrocities: predicting the court's impact' 54 (1) (2009) *Villanova Law Review* 36.

be more likely to engage in violence that might violate the Rome Statute.³⁸³ Therefore, it should be expected that these states would be less likely to ratify the Statute because of this risk. Generally, the more rule of law a state has, the better their human rights record, and the less likely they will have to deal with internal, political violence.³⁸⁴ In order to advance human rights protections, state ratification of the Rome Statute is a necessary first step. It is imperative for states to ensure that their legal systems are functionally effective and impartial in order for the ICC to exercise deterrence and reduce the likelihood of human rights abuses.³⁸⁵ It is true that the complementarity principle of the ICC depends on the willingness of national governments to bring criminal proceedings against those individuals who violate international law under the jurisdiction of the ICC.³⁸⁶ That measure also has a significant impact on the situation.

3.6 CHALLENGES IN MEASURING DETERRENCE

Criminal law continues to struggle to achieve deterrence, like many of its other goals. According to some, measuring deterrence is like proving negativity, proving that nothing happened.³⁸⁷ An obvious practical answer may suffice: the ICC, like many other tribunals, becomes involved in a case after many crimes have been committed. When it comes to this situation, there is rarely just a true negative involved. It is important to note that past and ongoing crimes provide good indicators of future crimes to come, helping to shed light on what would have happened had the relevant tribunal not been involved. In the words of former US Ambassador at Large for War Crimes David Scheffer, 'It is as unprovable to say there will be no deterrence at all as to say there will be deterrence, what are the ways in which you can prove the state of mind of an individual who has committed these crimes?'³⁸⁸

There are many causes for deterrence, and determining exactly what causes it depends on a variety of factors. Complex social phenomena such as deterrence are difficult, so much so that

³⁸³ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 329.

³⁸⁴ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 330.

³⁸⁵ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 330.

³⁸⁶ Alexander JF 'The international criminal court and the prevention of atrocities: predicting the court's impact' 54 (1) (2009) *Villanova Law Review* 36.

³⁸⁶ Meernik J 'The International Criminal Court and the Deterrence of Human Rights Atrocities' (2015) 17 (3) *Civil Wars* 324.

³⁸⁷ Paternoster R 'How Much Do We Really Know About Criminal Deterrence?' (2010) 3 *The Journal of Criminal Law and Criminology* 817.

³⁸⁸ David S 'Should the United States Join the International Criminal Court?' in Davis *UC Journal of International Law & Political Science* (2003) 45.

they may be impossible, to verify precisely. A major objective of the ICC's founders was not to serve as a sole deterrent, but to "put an end to impunity for those who commit such crimes, thereby contributing to the prevention of such crimes".³⁸⁹

3.7 DETERRENT EFFECT OF THE ICC DURING WAR

The impunity enjoyed by suspected war criminals and human rights violators was considerable until the recent wave of prosecutions for systematic atrocity crimes.³⁹⁰ Human rights abusers long enjoyed immunity from prosecution until the ICTY, ICTR, and the special courts for Cambodia and Sierra Leone began slowly chipping away at human rights abusers' immunity.³⁹¹ Governments around the world have also acted in domestic courts to hold human rights abusers accountable.³⁹²

Sceptics and pessimists are the two major camps that comprise the social science literature on international justice during war.³⁹³ Despite substantial challenges in securing the prosecutorial support necessary to pursue suspected war criminals, many sceptics maintain that ICTs would not deter international criminal law violations during wartime.³⁹⁴ To secure access to information, evidence, witnesses, and suspects, ICTs must rely on unwilling third parties, because they do not have police forces. The majority of combatants will not be prosecuted if they commit atrocities, so they have little to fear.³⁹⁵ It will also not suffice to convince some combatants to alter their decisions regarding violence against civilians if wartime ICTs are successful in securing prosecutorial support.³⁹⁶ It has been argued, for example, by some scholars that most combatants do not operate rationally, but rather in a world where emotions, even paranoia, are present.³⁹⁷ There are those who argue that, despite combatants' rationality, they may not be deterrable due to the likelihood of their facing far more urgent and life-

³⁸⁹ Rome Statute Preamble.

³⁹⁰ Sikkink K *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011) 59.

³⁹¹ Roht-Arriaza N & Javier M *Transitional Justice in the Twenty- First Century: Beyond Truth versus Justice* ed (2006) 62.

³⁹² Sikkink K *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011) 59.

³⁹³ McAllister JR 'Deterring Wartime Atrocities: Hard Lessons from the Yugoslav Tribunal' (2020) 44 (3) *International Security* 87.

³⁹⁴ McAllister JR 'Deterring Wartime Atrocities: Hard Lessons from the Yugoslav Tribunal' (2020) 44 (3) *International Security* 87.

³⁹⁵ Mendeloff D 'Punish or Persuade? The Compellence Logic of International Criminal Court Intervention in Cases of Ongoing Civilian Violence' (2017) 20 *International Studies Review* 395.

³⁹⁶ McAllister JR 'Deterring Wartime Atrocities: Hard Lessons from the Yugoslav Tribunal' (2020) 44 (3) *International Security* 88.

³⁹⁷ Stahn C "The Future of International Criminal Justice," (2009) 4 (3) *Hague Justice Journal* 257.

threatening issues than possible prosecution before a tribunal. In any case, they would not be faced with particularly severe sentences even if they were successfully prosecuted.³⁹⁸

A pessimist would contend that if a wartime ICT could make arrests without enough prosecutorial support, weak combatants might escalate attacks on civilians or engage in escalatory gambles for resurrection.³⁹⁹ As a general rule, victors and relatively more powerful actors tend to be jailed less frequently than others. Thus, combatant leaders are prone to abuse violence against civilians to avoid being prosecuted by international criminal authorities, especially if they are weak compared to their opponents.⁴⁰⁰ It is possible that victorious leaders will face international criminal prosecution. However, they will have numerous resources and channels of influence that they can utilize in their defence.

International law scholars and liberal international relations scholars argue that ICTs can deter atrocities against civilians, especially when they can guarantee legal punishment in the event of a crime.⁴⁰¹ These scholars are optimists. It has been demonstrated that by using game-theoretic models, the ICC is capable of deterring atrocities if it is able to press states to deny asylum to suspected war criminals.⁴⁰² Other optimists assert that legal punishment becomes more likely when ICTs are backed by Western actors, even for the worst offenders, and may thereby serve as a deterrent.⁴⁰³

There is some evidence to suggest that international tribunals deter atrocities through large-n work. According to some researchers, overcoming political obstacles to prosecution can significantly reduce human rights violations in countries subject to the jurisdiction of international or domestic courts.⁴⁰⁴ There are also other studies that show that governments that ratify the Rome Statute tend to violate fewer human rights when they commit to cooperate with the ICC, at least on paper.⁴⁰⁵ Researchers have also demonstrated a similar effect, especially

³⁹⁸ Mendeloff D 'Punish or Persuade? The Compellence Logic of International Criminal Court Intervention in Cases of Ongoing Civilian Violence' (2017) 20 *International Studies Review* 395.

³⁹⁹ George WD & David MR 'Conflict, Agency, and Gambling for Resurrection: The Principal-Agent Problem Goes to War' (1994) 38 (2) *American Journal of Political Science* 366.

⁴⁰⁰ McAllister JR 'Deterring Wartime Atrocities: Hard Lessons from the Yugoslav Tribunal' (2020) 44 (3) *International Security* 88.

⁴⁰¹ McAllister JR 'Deterring Wartime Atrocities: Hard Lessons from the Yugoslav Tribunal' (2020) 44 (3) *International Security* 88.

⁴⁰² Gilligan MJ 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime' (2006) 60(i) *International Organization* (2006) 937.

⁴⁰³ Meernik J 'Reaching Inside the State: International Law and Superior Liability (2004) 5 (4) *International Studies Perspectives* 357.

⁴⁰⁴ Mitchell SM & Emilia JP *Domestic Law Goes Global: Legal Traditions and International Courts* (2011) 24.

⁴⁰⁵ Benjamin JA 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' *Journal of Conflict Resolution* (2018) 7.

when governments make changes to their legal systems to incorporate the crimes and general principles contained in the Rome Statute.⁴⁰⁶ According to research by Hyeran Jo and Beth Simmons, as the ICC exhibits its "will and capacity to prosecute" by examining, investigating, and indicting suspected offenders, it is further believed to deter rebel and government forces.⁴⁰⁷ Furthermore, Jo and Simmons conclude that governments and centrally controlled, secessionist rebel forces face increased normative pressures in countries that ratified the Rome Statute.⁴⁰⁸ Furthermore, Courtney Hillebrecht notes that international support for ICC involvement during the Libyan crisis, in conjunction with ongoing efforts by ICC officials to monitor, investigate, and prosecute violations of international law, reduced civilian casualties in Libya, especially those caused by government forces.⁴⁰⁹

A qualitative study has also revealed that when ICC officials have been able to investigate and apprehend top rebel leaders, they have prevented some rebel forces from employing widespread violence against civilians.⁴¹⁰ According to Christopher Rudolph he found that prosecution support, particularly from great powers, as well as past success in apprehending high-level criminals, could increase the effectiveness of ICTs as deterrents.⁴¹¹

Even without full enforcement capabilities, the ICC and similar regimes can deter, by modifying the long-term incentives of both leaders and potential allies who might provide refuge.⁴¹² In spite of the incapacity of international criminal tribunals to execute all arrest warrants and build uniformly successful cases, they can have a deterrent effect in reshaping political elites' calculations about their long-term reputations.⁴¹³ The international community must provide the political and financial capital required to initiate, investigate, and try cases at the ICC in order for the threat of accountability to be credible and for the ICC to serve as a deterrent. Most supporters of international criminal justice do not support accountability for

⁴⁰⁶ Dancy G & Montal F 'Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions' (2017) 111 (3) *American Journal of International Law* 11.

⁴⁰⁷ Hyeran, J & Simmons BA 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 419.

⁴⁰⁸ Hyeran, J & Simmons BA 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 419.

⁴⁰⁹ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) *International Interactions* 618.

⁴¹⁰ Wegner PS *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace–Justice Divide* (2015) 36.

⁴¹¹ Rudolph C *Power and Principle: The Politics of International Criminal Courts* (2017) 43.

⁴¹² Gilligan MJ 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime' (2006) 60(4) *International Organization* 936.

⁴¹³ Akhavan P 'Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism' (2009) 31(3) *Human Rights Quarterly* 632.

their own citizens.⁴¹⁴ As a result, some human rights abusers may believe that their positions in international politics and trade shields them from international justice.

3.8 INTERNATIONAL CRIMINAL TRIBUNALS DETERRENCE EFFECT IN TERMS OF ENFORCEMENT

A limited enforcement mechanism governs the ICC, and it relies primarily on two elements to make sure its decisions are implemented. A first requirement of the Rome Statute is that all State Parties must support the ICC's work and enforce its indictments.⁴¹⁵ The ICC may also refer the matter to the Assembly of States Parties, its governing body, if a State Party fails to meet its obligations to the ICC.⁴¹⁶ In spite of this, the ICC's enforcement mechanism remains a subject of debate, and further research will need to be done to determine its effectiveness

No police or military forces are available at the ICC to arrest suspects or enforce its orders, the ICC is entirely dependent on states to enforce its orders.⁴¹⁷ For example, when he was a prosecutor in Buenos Aires, ICC Prosecutor Luis Moreno-Ocampo had thousands of police officers working for him, but now that he had become responsible for half the world, he had none.⁴¹⁸ It is believed by some scholars that institutional mechanisms impact the ability of the ICC to prosecute.⁴¹⁹ A lack of enforcement mechanisms, for example, affects the ICC's ability to prosecute crimes due to its limited institutional powers.⁴²⁰ An arrest warrant cannot be enforced when states refuse to comply with the ICC, which makes prosecution difficult. A limited capacity of the ICC can also be seen in its inability to force these states to comply. A state's willingness to cooperate, however, makes it easier for the ICC to investigate and confirm charges.

According to Clarke, the ICC relies heavily on states for prosecution, which determines when and where it can intervene.⁴²¹ ICC prosecutions are only initiated when national governments refuse or are unable to do so. It is important to note that the ICC relies heavily on states, which

⁴¹⁴ Bass GJ *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2001) 39.

⁴¹⁵ Rome Statute Article 103.

⁴¹⁶ Rome Statute Article 87 (7).

⁴¹⁷ Rome Statute Article 103.

⁴¹⁸ Ocampo LM 'Statement to the United Nations Security Council' pursuant to UNSCR 1593 (2008).

⁴¹⁹ Goodman SJ 'The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations' (2020) 12 (09) *Inquiries journal* 4.

⁴²⁰ Goodman SJ 'The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations' (2020) 12 (09) *Inquiries journal* 4.

⁴²¹ Clarke KM *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009) 5.

may explain why it can confirm charges in some cases, but not in others.⁴²² The ICC cannot hold a Confirmation of Charges Hearing if states refuse to cooperate with it. In Sudan, the ICC was unable to get the Confirmation of Charges Hearing because the state refused to extradite officials.⁴²³ A similar position is taken by Jordan Paust, who argues that the institution's limited jurisdiction makes it difficult for it to prosecute crimes.⁴²⁴ Due to limited political capital, the Prosecutor must choose carefully which cases to investigate, according to Paust.⁴²⁵ It would explain why some situations have not. It fails to explain why some cases achieve Confirmation of Charges and others do not.

During the first several years of its operation, the ICTY struggled to secure custody of most of its key suspects.⁴²⁶ However, NATO-led Stabilization Forces arrested most, but not all, of those indicted by the ICTY.⁴²⁷ Generally, the fewer perpetrators who are prosecuted, the less certainty of punishment and the consequent deterrent effect can be expected. Even though there can be difficulties getting physical control over suspects, the duration of international criminal trials often limits how many people can be tried. These challenges are illustrated by the experiences of ad hoc tribunals. Compared to the thousands of perpetrators of atrocities committed in the former Yugoslavia and Rwanda, these two tribunals have carried out a small number of prosecutions and convictions themselves.⁴²⁸ Many cases have been tried by national and local courts in both countries. The prolonged cases of many ad hoc tribunals, which often take years, explain in part why relatively few trials have taken place.⁴²⁹ Tribunals are often criticized for their sometimes frustratingly slow pace, not only because of the complexity of the cases, but also because they rigorously protect the rights of defendants.⁴³⁰ Trials require

⁴²² Clarke KM *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009) 6.

⁴²³ Clarke KM *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009) 6.

⁴²⁴ Paust JJ 'Crimes Within The Limited Jurisdiction Of The International Criminal Court.' (2010) 43 (3) *John Marshall Law Review* 689.

⁴²⁵ Paust JJ 'Crimes Within The Limited Jurisdiction Of The International Criminal Court.' (2010) 43 (3) *John Marshall Law Review* 689.

⁴²⁶ Kerr R *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (2004) 149.

⁴²⁷ Kaul HP 'The International Criminal Court: Current Challenges and Perspectives' *Washington University Global Studies Law Review* 6 (2007) 579.

⁴²⁸ Mutabazi E *The United Nations ad hoc Tribunals' effectiveness in prosecuting international crimes* (Unpublished Doctors pf Law University of South Africa 2014) 270.

⁴²⁹ Mutabazi E *The United Nations ad hoc Tribunals' effectiveness in prosecuting international crimes* (Unpublished Doctors pf Law University of South Africa 2014) 270.

⁴³⁰ Galbraith J 'The Pace of International Criminal Justice' (2009) 31 (1) *Michigan Journal of International Law* 82.

more resources, which decreases the number of trials that can be held, decreasing the likelihood of punishment for an offender.⁴³¹

Deterrence is affected by the importance of the perpetrators prosecuted.⁴³² Despite the fact that the ICTR has tried relatively few suspects and convicts, the list of suspects and convicts includes several prominent figures, several of Rwanda's leaders, such as Jean Kambanda.⁴³³ It should be easier to deter others to commit similar crimes by prosecuting higher-ranking suspects. In 2000 a commentator claimed that "the most obvious lesson to be learned from the experience of the ICTY is that the people with the highest levels of political and military responsibility must be indicted and arrested."⁴³⁴ Patricia Wald, former judge of the ICTY, noted that in order to justify the existence of ad hoc tribunals, there were too many low- and medium-level defendants indicted at the beginning.⁴³⁵ In contrast to the ICTY and ICTR, the ICC and its first prosecutor, Mr. Moreno-Ocampo, have focused the court's efforts on the prominent suspects from the beginning.⁴³⁶ As part of its Rome Statute, the ICC is given responsibility for investigating "the most serious crimes affecting the international community"⁴³⁷ and for deciding whether a case is admissible if it has "sufficient gravity."⁴³⁸ Taking these provisions literally, the Office of the Prosecutor interprets them as implying that it should put its resources on the people who allegedly committed the crimes, such as the leaders of States or organisations.⁴³⁹ When ICC prosecution appears likely to target variously situated perpetrators, the deterrent effect on them is naturally impacted by the prosecutor's intentions.

3.9 DETERRENT IMPACT FOR HEADS OF STATE AND HIGH-RANKING OFFICIALS

There have been sitting heads of state that were subjected to international tribunal scrutiny. This demonstrates that international jurisprudence does not exempt sitting heads of state from

⁴³¹ Wippman D 'Atrocities, Deterrence, and the Limits of International Justice' (1993) 23 (2) *Fordham International Law Journal* 23

⁴³² Gegout C 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34 (5) *Third World Quarterly* 804

⁴³³ Human Rights Watch 'Rwanda: Justice After Genocide—20 Years On' Available at: <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years> (Accessed 30 April 2022).

⁴³⁴ Coliver S 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina' In *International crimes, peace and human rights in crimes, peace and human rights: The role of the International Criminal Court* (2000) 22.

⁴³⁵ Wald PM 'International Criminal Courts-A Stormy Adolescence' *Virginia Journal of International Law* 46 (2006) 321.

⁴³⁶ Alexander JF 'The international criminal court and the prevention of atrocities: predicting the court's impact' *Villanova Law Review* 54(1) (2009) 14.

⁴³⁷ Rome Statute Article 5.

⁴³⁸ Rome Statute Article 17.

⁴³⁹ International Criminal Court Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor (2003), <http://www.icc-cpi.int/library/organs/otp/030905-Policy-Paper.pdf> (Accessed 30 April 2022).

scrutiny.⁴⁴⁰ From an institutional perspective, the practice was developed along with the proliferation of UN-sponsored ad hoc tribunals in the mid-1990s and affirms that crimes that are within their jurisdiction's magnitude require justice regardless of their location or perpetrator.⁴⁴¹ There is no institution that exemplifies this practice more than the ICC. Article 27 of the Rome Statute clarifies this point and states:

(1) "This Statute shall apply equally to all persons without any distinction based on official capacity. Official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".⁴⁴²

The official status of an individual, such as the head of government or state of a State Party to the Rome Statute, does not grant immunity from prosecution for the most serious international crimes.

Politicians are unlikely to be deterred by either specific or general deterrence. There are several reasons why leaders may be harder to deter in terms of general deterrence.⁴⁴³ Their belief is that they are immune from justice due to their political or socio-economic status. In addition to this, they often hold deep-seated personal beliefs that motivate them to violate human rights. People who have the most to lose are more easily deterred than those who have the least to lose. There is a possibility that leaders feel they are too powerful to be prosecuted.⁴⁴⁴ It is common for political and social leaders to become subject to the jurisdiction of an ICT after having lost most of their power and influence.

A war lord or authoritarian leader may not see their own removal from power as a legitimate possibility due to the fact that ICT's usually cannot prosecute leaders who have incited or

⁴⁴⁰ Cacciatori M 'When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents' (2018) 12 *International Journal of Transitional Justice* 389.

⁴⁴¹ Cacciatori M 'When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents' (2018) 12 *International Journal of Transitional Justice* 389.

⁴⁴² Rome Statute, Article 27.

⁴⁴³ Lehr R 'Do International Criminal Tribunals have a Deterrent Effect on Human Rights Abuses?' (2017) 250 *War Crimes Memoranda* 8.

⁴⁴⁴ Jenks C & Acquaviva G 'Debate: The Role of International Criminal Justice in Fostering Compliance with International Humanitarian Law, (2014) 96 *International Review of the Red Cross* 196.

ordered human rights abuses until after the leaders have been ousted.⁴⁴⁵ The lead prosecutor for the Nuremberg trials, Robert Jackson, said, ‘Architects of war seldom think about losing and facing accountability’.⁴⁴⁶ In spite of the threat of prosecution, political leaders are still ordering and carrying out large-scale human rights violations owing to their egos blinding them to factors that might deter them from committing large scale atrocities.⁴⁴⁷

The strong personal beliefs of some individuals may also prevent leader deterrence, regardless of the severe consequences of their actions.⁴⁴⁸ It is rationally possible for leaders to risk any punishment to achieve their objectives if they are motivated by their religious or political beliefs, such as the Hutu nationalists who incited the Rwandan genocide and ordered it.

The Court has the potential to provide a measure of deterrence, and there is a theoretical basis for believing it can, however, its current resources and jurisdictional shortcomings undermine this potential. Rome Statute violations occur within hierarchical organizations. This type of rational calculation is central to the criminal calculus, and deterrence theorists argue that laws and penalties can alter it.⁴⁴⁹ However, most of this calculation is based on factors related to certainty.⁴⁵⁰ Despite the fact that states' commitments to the ICC are realistic, the Court has limited jurisdiction, capacity, and enforcement, as well as a lack of empirical support for general deterrence, the chances of prosecution are low for victims of state-led atrocities worldwide.⁴⁵¹

A growing awareness of ICC prosecution may be influencing the decision-making calculus of national leaders, for better or worse. There is no reason to conclude that, in certain circumstances, such a fear of ICC prosecution may also act to curb abuses and shift the calculus in favour of avoiding war crimes or crimes against humanity, as long as such a fear factors into a regime's determination to cling to power. Even though there are many instances where criminal prosecution has failed to deter perpetrators of crimes against humanity or atrocities,

⁴⁴⁵ Lehr R ‘Do International Criminal Tribunals have a Deterrent Effect on Human Rights Abuses?’ (2017) 250 *War Crimes Memoranda* 9.

⁴⁴⁶ Lehr R ‘Do International Criminal Tribunals have a Deterrent Effect on Human Rights Abuses?’ (2017) 250 *War Crimes Memoranda* 9.

⁴⁴⁷ Lehr R ‘Do International Criminal Tribunals have a Deterrent Effect on Human Rights Abuses?’ (2017) 250 *War Crimes Memoranda* 9.

⁴⁴⁸ Jenks C & Acquaviva G ‘Debate: The Role of International Criminal Justice in Fostering Compliance with International Humanitarian Law, (2014) 96 *International Review of the Red Cross* 195.

⁴⁴⁹ Mullins CW& Rothe DL ‘The ability of the international criminal court to deter violations of international criminal law: theoretical assessment’ 10 (5) *International Criminal Law Review* (2010) 781.

⁴⁵⁰ Mullins CW& Rothe DL ‘The ability of the international criminal court to deter violations of international criminal law: theoretical assessment’ 10 (5) *International Criminal Law Review* (2010) 781.

⁴⁵¹ Mullins CW& Rothe DL ‘The ability of the international criminal court to deter violations of international criminal law: theoretical assessment’ 10 (5) *International Criminal Law Review* (2010) 781.

this does not prove that deterrence is ineffective. In opposition to deterrence, critics often emphasize "specific deterrence", which refers to the possibility that prosecutions may discourage future war crimes or crimes against humanity by leaders who have already committed them.⁴⁵² The reality is, however, that prosecutions in these situations are unlikely to deter. It is more likely that a ruler, or a ruling party, will see prosecution by the ICC as an existential threat, thus seeking to enshrine itself and maintain or even escalate abusive or criminal campaigns in such circumstances. It was evident in Sudan where President Bashir's arrest by the ICC is not preventing attacks on civilians, either in Darfur or South Kordofan.⁴⁵³

There were instances where heads of states were convicted for their crimes. In April 2012, former Liberian president Charles Taylor was convicted on 11 charges related to his involvement in the Sierra Leone Civil War, including terrorism, murder, and rape.⁴⁵⁴ Upon his conviction, he was sentenced to 50 years in prison.⁴⁵⁵ Initially, the trial was held in a courtroom of the ICC, but later in a courtroom of Special Court for Sierra Leone as a result of scheduling conflicts caused by the ICC's increased caseload.⁴⁵⁶ After a 50-year sentence is imposed on Charles Taylor, the Appeals Chamber upholds his conviction.⁴⁵⁷ It is clear that the ICC is able to hold former heads of state accountable for their involvement in international crimes as demonstrated in this case.

In another case, the Extraordinary African Chambers in Senegal tried and convicted Hissène Habré between 1982 and 1990 for crimes against humanity, war crimes, and torture committed in Chad.⁴⁵⁸ Under universal jurisdiction, the trial was conducted even though the crimes were committed abroad, by foreigners, and against foreign victims.⁴⁵⁹ In addition to funding from the African Union, European Union, Chad, US, and several European nations, the trial was also supported by the US. On appeal, Habré's verdict was upheld, and he was sentenced to life in

⁴⁵² Lehr R 'Do International Criminal Tribunals have a Deterrent Effect on Human Rights Abuses?' (2017) 250 *War Crimes Memoranda* 9.

⁴⁵³ Mudukuti, A 'Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal' (2020) 114 (1) *American Journal of International Law* 109.

⁴⁵⁴ Jalloh CC 'The Law and Politics of the Charles Taylor Case' (2015) 43 (3) *Denver Journal of International Law and Policy* 229.

⁴⁵⁵ Jalloh CC 'The Law and Politics of the Charles Taylor Case' (2015) 43 (3) *Denver Journal of International Law and Policy* 229.

⁴⁵⁶ Statute of the Special Court for Sierra Leone (2002) Preamble.

⁴⁵⁷ Jalloh CC 'The Law and Politics of the Charles Taylor Case' (2015) 43 (3) *Denver Journal of International Law and Policy* 229.

⁴⁵⁸ Sperfeldt C 'The trial against Hissène Habré: networked justice and reparations at the Extraordinary African Chambers' (2017) 21 (9) *The International Journal of Human Rights* 1243.

⁴⁵⁹ Sperfeldt C 'The trial against Hissène Habré: networked justice and reparations at the Extraordinary African Chambers' (2017) 21 (9) *The International Journal of Human Rights* 1246.

prison.⁴⁶⁰ For African states to assume responsibility for prosecuting serious international crimes is recognized as a landmark decision for international justice.

There are also instances where the ICC failed to prosecute heads of state. As a result of his war crimes and crimes against humanity committed in Darfur, Omar al-Bashir, the former president of Sudan, was indicted by the ICC in 2009.⁴⁶¹ Two arrest warrants were issued by the ICC in 2009 and 2010, but he remained at large and was not brought before the court.⁴⁶² According to Sudan's announcement, al-Bashir would be handed over to the ICC for trial in August 2021. However, his case has not yet been resolved.

In more current news, a warrant was issued for the arrest of Russian President Vladimir Putin and Russian official Maria Alekseyevna Lvova-Belova by the ICC on March 17, 2023.⁴⁶³ In addition to unlawful deportations and transfers of children from occupied Ukrainian regions to the Russian Federation, Putin is accused of war crimes.⁴⁶⁴ ICC enforcement mechanisms are limited, and it depends on cooperation with countries around the world. Because Russia is not a member of the ICC and the court does not conduct trials in absentia, anyone charged with a crime must be handed over by Moscow or arrested abroad.⁴⁶⁵ As a significant step forward in international justice, the ICC's decision to issue arrest warrants against Putin could serve as a deterrent to other international criminals in the future.

For the purposes of this paper, I will be focusing on Kenya and Libya as case studies.

3.10 ICC AND DETERRENCE BEYOND HEADS OF STATES AND HIGH-RANKING OFFICIALS

It is important to consider deterrence and the Court beyond the scope of heads of state and high-ranking officials if we are to achieve a global system of justice, as claimed by the Court and proponents of ICJ. Even though the prosecutor's office is not interested in prosecuting foot soldiers now, there is no interest in prosecuting foot soldiers.⁴⁶⁶ A court that symbolizes global

⁴⁶⁰ Chambre Africaine Extraordinaire d'Assises d'Appel 'Le Procureur Général c. Hissein Habré– Arrêt (2017).

⁴⁶¹ Mudukuti, A 'Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal' (2020) 114 (1) *American Journal of International Law* 103.

⁴⁶² Mudukuti, A 'Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal' (2020) 114 (1) *American Journal of International Law* 103.

⁴⁶³ Yaman DK 'Heads of States Before the ICC: On the Arrest Warrant against Putin and Its Consequences' (2023) *Völkerrechtsblog*.

⁴⁶⁴ Yaman DK 'Heads of States Before the ICC: On the Arrest Warrant against Putin and Its Consequences' (2023) *Völkerrechtsblog*.

⁴⁶⁵ Yaman DK 'Heads of States Before the ICC: On the Arrest Warrant against Putin and Its Consequences' (2023) *Völkerrechtsblog*.

⁴⁶⁶ Wippman, D 'Atrocities, deterrence, and the limits of international justice (2017) *Fordham International Law Journal* 468.

justice and aims to ensure global peace should end impunity and serve as a deterrent to high-ranking officials and heads of state. In the interests of justice, the Court may decide they must expand their focus beyond those most responsible.⁴⁶⁷ In the words of the Prosecutor, measuring the Court is not just about what happens inside the Court, it is about how it impacts the world.⁴⁶⁸

By its own admission, the court focuses on convicting those who have committed the most crimes in terms of international criminal law.⁴⁶⁹ Therefore, no action will be taken against middle or lower ranked perpetrators. As a matter of fact, this has been the case in current practice. Despite being a limitation imposed by resources, it continues to extend impunity to large numbers of criminals. Trying only leaders and limiting itself to widespread and systematic violations will not deter on-the-ground soldiers from committing more opportunistic war crimes.⁴⁷⁰ Furthermore, it allows commanders to honestly inform their subordinates that they are not at risk of facing international legal action for following orders to commit atrocities.⁴⁷¹ Therefore, it does not end impunity in its entirety.

To accomplish its mission, the Court aims to build capacity among the states from which it draws cases. States will be assisted in building independent and capable judiciary bodies that can try low and mid-level criminals. Additional aspects of deterrence may emerge if these mission goals are achieved. As a result, there should be investigations on the way in which lower-ranking criminals commit crimes.

3.11 ICC AND DETERRENCE IMPACT OF LOWER-LEVEL PERPETRATORS

Regardless of the extent of the action, if it is simply giving orders to officers for international criminal law violations to be committed within the ranks and file of the troops, individuals are still responsible for carrying out the violence. International law violators are like western street criminals when examined closely.

Offender decision making is characterized by a mixture of rational and irrational processes, according to a substantial body of qualitative literature on street crime. Despite the rational but narrow script that drives the specific elements of offense enactment, decisions to commit offenses are often taken in a strongly irrational context. Offending behaviours are often framed

⁴⁶⁷ Policy Paper on the Interest of Justice, Ref-ICC-OTP-InterestsOfJustice (2007).

⁴⁶⁸ Policy Paper on the Interest of Justice, Ref-ICC-OTP-InterestsOfJustice (2007).

⁴⁶⁹ Policy Paper on the Interest of Justice, Ref-ICC-OTP-InterestsOfJustice (2007).

⁴⁷⁰ Mullins CW& Rothe DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' 10 (5) *International Criminal Law Review* (2010) 782.

⁴⁷¹ Mullins CW& Rothe DL 'The ability of the international criminal court to deter violations of international criminal law: theoretical assessment' 10 (5) *International Criminal Law Review* (2010) 782.

within the context of substance abuse and a phenomenological perception of a pressing need for money, which can obscure a rational evaluation of costs versus benefits.⁴⁷² Offenders who use psychoactive substances to commit their crimes are less rational in their decision-making processes, which further hinders their ability to be rational.⁴⁷³ Combined with intoxication and the criminal subculture, little law is able to deter street crimes.

Examining the context of international criminal law violators on the ground, there are parallels, although not exact duplications. Several Interahamwe have been accused of heavy drinking and marijuana use during their testimony before the ICTR. There was a high rate of drug use among child soldiers in Sierra Leone before combat.⁴⁷⁴ Soldiers are also stressed and agitated during armed conflict situations, which can overpower rational reasoning and result in atrocities.⁴⁷⁵ Due to the minds of the individuals on-the-ground are not using rational decision-making mechanisms, these emotive states short-circuit deterrent effects of law. Therefore, national prosecutions of low-level offenders are likely to be retributive rather than deterrent.

Military activity and life also suggest that there should be a greater emphasis on value-rationality than instrumental rationality. In small groups, interpersonal bonds and the immediate social and interactional context heavily influence how soldiers perceive and act. The prosecution of ground forces is not performed internationally, but rather domestically if at all. In many cases, they are eligible for amnesties. Low level troops may not have the knowledge or understanding of the differences between legal bodies or jurisdictions, even if amnesties state that they do not cover international crimes. As a result, international criminal law in general and the Court in particular should substantially less deter on-the-ground forces.

The end of impunity for war criminals, genocide perpetrators, and crimes against humanity requires much more deterrence than other measures. For the Court to be effective, perceived certainty must become a factor on the ground as well as among high-ranking state officials and militias. The Court risks losing ground it has gained in recent years without a sense of certainty, perceived and real.

Improving the ICC's perceived certainty through enhanced cooperation, efficient prosecutions, and transparent decision-making is essential for the court to effectively deter the commission

⁴⁷² Wright R & Decker S *Burglars on the Job: Streetlife and Residential Break-ins* (1997) 46.

⁴⁷³ Wright R, Brookman F & Bennett T 'The Foreground Dynamics of Street Robbery in Britain' (2006) 46 (1) *British Journal of Criminology* 4.

⁴⁷⁴ Brett R & Specht I *Young Soldiers: Why They Chose to Fight* (2004) 100.

⁴⁷⁵ Dutton DG, Boyanowsky E & Bond MH 'Extreme Mass Homicide: From Military Massacre to Genocide' (2005) *10 Aggression and Violent Behavior* (2005) 437-473.

of international crimes and fulfil its mandate. Addressing the challenges to perceived certainty remains a key priority for the ICC and its supporters.

3.12 CONCLUSION

Aside from the ICC, the Rome Statute system of ICJ around it holds tremendous promise for preventing atrocity crimes. The ICC has the potential to deter conflicts and intervene in actual conflict situations, to contribute to long-term stability with its accountability efforts, and finally to set norms through the Rome Statute. State compliance with the ICC tenets begins with ratification of the Rome Statute. ICC's preventive potential can only be fully realized if states cherish and support it. To achieve the goals of the Rome Statute, nations must act unified in defiance of impunity. It is imperative that states cooperate with the ICC so that investigations, prosecutions, and trials can be conducted effectively and expeditiously. Potential perpetrators must be shown that their actions will not go unpunished for their calculus to be changed. The ICC is only as strong as its State Parties. With more states joining forces under the Rome Statute, the more impact the developing system of ICJ can have.

In 2012, the ICC celebrated its tenth anniversary, however, in terms of resources and legitimacy, it has not yet gained consistent support from major powers such as the United States, China, Russia, and India. Despite the support of many countries, observers note that the ICC faces several practical challenges each day, such as gathering evidence and conducting quality fact-finding.⁴⁷⁶ Although it is willing to prosecute, this has contributed to the perception that impunity for egregious crimes against humanity is fading.

⁴⁷⁶ Hamilton RJ 'The ICC's Exit Problem' (2014) 47 (1) *New York University Journal of International Law and Politics* 20.

CHAPTER 4

SELECTED COUNTRIES IN WHICH THE ICC HAS HAD A DETERRENT EFFECT

4.0 INTRODUCTION

To ensure there are no unpunished crimes in the international community, the ICC strives to bring legal proceedings against all crimes of concern.⁴⁷⁷ Furthermore, the Preamble emphasizes the need to end impunity for those responsible for these crimes and thus contribute to their prevention.⁴⁷⁸ By prosecuting and threatening to prosecute, the ICC aims to produce a deterrent effect. Nevertheless, opinion among commentators is divided over whether the ICC and its predecessors can mitigate international crime. Deterrence is cited as the primary reason for the investigation of international crimes by both the ICC and the ad hoc tribunal for the former Yugoslavia.⁴⁷⁹ It is not surprising that supporters of the ICC emphasize the court's role in preventing international crime and ending impunity for mass atrocities.⁴⁸⁰ In creating the ICC, states believed that punishing international crimes would also reduce their prevalence.⁴⁸¹

Some critics contend that crimes committed within the jurisdiction of the ICC cannot be deterred because the perpetrators are not rational actors.⁴⁸² The institutional design of the court is also criticized by some, who argue that prosecutions are infrequent, punishments are insufficiently severe, and justice is slow, which makes discouraging international crime unlikely.⁴⁸³ There are even some scholars who believe international prosecutions may actually serve as an incentive for perpetrators to continue human rights violations and war crimes, which would hurt peace prospects.⁴⁸⁴

⁴⁷⁷ Rome Statute Preamble.

⁴⁷⁸ Rome Statute Preamble.

⁴⁷⁹ Vinjamuri L 'Deterrence, Democracy, and the Pursuit of International Justice' (2010) 24 *Ethics & International Affairs* 192.

⁴⁸⁰ Klabbers J 'Just Revenge? The Deterrence Argument in International Criminal Law' (2001) 12 *The Finnish Yearbook of International Law* 249.

⁴⁸¹ Klabbers J 'Just Revenge? The Deterrence Argument in International Criminal Law' (2001) 12 *The Finnish Yearbook of International Law* 250.

⁴⁸² Mégret F 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' (2001) 12 *Finnish Yearbook of International Law* 193.

⁴⁸³ Goldsmith J & Krasner SD 'The Limits of Idealism' (2003) 132 *Daedalus* 55.

⁴⁸⁴ Snyder J & Vinjamuri L 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 *International Security Journal* 20.

4.1 WHY IS KENYA A GOOD CASE STUDY?

A history of weak domestic legal institutions, poor human rights practices, and a culture of impunity led Kenya to join the ICC in 2005.⁴⁸⁵ There were unprecedented levels of elite-driven violence in Kenya during the 2007 and 2008 elections which resulted in the deaths of over 1,000 people and the displacement of more than 500,000 others.⁴⁸⁶ A court investigation and prosecution soon followed in Kenya, making it one of the first dozen countries where the Court intervened.

As a result of their alleged roles in orchestrating the violence in 2007 and 2008, the ICC's Office of the Prosecutor brought crimes against humanity charges against six high-level and influential Kenyans.⁴⁸⁷ As of March 2013, Kenya's President and Deputy President, respectively, Uhuru Kenyatta and William Ruto, were both charged by the OTP.⁴⁸⁸ Former Cabinet Secretary Francis Muthaura and Kenyatta were dropped from prosecution in December 2013 and December 2014 due to interference with witnesses and obstruction of evidence gathering by Kenya.⁴⁸⁹ It is useful to examine how those in power responded to the ICC's threat of prosecution in this case study in order to understand the ICC's deterrent effect.

4.2 KENYA AS A CASE STUDY

Despite a history of poor human rights practices and weak and corrupt domestic legal institutions, the country joined the ICC in 2005.⁴⁹⁰ In fact, both Jomo Kenyatta, the country's first president after independence, and Daniel Arap Moi, who ruled after Kenyatta's death in 1978, were accused of exploiting state resources for their own benefit.⁴⁹¹ As part of their campaign to maintain power and impunity, both have been accused of committing human rights

⁴⁸⁵ Appel BJ 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' (2018) 62 (1) *The Journal of Conflict Resolution* 10.

⁴⁸⁶ Yamano T, Tanaka Y & Gitau R 'Haki Yetu (It's Our Right): Determinants of Post-Election Violence in Kenya' (2010) 10 (20) *GRIPS Policy Research Center* 1.

⁴⁸⁷ Wolf TP 'A 'Criminal Investigation', Not a 'Political Analysis'? Justice Contradictions and the Electoral Consequences of Kenya's ICC Cases' in Clarke K, Knottnerus A & Volder E (Eds.) *Africa and the ICC: Perceptions of Justice* 234.

⁴⁸⁸ Wolf TP 'A 'Criminal Investigation', Not a 'Political Analysis'? Justice Contradictions and the Electoral Consequences of Kenya's ICC Cases' in Clarke K, Knottnerus A & Volder E (Eds.) *Africa and the ICC: Perceptions of Justice* 256.

⁴⁸⁹ Wolf TP 'A 'Criminal Investigation', Not a 'Political Analysis'? Justice Contradictions and the Electoral Consequences of Kenya's ICC Cases' in Clarke K, Knottnerus A & Volder E (Eds.) *Africa and the ICC: Perceptions of Justice* 267.

⁴⁹⁰ Brown S & Sriram CL 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' (2012) 111 *Current Africana* 244.

⁴⁹¹ Rutten M & Owuor S 'Weapons of Mass Destruction: Land, Ethnicity and the 2007 Elections in Kenya' (2009) 27 *The Journal of Contemporary African Studies* 313.

abuses.⁴⁹² After 1991, when multi-party elections were introduced, those in power continued to abuse their power by inciting violence between ethnic groups.⁴⁹³ Moi's intent was to influence voting patterns both in 1992 and 1997 by inciting ethnic violence.⁴⁹⁴ More than 300,000 people were displaced as a result of the 1992 violence and 1,500 people were killed and over 1,500 were injured.⁴⁹⁵ Approximately 200,000 people were displaced by the 1997 violence and 70 to 100 people died.⁴⁹⁶

History shows that impunity reigns in Kenya after election violence subsides. A parliamentary committee was appointed in response to opposition and church calls for investigations after the 1992 violence. No one was ever held accountable for organizing and funding the violence, even though the committee concluded Moi was responsible.⁴⁹⁷ Moi formed a committee again following the 1997 violence. During the Akiwumi Commission of Inquiry, he assigned it the task of investigating tribal clashes since 1991, the origins and underlying causes of the clashes, how law enforcement agencies responded to these incidents, and how prepared and effective they were in controlling and preventing such clashes.⁴⁹⁸ In 1999, the Commission released a report, but it was not made public until 2002 due to government objections. Moi's ruling party members incited violence and obstructed investigations, according to the Akiwumi Commission.⁴⁹⁹ However, as before, no one was held accountable for their involvement in the violence by the government.⁵⁰⁰

As far as violence is concerned, the 2002 elections that resulted in Mwai Kibaki's election were relatively peaceful.⁵⁰¹ Due to the fact that both presidential candidates were from the Kikuyu

⁴⁹² Rutten M & Owuor S 'Weapons of Mass Destruction: Land, Ethnicity and the 2007 Elections in Kenya' (2009) 27 *The Journal of Contemporary African Studies* 305-313.

⁴⁹³ Mueller SD 'Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya' (2011) 29 *The Journal of Contemporary African Studies* 99-103.

⁴⁹⁴ Sulley CR 'Electoral Violence in Africa: A Comparative Analysis of Kenya and Tanzania' (2013) 40 (2) *African Review* 86.

⁴⁹⁵ Höhn S 'New Start or False Start? The ICC and Electoral Violence in Kenya' (2014) 45 *Development and Change* 568.

⁴⁹⁶ Höhn S 'New Start or False Start? The ICC and Electoral Violence in Kenya' (2014) 45 *Development and Change* 568.

⁴⁹⁷ Akiwumi Report Judicial Commission of inquiry into tribal clashes in Kenya (2008) Report of judicial commission appointed to enquire in clashes in Kenya (2008).

⁴⁹⁸ Akiwumi Report *Judicial Commission of inquiry into tribal clashes in Kenya* (2002) Report of judicial commission appointed to enquire in clashes in Kenya (2002).

⁴⁹⁹ Akiwumi Report *Judicial Commission of inquiry into tribal clashes in Kenya* (2002) Report of judicial commission appointed to enquire in clashes in Kenya (2002).

⁵⁰⁰ Akiwumi Report *Judicial Commission of inquiry into tribal clashes in Kenya* (2008) Report of judicial commission appointed to enquire in clashes in Kenya (2008).

⁵⁰¹ Dercon S & Gutiérrez-Romero R 'Triggers and Characteristics of the 2007 Kenyan Electoral Violence' (2012) 40 *World Development* 731.

community, there were no significant ethnic tensions during the 2002 elections.⁵⁰² Although Kibaki promised democratic reforms during his campaign, this did not materialise. As of 2008, few reforms had been implemented, according to Human Rights Watch.⁵⁰³ Kenya's judicial system was described as slow and corrupt in a 2009 Human Rights Council report.⁵⁰⁴ During the post-election violence of 2007, Kenya's democracy was not yet consolidated. According to Muller, a major reason for Kenya's violence was its deliberately weak institutions, which were mostly overridden by a highly personalized and centralized presidency, which could but did not exercise the autonomy and checks and balances that typically accompany democracies.⁵⁰⁵

All these factors lead Kenya to be a country that could improve its human rights practices and protections against abuses as soon as it joined the ICC. As a result of joining the court, Kenya committed itself to addressing mass atrocities and increased its chances of its citizens facing ICC prosecution, as well as increasing a threat to its sovereignty by putting its citizens at risk of being prosecuted in the Hague if they commit mass atrocities or if Kenya fails to prosecute perpetrators on its own. Kenya could prevent this fate by improving its behaviours and practices related to human rights abuses and mass atrocities. To be able to respond to these crimes, the institution could also improve its institutional mechanisms. There is less opportunity for finding evidence of the ICC's deterrent effect in countries that already have good practices and institutions since those countries have less room for improvement and less reason to fear an ICC prosecution against their citizens.

This case study provides a chance to examine how those in power or those seeking a hold in power respond to an ICC intervention since the suspects in the Kenya cases included state actors, including Uhuru Kenyatta, the country's sitting president in March 2013.

ICC investigations and prosecutions have only taken place in a few countries, and Kenya is one of them.⁵⁰⁶ Unlike the preliminary examination phase that precedes it, this is the highest level of intervention the ICC can undertake. In order to decide whether there is a reasonable basis to initiate an investigation, the OTP conducts a preliminary investigation on all situations

⁵⁰² Dercon S & Gutiérrez-Romero R 'Triggers and Characteristics of the 2007 Kenyan Electoral Violence' (2012) 40 *World Development* 731.

⁵⁰³ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 139.

⁵⁰⁴ Alston P *Report of the Special Rapporteur on Extrajudicial (2009) Summary or Arbitrary Executions United Nations Doc. A/HRC/11/2/Add.6* .

⁵⁰⁵ Mueller SD 'Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya' (2011) 29 *The Journal of Contemporary African Studies* 186

⁵⁰⁶ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 140

brought to its attention.⁵⁰⁷ Kenya was eventually the subject of a formal investigation by the OTP, which required the OTP to convince the ICC's Pre-Trial Chamber that a formal investigation was justified.⁵⁰⁸ Due to the fact that the ICC has intervened in Kenya with investigations and prosecutions of suspects, more evidence should be available to assist in determining whether the ICC is more or less likely to act as a deterrent.

4.3 DETERRENCE IN KENYA

Professor Yvonne Dutton makes distinction of various time periods in which we can determine whether the ICC was more or less likely to act as a deterrent.

4.3.1 ICC's legal deterrence effect in the 2007 Post-Election Violence

Kenya's decision to join the ICC in 2005 is somewhat surprising given its history of poor human rights practices, elite-driven election violence, and impunity. Such countries face a greater risk of having their citizens tried at The Hague if they have such characteristics. In order to avoid a similar fate, Kenya must break free from its past and improve its practices and institutions. Despite Kenya's ratification of the Rome Statute, this does not seem to have resulted in a deterrent effect: the evidence does not suggest that mass atrocities and other human rights abuses decreased during this period, nor did domestic protections improve to hold perpetrators accountable for these crimes.

The evidence indicates that ratification of the ICC did not result in Kenya committing fewer mass atrocities or human rights abuses. The country was engulfed in violence only two years after ratification. Kenya had previously experienced mass violence of a similar type. To gain or maintain power, political elites incited violence and pitted ethnic groups against one another.

Amid pre-election polls showing Raila Odinga was to hold a substantial lead, the Electoral Commission of Kenya announced on December 30, 2007, that Mwai Kibaki had won the presidency.⁵⁰⁹ Despite Odinga's call for protests against a rigged election, Kibaki swore himself in hastily as president.⁵¹⁰ Inter-ethnic violence erupted shortly thereafter in Kenya. Luos and Kalenjins supported Odinga and attacked Kikuyus in support of Kibaki. Retaliation was taken by the Kikuyus. Several pieces of information have emerged since the violence ended

⁵⁰⁷ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 140

⁵⁰⁸ *Situation in the Republic of Kenya* (2010) Case No. ICC-01/09

⁵⁰⁹ Höhn S 'New Start or False Start? The ICC and Electoral Violence in Kenya' (2014) 45 *Development and Change* 567.

⁵¹⁰ Steeves J 'Democracy Unravelling in Kenya: Multi-Party Competition and Ethnic Targeting' (2011) 9 *African Identities* 455.

suggesting that politicians and businessmen orchestrated and planned much of the violence with criminal gangs, such as the Mungiki.⁵¹¹ Over a two-month period, approximately 500,000 people were displaced and at least 1,000 people died.⁵¹²

There is no evidence that Kenya improved its domestic punishment mechanisms after ratifying the ICC. Firstly, the 2008 International Crimes Act did not implement ICC crimes into Kenyan law until January 2009.⁵¹³ After the ICC prosecutor threatened to launch his investigation, Kenya finally passed the National Legislation for Prosecution of International Crimes in Kenya in 2009.⁵¹⁴ Secondly, during this time period the government failed to implement any meaningful democratic reforms that would support independent investigations and prosecutions of mass atrocities and other human rights violations. One notable and positive step taken by the Kibaki government was the establishment of the Kenya National Commission on Human Rights in 2003.⁵¹⁵ The Rome Statute was not yet ratified by Kenya at the time. Aside from that, the report indicates that a great deal of promise could not be kept when it came to reform.⁵¹⁶ It is more likely that the facts surrounding Kibaki's proposed constitution of 2005, demonstrated his lack of commitment to democratic reform. Kibaki's stronghold on executive power led voters to reject the 2005 constitution.⁵¹⁷ Kibaki subsequently dismissed the entire cabinet, demonstrating his dissatisfaction with the vote and his intention to retain power.⁵¹⁸ Most of the people in the cabinet were replaced with old friends and colleagues of his.⁵¹⁹

Overall, the evidence indicates that Kenya did not experience a deterrent effect because of ratification, the lowest level of ICC intervention. Even though there is no certainty in knowing why this is so, the evidence indicates that Kenyans greatly discounted the ICC's threat and the costs associated with it during this period.⁵²⁰ It appeared at the time of Kenya's ratification of

⁵¹¹ Akiwumi Report *Judicial Commission of inquiry into tribal clashes in Kenya* (2008) *Report of judicial commission appointed to enquire in clashes in Kenya* (2008).

⁵¹² Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 143.

⁵¹³ Okuta A 'National Legislation for Prosecution of International Crimes in Kenya' (2009) 7 *Journal of International Criminal Justice* 1072–73.

⁵¹⁴ Okuta A 'National Legislation for Prosecution of International Crimes in Kenya' (2009) 7 *Journal of International Criminal Justice* 1072–73.

⁵¹⁵ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 144.

⁵¹⁶ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 144.

⁵¹⁷ Wrong M *It's Our Turn to Eat: The Story of a Kenyan Whistle blower* (2009) 243.

⁵¹⁸ Wrong M *It's Our Turn to Eat: The Story of a Kenyan Whistle blower* (2009) 244.

⁵¹⁹ Wrong M *It's Our Turn to Eat: The Story of a Kenyan Whistle blower* (2009) 244.

⁵²⁰ Mueller SD 'Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya' (2011) 29 *The Journal of Contemporary African Studies* 186.

the Rome Statute that the court was still in its infancy. Furthermore, Kenya's political situation appeared to be improving, making it impossible for anyone to be charged by the court.⁵²¹ According to Professor Dutton, former government advisors and other interviewees, said that Kenya's political leaders were not aware that they could be brought to The Hague at the time the Rome Statute was ratified.⁵²² According to an interview conducted by Professor Dutton, Kenyans expected the ICC to handle only the worst cases. There were far worse things going on in other countries in Africa at the time, and Kenya was optimistic about its future and democracy at the time, so many would not have seen Kenya as a candidate for the court at the time. During the interview, a member of civil society stated that Kenya would appear progressive if it signed the Rome Statute.⁵²³ As well as demonstrating a strong human rights record in the country, signing certain treaties might also result in donor funding, according to the interviewee.⁵²⁴ It is not for content as much as prestige that Kenya signs international agreements.⁵²⁵

Kenyan politicians did not seem to be too concerned about the risks of ratifying the Rome Statute based on evidence from parliamentary debates in 2001⁵²⁶ and 2003.⁵²⁷ A major focus of the 2001 Parliamentary debate was ratification and implementation of the Statute.⁵²⁸ When asked whether the Government fears that the ICC will try people in its ranks, the Government replied that it has done so, Amos Wako, then-Attorney General, expressed no concern about the case of Slobodan Milosevic and General Pinochet, stating that Kenya was committed to ratifying the Rome Statute.⁵²⁹ In his remarks, he described the Kenyan government as one of the most active participants at the New York Preparatory Commission meetings.⁵³⁰ During the 2003 parliamentary debates, Kenyan leaders indicated they were still committed to ratifying,

⁵²¹ Mueller SD 'Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya' (2011) 29 *The Journal of Contemporary African Studies* 186.

⁵²² Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 144.

⁵²³ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 145.

⁵²⁴ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 145.

⁵²⁵ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 52.

⁵²⁶ National Assembly Kenya *National Assembly official record (Hansard)* (2001) 3094.

⁵²⁷ National Assembly Kenya *National Assembly official record (Hansard)* (2003) 2674.

⁵²⁸ Mueller D 'Kenya and the International Criminal Court: Politics, the Election, and the Law' (2014) 8 *Journal of African Studies and Development* 29.

⁵²⁹ National Assembly Kenya *National Assembly official record (Hansard)* (2001) 3094.

⁵³⁰ National Assembly Kenya *National Assembly official record (Hansard)* (2001) 3094.

but concerned about signing a bilateral immunity agreement with the United States that would not surrender US personnel to the ICC.⁵³¹

It makes sense when one considers the context that Kenya did not believe that the ICC posed a major threat at the time. When Kenya ratified the ICC, it had only been operating for a few years. Aside from Darfur, Sudan, which was referred to the Security Council by the Security Council, the prosecutor relied on self-referrals in those years. Furthermore, those cases entailed collapsing or transitional nations amid intense civil wars.⁵³² Last but not least, Kenya's past as a non-democracy with a culture of impunity probably played a role in determining the risk posed by the ICC as well as the financial side of the rational cost-benefit analysis. Kenyan politicians were accustomed to getting away with their misdeeds; they had never faced court punishment and did not anticipate doing so. Before the ICC became engaged, there was a lot of impunity, and anyone could commit any crime before the post-election violence in 2007 occurred.⁵³³

4.3.1.1 Analysis of the Social Deterrent Effect in this period in Kenya

Since state actors are most likely to respond to domestic and international pressure to conform their behaviour to acceptable norms, the ICC produces a social deterrent effect more than rebels. Although Kenya had important relationships with the international community and an increasingly activist civil society during this period, there was little evidence that Kenya's government actors were socially deterred.⁵³⁴

A trade and aid relationship were established between Kenya and the international community during this period. The World Bank estimates that Kenya received approximately US \$3 billion in official aid between 2005 and 2007.⁵³⁵ As a recipient of aid, Kenya could easily rank among the top. By refusing to sign a bilateral agreement promising not to transfer any U.S. citizens to the ICC to face prosecution, Kenya sacrificed \$9.8 million in military aid in 2005 alone.⁵³⁶ A

⁵³¹ Mueller D 'Kenya and the International Criminal Court: Politics, the Election, and the Law' (2014) 8 *Journal of African Studies and Development* 29.

⁵³² Hansen TO 'The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and Their Implications for the Future of International Justice' (2012) 18 *Australian Journal of Human Rights* 187.

⁵³³ Akhaabi RC International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence (Published Mater in International Conflict Management: University of Nairobi (2018) 25.

⁵³⁴ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 146.

⁵³⁵ Net Official Development Assistance and Official Aid Received 'The World Bank' available at: <http://data.worldbank.org/indicator/DI.ODA.ALLD.CD?page=1> (Accessed 23 September 2022).

⁵³⁶ Oluoch F 'Kenya: Will Kibaki Succumb to U.S. Pressure?' (2005) *New African* 27.

growing civil society sector also emerged after Kibaki came to power, it was this sector that pushed for the ratification of the ICC.⁵³⁷

After the results of the 2007 presidential elections were announced, the country's leaders once again utilized violence to gain power. As for domestic protections against human rights abuses, Kenya did not make any noteworthy progress during this period. Although causal inferences always come with disclaimers, the evidence does not indicate that Kenya's domestic practices were significantly improved to avoid an ICC prosecution because of international or domestic social shame during this period.⁵³⁸

4.3.2 ICC's legal deterrence of the Aftermath of the 2007 Post-Election Violence Until the March 2010

Kenya was subject to an ICC preliminary examination following the post-election violence, a greater level of intervention than ratification alone, until the court authorized the prosecutor to begin a formal inquiry.⁵³⁹ Legal deterrence appears to have been produced by the ICC's preliminary examination intervention, but evidence is mixed. It appears that more domestic mechanisms have been established for holding perpetrators of mass atrocities and human rights abuses accountable in recent years. However, the evidence is not all positive on either front.

According to the ICC, Kenya experienced no repeat of mass violence during the preliminary examination period due to the post-election violence that ended in February 2008. It is certainly an improvement that there has been no mass violence. Although this improvement may have resulted from the Kenyan government's commitment to protecting its citizens from mass atrocities and human rights abuses. However, this commitment is questionable. Evidence indicates that individuals who may have been witnesses in any prosecution of perpetrators of the post-election violence were killed or disappeared during this time period.⁵⁴⁰ As part of his cover up for his involvement with and through the Mungiki gang in the post-election violence, Kenyatta had members of the gang killed between 2008 and 2009.⁵⁴¹ While Mungiki members disappeared or were found dead, none of these allegations can be proven beyond a reasonable

⁵³⁷ Dutton YM *Rules, politics and the International Criminal Court: Committing to the court* 3 (2013) 143.

⁵³⁸ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 147.

⁵³⁹ Press Release 'Prosecutor Receives Materials on Postelection Violence in Kenya' available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr438> (Accessed 27 September 2022).

⁵⁴⁰ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 19.

⁵⁴¹ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 19.

doubt. Several Mungiki leaders were murdered in March 2008.⁵⁴² Mungiki's Nairobi Coordinator was assassinated a few months later. In April and June of 2008, two Mungiki leaders were arrested by police and were presumed dead, according to the ICC prosecutor. Naivasha police arrested a Mungiki leader in May 2009 and he is presumed dead as well.⁵⁴³ The OTP requested that a probe be opened into the Kenyan situation the same day that another prominent Mungiki member was killed.⁵⁴⁴

Professor Dutton further states that, in comparison with international and domestic communities, the ICC played a relatively small role.⁵⁴⁵ There had only been one statement by the ICC stating that it was monitoring Kenya as of February 2008.⁵⁴⁶ In contrast, international and domestic communities were actively involved in ending the violence during February 2008. In early February 2008, former Secretary-General of the United Nations, Kofi Annan, led the international community in establishing a mediation process, the Kenyan National Dialogue and Reconciliation process.⁵⁴⁷ A National Accord and an agreement to form a coalition government was announced on February 28, 2008, because of the mediation led by Annan. Kibaki and Odinga urged their supporters to stop fighting and respect the power-sharing deal when Annan announced it in late February 2008.⁵⁴⁸ As part of the Concerned Citizens for Peace (CCP) umbrella group, civil society was also fighting against the violence during February 2008.⁵⁴⁹ As part of the mediation effort, the CCP invited some of the prominent Africans to help mediate and facilitate the mediation between the Orange Democratic Movement and the Party of National Unity.⁵⁵⁰

⁵⁴² Wolf TP 'A 'Criminal Investigation', Not a 'Political Analysis'? Justice Contradictions and the Electoral Consequences of Kenya's ICC Cases' in Clarke K, Knottnerus A & Volder E (Eds.) *Africa and the ICC: Perceptions of Justice* 238.

⁵⁴³ Wolf TP 'A 'Criminal Investigation', Not a 'Political Analysis'? Justice Contradictions and the Electoral Consequences of Kenya's ICC Cases' in Clarke K, Knottnerus A & Volder E (Eds.) *Africa and the ICC: Perceptions of Justice* 238.

⁵⁴⁴ Wolf TP 'A 'Criminal Investigation', Not a 'Political Analysis'? Justice Contradictions and the Electoral Consequences of Kenya's ICC Cases' in Clarke K, Knottnerus A & Volder E (Eds.) *Africa and the ICC: Perceptions of Justice* 252.

⁵⁴⁵ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 149.

⁵⁴⁶ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 25

⁵⁴⁷ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 149.

⁵⁴⁸ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 26.

⁵⁴⁹ Zanker F 'The Legitimation of Peace Negotiations: A Non-Exclusive Role for Civil Society Actors' (2015) *GIGA Institute of African Affairs* 6.

⁵⁵⁰ Wanyeki LM 'The International Criminal Court's Cases in Kenya: Origin and Impact' (2012) *Institute for Security Studies* 5.

It is also unclear whether Kenya has improved its domestic protection against human rights abuses. The Kenyan government agreed as part of the mediation process to implement judicial and constitutional reforms following the postelection violence.⁵⁵¹ The government established a task force in July 2009 to make recommendations on how to improve the independence and effectiveness of the judiciary.⁵⁵² In August 2010, Kenya adopted a new constitution that includes checks and balances on government powers.⁵⁵³ The new constitution was drafted by the government and adopted by the people.⁵⁵⁴ Moreover, the International Crimes Act was passed in 2009, which incorporates the ICC's definition of international crimes into Kenyan law.⁵⁵⁵ As a result, any individual who commits war crimes, crimes against humanity, or genocide in Kenya will be able to face domestic prosecution.

A significant part of the 2010 constitution can be attributed to the involvement of the ICC. A new constitution may have been pushed more by government leaders because they thought it would help them convince the ICC to leave.⁵⁵⁶ Several interviewees even stated that the government rushed the constitution through to shield itself and its closest allies from prosecution by the ICC.⁵⁵⁷ Due to Kenya's improved courts and its ability to try suspects under the new International Crimes Act, the Kenyan cases are not admissible before the ICC.⁵⁵⁸

However, Kenya failed to change its previous practice of impunity for mass atrocities despite implementing some institutional reforms on paper. Kenya's government established the Waki Commission to investigate the post-election violence as part of the mediation process following the post-election violence.⁵⁵⁹ Waki Commission's report, published in October 2008, recommended the creation of a Special Tribunal for Kenya comprised of Kenyan and international judges.⁵⁶⁰ However, the Commission's recommendations were not implemented

⁵⁵¹Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 150.

⁵⁵² Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 150.

⁵⁵³ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 33.

⁵⁵⁴ Constitution of Kenya (2010).

⁵⁵⁵ Okuta 'A National Legislation for Prosecution of International Crimes in Kenya' 7 (2009) *Journal of International Criminal Justice* 1072–73.

⁵⁵⁶ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 151.

⁵⁵⁷ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 39.

⁵⁵⁸ *Prosecutor v. Ruto* (2011) Case Nos. ICC-01/09-01/11, ICC-01/09-02/11.

⁵⁵⁹ Akiwumi Report Judicial Commission of inquiry into tribal clashes in Kenya (2008) Report of judicial commission appointed to enquire in clashes in Kenya (2008) 1.

⁵⁶⁰ Akiwumi Report *Judicial Commission of inquiry into tribal clashes in Kenya* (2008) Report of judicial commission appointed to enquire in clashes in Kenya (2008) 472.

by the Kenyan government.⁵⁶¹ Despite being given several extensions of its original deadline, it never established a Special Tribunal.⁵⁶² Additionally, it did not file any domestic charges against the perpetrators.⁵⁶³ As a final note, the Kenyan government announced in late July 2009 that it had rejected the idea of establishing a Special Tribunal and instead allowed the Truth, Justice and Reconciliation Commission to prosecute those responsible for the post-election violence.⁵⁶⁴

Thus, the evidence shows that Kenya was not committed to holding accountable those responsible for the post-election violence during this preliminary examination phase. According to the evidence, the country did not fear the ICC enough to implement domestic processes for trying those responsible for the violence in 2007 and 2008. The ICC was viewed by some as a hollow threat and a court without teeth before its names were revealed, referencing Ruto's comment that it would take 90 years or more for the court to act.⁵⁶⁵

It may have been thought by Kenyan leaders that they could block the ICC from acting indefinitely. When Kenyan leaders failed to establish a Special Tribunal in 2009, the ICC prosecutor repeatedly warned them that impunity was not an option.⁵⁶⁶ It failed repeatedly to establish the tribunal because of the Kenyan government's response. There were also promises made by Kenyan leaders that were not kept. Kenyan leaders informed the ICC prosecutor in July 2009 that, if the Special Tribunal did not exist, they would self-refer the matter to the court.⁵⁶⁷ Neither state nor UN Security Council referred the Kenya cases to the court, and instead the prosecutor used the proprio motu power of the prosecutor under the Rome Statute to initiate the proceedings.⁵⁶⁸ As part of their deal, Kibaki and Odinga also agreed to expel

⁵⁶¹ Brown S & Sriram CL 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' (2012) 111 *Current Africana* 250.

⁵⁶² Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 18.

⁵⁶³ *Prosecutor v. Ruto* (2010) Case No. ICC-01/09-19.

⁵⁶⁴ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 39.

⁵⁶⁵ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 153.

⁵⁶⁶ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 16.

⁵⁶⁷ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 153.

Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 16.

anyone named as an ICC suspect from government service. However, none of the suspects were forced to leave.⁵⁶⁹

Kenyan leaders, however, may have considered the creation of a Special Tribunal to be highly risky for them and their allies. In contrast, the ICC cannot pursue more than a half-dozen perpetrators at their highest level, while the Special Tribunal could prosecute hundreds of suspects.⁵⁷⁰ As a result, some parliamentarians believed that they would not be targeted by the ICC because they were not big fish before the ICC prosecutor named suspects.⁵⁷¹ Thus, although the ICC may pose a threat to some Kenyans, not all parliamentarians who had to vote in favour of the Special Tribunal will be affected by it. Brown and Sriram contend that some parliamentarians may have believed that the ICC could assist in getting rid of their political rivals during that time, before names were disclosed.⁵⁷² In a similar vein, a former executive director of the Kenyan Human Rights Commission argues that legislators voted down the Special Tribunal because they wanted accountability only for their political opponents.⁵⁷³

4.3.2.1 *Analysis of the Social Deterrence in this Time Period*

According to the facts presented by the ICC at the time of its preliminary examination phase, both the international and domestic community called on Kenya to end the violence following the election and implement reforms and other measures designed to ensure accountability for the perpetrators. There have been some institutional reforms and a cessation of violence because of the mediation process guided by Kofi Annan and backed by the international and domestic communities.

Despite numerous calls to end the impunity cycle in Kenya, Kenyan leaders ignored them. An investigation expert for a Special Tribunal was requested in December 2008 by the US Ambassador to Kenya.⁵⁷⁴ According to Kofi Annan, Kenyan reforms have been slow since the post-election violence began in December 2009.⁵⁷⁵ International Commissions of jurists for

⁵⁶⁹ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 153.

⁵⁷⁰ Brown S & Sriram CL 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' (2012) 111 *Current Africana* 253.

⁵⁷¹ Brown S & Sriram CL 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' (2012) 111 *Current Africana* 253.

⁵⁷² Brown S & Sriram CL 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' (2012) 111 *Current Africana* 253.

⁵⁷³ Wanyeki LM 'The International Criminal Court's Cases in Kenya: Origin and Impact' (2012) *Institute for Security Studies* 9.

⁵⁷⁴ Zanker F 'The Legitimation of Peace Negotiations: A Non-Exclusive Role for Civil Society Actors' (2015) *GIGA Institute of African Affairs* 6.

⁵⁷⁵ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 32.

Kenya issued a letter in July 2009 urging Kenya to create a Special Tribunal that would not be subject to the reach of Kenya's Attorney General, who, according to the jurists, uses his power to prevent his political friends from being brought to justice.⁵⁷⁶ A Special Tribunal was called for by Human Rights Watch in August 2009.⁵⁷⁷ Also, Kenyan Civil Society has expressed disappointment with the cabinet's decision to abandon the establishment of the Special Tribunal.⁵⁷⁸

Because Kenya did not embrace any of the proposed structural or normative changes, such as new institutions designed to ensure that perpetrators of violence would be held accountable during this period, there is a lack of evidence supporting a social deterrent effect. A Special Tribunal was not established by Kenyan leaders. Furthermore, Kenyan leaders did not enlist the assistance of an international accountability process; although they agreed to refer the matter to the ICC, they did not act.

4.3.3 ICC's Legal Deterrent Effect at the Prosecution Level of Intervention

A new level of intervention was initiated by the ICC in December 2010: Special investigations and prosecutions were launched. According to the then-ICC prosecutor, in December 2010, six prominent Kenyans were to be charged with crimes against humanity because their crimes constituted the greatest responsibility for the violence.⁵⁷⁹ Six prominent Kenyans were summoned by the ICC in March 2011, three from each of Kibaki's and Odinga's political parties.⁵⁸⁰

A prosecutor for the ICC filed charges in 2010 against William Ruto, the former Minister of Higher Education, Science and Technology and current Deputy President, Henry Kosgey, the Minister of Industrialization, and Joshua Arap Sang, the Head of Operations for Kass FM, alleges that they plotted to attack the PNU members in a criminal manner. Following the announcement of Kibaki's election results, they implemented the plan immediately. Particularly, they mobilized perpetrators to burn down homes and buildings and kill civilians as a way of attacking PNU supporters. Former Deputy Prime Minister Uhuru Kenyatta, former

⁵⁷⁶ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 154.

⁵⁷⁷ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 154.

⁵⁷⁸ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 154.

⁵⁷⁹ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 154.

⁵⁸⁰ Zanker F 'The Legitimation of Peace Negotiations: A Non-Exclusive Role for Civil Society Actors' (2015) *GIGA Institute of African Affairs* 6.

Secretary to the Cabinet Francis Muthaura, and former Commissioner of the Kenyan Police Mohammad Ali developed and implemented a plan to attack perceived ODM supporters to maintain the PNU in power in response to attacks on PNU supporters. Kenyatta was accused of facilitating a plan that involved pro-PNU youth, from Mungiki, attacking ODM civilian supporters in Nakuru and Naivasha districts of Kenya. Some 150 ODM supporters were killed because of those attacks.⁵⁸¹ Kosgey and Ali were not charged because the prosecutor had not met the necessary evidentiary threshold for proceeding, but the Pre-Trial Chamber confirmed charges against four of the six individuals on January 23, 2012.⁵⁸²

Deterrence should generally be enhanced by increased ICC intervention. With a greater level of intervention by the ICC, the costs increase, increasing the chances that individuals will be legally dissuaded from committing crimes and that governments will introduce domestic accountability measures. It is proper for rational actors to refrain from doing anything that might attract increased attention from the ICC in such cases, since the ICC has demonstrated its ability to act. Despite this, high levels of ICC intervention may harm leaders seeking to gain power or hold power in an unintended or perverse way. It is possible for politicians in non-democracies or unconsolidated democracies to conclude, given these circumstances, that they have little reason to refrain from abusing their position for their own benefit.

Kenya's leaders have also refused to embrace the ICC process as a means of redressing the harms suffered by thousands of victims during this period.⁵⁸³ Instead, Kenyan leaders have attempted to remove the ICC from their country. Despite the fact that polls at the time showed that most Kenyans supported having cases tried in the ICC so that perpetrators of the violence would not enjoy impunity, the Kenyan government passed a motion to withdraw from the ICC just days after the names of the suspects were announced in December 2010.⁵⁸⁴ During the September 2013 session of the Kenyan Parliament, a second vote was taken to withdraw from the court.⁵⁸⁵ The International Crimes Act of 2008 was also scheduled to be repealed by a member of parliament.⁵⁸⁶

⁵⁸¹ *Prosecutor v. Ruto* (2010) Case No. ICC-01/09.

⁵⁸² *Prosecutor v. Ruto* (2010) Case No. ICC-01/09.

⁵⁸³ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 14.

⁵⁸⁴ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 36.

⁵⁸⁵ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 164.

⁵⁸⁶ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 164.

As part of its efforts to stop these cases, Kenya has lobbied the international community and the ICC. The Kenyan government successfully requested that the ICC cases be deferred so that it could try the cases locally in 2011.⁵⁸⁷ Kenya also sought to have the ICC cases deferred to the UN Security Council in 2011, but its request was denied.⁵⁸⁸ Kenya's bid to intervene in ICC cases was again rejected by the UN Security Council in 2013.⁵⁸⁹ Kenyan defendants challenged the ICC's jurisdiction at the ICC itself, arguing that Kenya should have the right to try any case domestically. A motion to dismiss that case was denied by the ICC, which argued that the crimes met the threshold of gravity to fall under its jurisdiction, despite there being no national prosecutions involving the same crimes.⁵⁹⁰

A perverse effect may have occurred as a result of the ICC's demonstrated threat to prosecute Kenyatta and Ruto after they assumed their positions as president and deputy president, consequently, the country's leaders took measures to ensure they would not be held accountable for any human rights abuses when they were forced into a corner.⁵⁹¹ The ICC campaign continued after Kenyatta and Ruto won power in March 2013.⁵⁹² Additionally, they assisted the lobbying effort by using their position as leaders. To avoid prosecution of head of state, they lobbied the African Union. Kenyatta and Ruto were not heads of state when the ICC brought their cases against them. In October 2013, the African Union nevertheless issued a statement calling on the ICC to halt its case against Kenyatta and other sitting presidents.⁵⁹³

4.3.3.1 Analysis of the social deterrence in this period

During this period, according to Professor Dutton, no social deterrent effect appears to have occurred. Prior to the presidential elections, the international community put significant pressure on Kenya. Odinga seemed to be backed by the United Kingdom, France, and the United States in their opposition to Kenyatta and Ruto running for office.⁵⁹⁴ If the ICC inductees won the election, those countries publicly announced that diplomatic relations with

⁵⁸⁷ Mueller SD 'Kenya and the International Criminal Court (ICC): politics, the election and the law' (2014) 8 (1) *Journal of East African Studies* 31.

⁵⁸⁸ ICC-01/09-02/1173 (2013) ICC-01/09-02/11-687.

⁵⁸⁹ ICC-01/09-02/1173 (2013) ICC-01/09-02/11-687.

⁵⁹⁰ Mueller SD 'Kenya and the International Criminal Court (ICC): politics, the election and the law' (2014) 8 (1) *Journal of East African Studies* 27.

⁵⁹¹ Mueller SD 'Kenya and the International Criminal Court (ICC): politics, the election and the law' (2014) 8 (1) *Journal of East African Studies* 27.

⁵⁹² ICC-01/09-02/11-687 (2013) ICC-01/09-02/11-692.

⁵⁹³ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 166.

⁵⁹⁴ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 167.

Kenya would end.⁵⁹⁵ A US State Department official, Johnnie Carson, stated that choices have consequences with regards to the duo's campaign.⁵⁹⁶ It appears that all of the West's warnings have gone unheeded: Kenyatta and Ruto ran for office using a campaign strategy that portrayed the ICC as anti-African and an instrument of the neo-colonialist West.⁵⁹⁷ According to reports, they reacted against Carson, stating they would demonstrate the consequences of Carson's statement.⁵⁹⁸ In addition to the West not following through on its threats to cut off contact with Kenyan leaders, the international community's shaming had no apparent effect. Kenyatta was still facing ICC charges in 2013, but David Cameron, the British Prime Minister, and Barack Obama, the President of the United States, welcomed him to their countries in 2013 and 2014.⁵⁹⁹

A push for accountability was also evident on the domestic front. A civil society organization called Kenyans for Peace with Truth and Justice has urged Kenyan leaders to bring those responsible for the postelection violence to justice.⁶⁰⁰ In the beginning, the Kenyan public wanted trials to be conducted in The Hague. 68% of Kenyans supported the ICC in October 2010, before the names of the suspects were released. As a result, Kenyan leaders preferred obstruction to accountability, and the populace elected Kenyatta and Ruto in March 2013.⁶⁰¹ Aside from that, it appears that the anti-ICC campaign strategy worked as well. Only 7% of Central Province respondents and 24% of Rift Valley respondents supported trials by The Hague in mid-2013, according to polling.⁶⁰²

4.3.4 ICC's legal deterrence effect in the aftermath of December 2014

In Kenya, only Ruto and Sang were charged after the OTP withdrew the charges against Kenyatta.⁶⁰³ The trial against the two defendants against the ICC began on September 10, 2013,

⁵⁹⁵ Brown S & Raddatz R 'Dire Consequences or Empty Threats? Western Pressure for Peace, Justice and Democracy in Kenya' (2014) 8 *Journal of African Studies and Development* 51.

⁵⁹⁶ Gabe Joselow, US Official Says Kenya's Elections Have 'Consequences' Voa News Available at: <http://www.voanews.com/content/us-officialsays-kenya-elections-have-consequences/1599063.html>. (Accessed 1 November 2022).

⁵⁹⁷ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 168.

⁵⁹⁸ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 168.

⁵⁹⁹ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 4 *St. John's Law Review* 168.

⁶⁰⁰ Kenya's Transitional Justice Network 'Truth Justice and Reconciliation Commission Report' (2013) 36

⁶⁰¹ Ipsos Synovate 'Confirmation Hearings Boost Support for ICC Process' (2011) 2.

⁶⁰² Ipsos Synovate 'Confirmation Hearings Boost Support for ICC Process' (2011) 2.

⁶⁰³ *Prosecutor v. Gicheru* (2015) Case No. ICC-01/09-01/15.

after several delays.⁶⁰⁴ A terrorist attack in Nairobi forced Ruto to suspend the trial at the end of September 2013.⁶⁰⁵ The court allowed Ruto to be absent as the proceedings against him continued. The Trial Chamber decided in the beginning of 2014 that Ruto's presence would not be necessary aside from during crucial sessions, provided that a waiver is presented.⁶⁰⁶

In its case against Ruto, the ICC prosecutor also argued that witness intimidation had been an issue in the Kenyatta case.⁶⁰⁷ ICC prosecutors reported in late June 2015 that they had tapes of conversations indicating witnesses were being bribed and intimidated on behalf of Ruto.⁶⁰⁸ Despite Ruto's lawyers' denials, the Trial Chamber found some validity in the prosecutor's allegations of witness intimidation. As a result of the systematic interference with several witnesses in this case, which gives rise to the impression that an attempt has been made to methodically target witnesses in this case to sabotage the proceedings, the Trial Chamber ruled that the prosecutor would be permitted to admit the prior recordings of witnesses against Ruto in the trial.⁶⁰⁹

ICC Appeals Chamber reversed Trial Court's decision regarding witness statements in February 2016, weakening the OTP's case against Ruto.⁶¹⁰ According to the Appeals Chamber, Rule 68 of Rules of Procedure and Evidence was abused by the Trial Chamber when allowing previously recorded witness statements to be introduced for their truthfulness.⁶¹¹ The Appeals Chamber, however, noted that the provisions in Rule 68 that were relied upon only became effective after the Ruto and Sang trials had begun in November 2013.⁶¹² As a result, the Appeals Chamber held that applying that rule retroactively would be improper to the accused's disadvantage.⁶¹³ In making their determination on the Ruto and Sang case, the ICC Trial Chamber would not be able to take into account the recorded witness statements due to this

⁶⁰⁴ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 33.

⁶⁰⁵ Akhaabi RC *International Criminal Court (ICC) in conflict management: deterrence role in Kenya's post-election violence* (Published Mater in International Conflict Management: University of Nairobi 2018) 33.

⁶⁰⁶ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 169.

⁶⁰⁷ *Prosecutor v. Gicheru* (2015) Case No. ICC-01/09-01/15.

⁶⁰⁸ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 169.

⁶⁰⁹ *Prosecutor v. Ruto* (2015) Case No. ICC-01/09-01/11.

⁶¹⁰ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 169.

⁶¹¹ *Prosecutor v. Ruto* (2015) Case No. ICC-01/09-01/11.

⁶¹² *Prosecutor v. Ruto* (2015) Case No. ICC-01/09-01/11.

⁶¹³ *Prosecutor v. Ruto* (2015) Case No. ICC-01/09-01/11.

decision. The OTP's cases against both Ruto and Sang were vacated by the ICC Trial Chamber shortly after the Appeals Chamber's decision in April 2016.⁶¹⁴

During this period, there is little evidence, according to Professor Dutton, that social deterrence had any effect. In July 2015, President Obama visited Kenya, meeting with President Kenyatta who had only recently been indicted for allegedly committing crimes against humanity by the ICC.⁶¹⁵ In an interview with the International Commission of Jurists' Kenyan Section Executive Director, George Kegoro, he stated that Obama's trip was a departure from the warnings about choices having consequences. As a result, no consequences are associated with choices.⁶¹⁶ During his visit, Kegoro stated that Kenya regained acceptance by the international community and moved away from being regarded as a pariah country.⁶¹⁷ As a result of Obama's visit to Kenya, the nation's image was believed to be rehabilitated. It has therefore been legitimized by the visit.⁶¹⁸

4.4 CONCLUSION

As a result of Kenya's interaction with the ICC over time, it is evident that judging the ICC's deterrent power is difficult and that a deeper understanding of how deterrence works and what factors influence the ICC's ability to deter must be developed. Various actors and situations play a role in deterrence over time as indicated by the Kenya case study. A decrease in mass atrocities or an expansion of domestic mechanisms to punish abuses was not associated with ratification alone, nor did it produce a deterrent effect. Mass atrocities, however, appeared to reduce as ICC intervention, investigations, and prosecutions increased.

Despite this, Professor Dutton shows that the law has not produced a lasting deterrent effect in Kenya, there has been no change in normative norms with respect to provoking violence or permitting impunity. It has been alleged that Kenyan leaders committed human rights abuses to avoid being charged by the ICC. In the election campaigns, ethnicity is again front and

⁶¹⁴ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 170.

⁶¹⁵ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 175.

⁶¹⁶ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 175.

⁶¹⁷ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 175.

⁶¹⁸ Dutton YM 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 4 *St. John's Law Review* 175.

centre, dividing the country and fuelling tensions as democratic reforms envisioned by the 2010 constitution were reversed.

Furthermore, the Kenya case study, according to Professor Dutton, suggests that the ICC may have trouble deterring criminal behaviour when it intervenes in non-democracies or unconsolidated democracies. It is often these individuals who can control the state machinery and by doing so are able to frustrate not only the domestic criminal process, but also the ICC process. When the debate is reframed in terms of the court's deterrent effect, a more nuanced understanding is made possible, which is crucial to ensuring that the ICC fulfils its mandate in the most effective way possible, so that the Rome Statute can achieve the desired norm change and long-term deterrent effect.

On the other side, successful promotion of peace and justice has been accomplished with the ICC's invitation to Kenya. During its investigation and prosecution of key suspects accused of spreading violence that violated human rights, the Court followed the mandate provided. It helped prevent further violence by preparing the judiciary to deal with disputed elections cases. Since the leaders in Kenya were aware of the repercussions of their conduct and incitements, the deterrent approach helped achieve peace. After the ICC deterred tribes who were deeply involved in the 2007/2008 violence in Kenya, the two co-accused leaders were able to unite their tribes.

In Kenya, the presence of the Court during the inquiry of crimes against humanity led to a better understanding of the importance of respecting human rights. It was evident in the 2013 campaign when leaders avoided using hate speech and stricter laws were imposed on those presumed to incite public hatred. As a result of the ICC's legal threat, an ethnically diverse country has been made more aware of the importance of promoting peace, reconciliation, and tolerance. Moreover, the presence of the ICC encouraged the adoption of the 2010 Constitution, the establishment of an independent judiciary, and a judiciary that relies on international standards.

4.5 CASE OF LIBYA

Libyan atrocity crimes and violations of international humanitarian law were loudly condemned by the OTP from the start. Libyan human rights activist's arrest on 15 February 2011 sparked clashes between civilians and security forces, which quickly developed into an

anti-authoritarian rebellion against the Gaddafi regime.⁶¹⁹ In an attempt to suppress the revolt, the government killed and injured many people. Thousands of protestors took to the streets on February 17, 2011, to protest Muammar Qaddafi's 41-year rule in Benghazi, Tripoli, and other cities throughout the country.⁶²⁰ There was an armed standoff between rebel groups and security forces loyal to Colonel Gaddafi in Benghazi, Tripoli, and other cities throughout the country as protestors flooded the streets.⁶²¹ Libya's eastern territory, mostly around Benghazi, was taken over by rebel forces in the early days of the conflict. Gaddafi's air power, however, ultimately triumphed over the rebels because the rebels lacked the training and were highly fragmented.⁶²² Therefore, the captured bases, planes, and helicopters could not be used to defend the strategic oil cities in the east.⁶²³

In response to the alleged crimes in Libya, the Office of the Prosecutor of the ICC made a statement on 23 February 2011. The United Nations Human Rights Council passed resolution S-15/11 two days later in order to establish an inquiry commission into the atrocities committed over these first few days.⁶²⁴ ICC investigations and indictments were authorized by the Security Council Resolution 1970, passed on 26 February 2011.⁶²⁵ Aside from referring the case to the ICC, SC Resolution 1970 also included travel bans, asset freezes and arms embargoes as additional means of international peacekeeping. A no-fly zone, an arms embargo and the protection of civilians were established by Resolution 1973, adopted by the Security Council in March 2011. U.S. and French forces led the initial military intervention, which was later taken over by NATO forces.⁶²⁶ Libyan forces allegedly violated humanitarian law, according to the International Commission of Inquiry. In a report issued on 1 June 2011, the committee concluded that Libyan forces were committing crimes against humanity and war crimes, as well as accusing the rebel forces of abuse.⁶²⁷ The conflict had devastating effects on the Libyan

⁶¹⁹ Mühlbacher A 'Security Council Referrals to the ICC and selected questions regarding the 'Situation in Libya' (2012) *Institute of Public International Law, Air Law and International Relations* LL.M. Thesis (London) 23.

⁶²⁰ Fasanotti FS 'Libya: a nation suspended between past and future' (2017) 68 (4) *Studia Diplomatica* 96.

⁶²¹ Fasanotti FS 'Libya: a nation suspended between past and future' (2017) 68 (4) *Studia Diplomatica* 96.

⁶²² Fasanotti FS 'Libya: a nation suspended between past and future' (2017) 68 (4) *Studia Diplomatica* 96.

⁶²³ Fasanotti FS 'Libya: a nation suspended between past and future' (2017) 68 (4) *Studia Diplomatica* 99.

⁶²⁴ UN Human Rights Council Report of the Human Rights Council on Its Fifteenth Special Session (2011) A/HRC/S-15/1.

⁶²⁵ United Nations Security Council United Nations Security Council Resolution 1970 (2011) S/Res/1970.

⁶²⁶ United Nations Security Council United Nations Security Council Resolution 1973 (2011) S/RES/1973.

⁶²⁷ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (2) *International Interactions* 620.

people. A total of 21,490 people were killed, 19,700 injured, and 435,000 were displaced between February 2011 and February 2012.⁶²⁸

Some Western nations recognized the National Transitional Council as the legitimate government of Libya in August 2011.⁶²⁹ On 20 October 2011, Muammar Gaddafi was captured and killed after going into hiding.⁶³⁰ A newly elected parliament, the General National Congress, was sworn in in November 2012 after the NTC seized control of the country in August 2012.⁶³¹ As a result of the conflict, many human rights abuses were reported, including torture and enforced disappearances, as well as violations of international humanitarian law, including violence against civilians and medical workers. Libya's International Commission of Inquiry was established on 25 February 2011 by the Human Rights Council to investigate all allegations of human rights violations.⁶³² In its report, the Commission concluded that both the government and the rebel forces committed international crimes in Libya, specifically crimes against humanity and war crimes.⁶³³

4.6 INTERVENTION OF NATO IN THE LIBYAN CASE

Resolution 1973 was adopted by the UNSC on 17 March 2011, in response to the escalating Libyan conflict that permitted a no-fly zone to be imposed over Libya and permitted member states to act 'in order to protect civilians and civilian populated areas'.⁶³⁴ As a result of NATO's decision not to deploy ground troops in support of UNSC Resolution 1973, it meant that NATO's method and means of protecting civilians compromised its mandate.⁶³⁵ NATO's non-deployment of ground troops in Libya was primarily motivated by a concern for the safety of its troops, not because it was the best or most effective method of defending Libyans.⁶³⁶ Airstrikes against Libyan military targets were carried out by a coalition of the United States

⁶²⁸ Daw MA, El-Bouzedi A & Dau AA 'Libyan armed conflict 2011: Mortality, injury and population displacement' (2015) 5 *African Journal of Emergency Medicine* 103.

⁶²⁹ Mühlbacher A 'Security Council Referrals to the ICC and selected questions regarding the 'Situation in Libya' (2012) *Institute of Public International Law, Air Law and International Relations* LL.M. Thesis (London) 23.

⁶³⁰ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42:2 *International Interactions* 618.

⁶³¹ Mühlbacher A 'Security Council Referrals to the ICC and selected questions regarding the 'Situation in Libya' (2012) *Institute of Public International Law, Air Law and International Relations* LL.M. Thesis (London) 23.

⁶³² Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42:2 *International Interactions* 619.

⁶³³ Kersten M *Justice in conflict: the ICC in Libya and Northern Uganda* (Doctoral of Philosophy Thesis, The London School of Economics and Political Science 2014) 196.

⁶³⁴ UNSC Resolution 1973, (2011) paragraph 4.

⁶³⁵ Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical Analysis of NATO's Intervention in Libya' (2012) *Conflict trends* 44.

⁶³⁶ Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical Analysis of NATO's Intervention in Libya' (2012) *Conflict trends* 44.

(US), the United Kingdom (UK), and France days later.⁶³⁷ Due to NATO's decision to drop bombs from high altitude and not deploy ground troops, civilians were killed by NATO's bombing of civilian targets, so NATO was responsible for a number of civilian deaths.⁶³⁸ In March 2011, NATO took control of the military operation in Libya. After taking control of most of the country with NATO's assistance, the rebel forces overthrew Qadhafi.⁶³⁹

Despite its conformity with post-Cold War UNSC practice, Resolution 1973 caused controversy over the legality of NATO's intervention in Libya because of its unclear scope and limit.⁶⁴⁰ In addition to exceeding the mandate of Resolution 1973, Zifcak also contends that the intervention exceeded UN Charter provisions.⁶⁴¹ Additionally, Thakur emphasizes that while Resolution 1973 allowed military action to prevent a civilian massacre, it did not allow intervention in the civil war, regime change, or targeting Qadhafi.⁶⁴²

Due to NATO's targeting of Qaddafi, it exceeded the UN's authority and violated the UN Charter.⁶⁴³ Additionally, China and Brazil expressed strong criticism of NATO's decision to interpret Resolution 1973 as a way of assisting the overthrow of the Gaddafi regime.⁶⁴⁴ Further, the then Arab League Secretary-General pointed out that the UNSC never authorized regime change, but only civilian protection.⁶⁴⁵

However, Payandeh asserts that NATO conducted its intervention in accordance with international law.⁶⁴⁶ Using Resolution 1973 as a legal basis for regime change, he claims, the UN provided a broad scope of authorization. Despite the fact that the Resolution does not explicitly mention regime change, it does not explicitly rule it out either.⁶⁴⁷ In addition to

⁶³⁷ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 8.

⁶³⁸ Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical Analysis of NATO's Intervention in Libya' (2012) *Conflict trends* 44.

⁶³⁹ Payandeh M 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 (2) *Virginal Journal of International Law* 357.

⁶⁴⁰ Payandeh M 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 (2) *Virginal Journal of International Law* 355.

⁶⁴¹ Zifcak S 'The Responsibility to Protect After Libya and Syria' (2012) 13 (1) *Melbourne Journal of International Law* 62.

⁶⁴² Thakur R 'Libya and Responsibility to Protect: Between Opportunistic Humanitarianism and Value-free Pragmatism' (2011) 7 *Security Challenges* 13.

⁶⁴³ Kersten M 'Justice After the War: The ICC and Post-Gaddafi Libya' (2012) *Routledge* 25

⁶⁴⁴ Zifcak S 'The Responsibility to Protect After Libya and Syria' (2012) 13 (1) *Melbourne Journal of International Law* 11.

⁶⁴⁵ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 9.

⁶⁴⁶ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 9.

⁶⁴⁷ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 9.

focusing on human rights, the report emphasized that a solution must answer the legitimate demands of the Libyan people, which were likely to be challenging to achieve under Qaddafi.⁶⁴⁸ Payandeh further points out that while Resolution 1973 clearly outlines the purpose of the authorization, it does not describe how it will be accomplished.⁶⁴⁹ As a result, even though regime change was not a legitimate objective under the mandate of the Resolution, it might have served to accomplish its objective of protecting civilians.⁶⁵⁰ As long as the NATO action was necessary, the Resolution covered the measures, despite promoting regime change simultaneously. Therefore, NATO's attacks are not illegal merely because they contributed to Qaddafi's overthrow or were carried out with the intention of achieving that goal.⁶⁵¹

The arguments presented by Payandeh are not very convincing, as they are based solely on a textual interpretation of Resolution 1973, which has clear ambiguities. Therefore, it is crucial to take into consideration the perspective of those who drafted the Resolution before you interpret it. Henderson persuasively argues that UNSC resolutions are drafted and endorsed by a collective group of actors within the UNSC whose collective views are the key to interpreting them.⁶⁵² When Resolution 1973 was adopted at the UNSC meeting, regime change was not discussed, but civilian protection was the priority.⁶⁵³ NATO interpreted the Resolution in a manner that allowed regime change outside the UNSC format.⁶⁵⁴ As Henderson convincingly argues, using force in this context should be directed only at the protection of civilians, and any other actions taken by the coalition aimed at achieving other objectives fall outside the scope of this resolution.⁶⁵⁵

Considering the above, NATO's Libya operation clearly violated the UN Charter in breach of its mandate under resolution 1973. According to Chapter VII of the Security Council, force can only be used to protect civilians, not to change regimes. Due to the UNSC endorsement, the

⁶⁴⁸ UNSC Resolution (1973) paragraph 2.

⁶⁴⁹ Payandeh M 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 (2) *Virginal Journal of International Law* 387.

⁶⁵⁰ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 10.

⁶⁵¹ Payandeh M 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 (2) *Virginal Journal of International Law* 389.

⁶⁵² Henderson C 'International measures for the protection of civilians in Libya and Cote D'Ivoire' (2011) 60 (3) *International and Comparative Law Quarterly* 770.

⁶⁵³ 'UNSC 6498th Meeting UN Doc S/PV.6498' Available at: <https://www.securitycouncilreport.org/un-documents/document/libya-s-pv-6498.php> (accessed 25 September 2023).

⁶⁵⁴ Zifcak S 'The Responsibility to Protect After Libya and Syria' (2012) 13 (1) *Melbourne Journal of International Law* 11.

⁶⁵⁵ Henderson C 'International measures for the protection of civilians in Libya and Cote D'Ivoire' (2011) 60 (3) *International and Comparative Law Quarterly* 771.

intervention initially had legal status; however, when it became a regime change operation, it lost legal status. Considering such criteria, NATO's intervention can be considered unjustified.

4.7 RESULTS OF NATO'S INTERVENTION

As a model intervention, NATO intervention in Libya was considered successful in providing protection for hundreds of thousands of civilians threatened by the oppressive regime.⁶⁵⁶ Thus, Zifcak asserts that the intervention was successful in achieving its goal of protecting Libyan citizens from further gross human rights violations, and emphasizes that "the citizens of Benghazi, referred to as cockroaches by their leader, were spared the massacre that was most likely to await them".⁶⁵⁷ He emphasizes that no 'boots on the ground' were used to achieve this success.⁶⁵⁸

In addition, Bellamy and Williams point out that NATO has been extensively accused of stretching the definition of Resolution 1973 and therefore inflicting civilian casualties in Libya. In addition, they draw attention to past experiences from Kosovo and the NATO first phase of Libya, which indicate that air power may halt mass killing, but it offers only indirect protection and may even result in some unintentional extra harm to civilian populations.⁶⁵⁹

As we saw in the case of Libya, this is exactly what happened. In its report from March 2012, Amnesty International said that NATO airstrikes had killed and injured scores of civilians in Brega, Tripoli, Zlitan, Sirte and Majer. Their belief is that many civilian deaths were the result of airstrikes on private homes, which at the time of attack had not been used for military purposes.⁶⁶⁰ Despite the allegations made by Amnesty International, NATO never investigated the allegations nor provided any reparations to victims. The only thing that was done, is that NATO released a statement. In its statement, it expressed its regret for the harm caused by the airstrikes and emphasized that such investigations must be conducted by the Libyan

⁶⁵⁶ Kuperman AJ 'A Model Humanitarian Intervention?: Reassessing NATO's Libya Campaign' (2013) 38 (1) *International Security* 108.

⁶⁵⁷ Zifcak S 'The Responsibility to Protect After Libya and Syria' (2012) 13 (1) *Melbourne Journal of International Law* 9.

⁶⁵⁸ Zifcak S 'The Responsibility to Protect After Libya and Syria' (2012) 13 (1) *Melbourne Journal of International Law* 11.

⁶⁵⁹ Bellamy AJ & Williams PD 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect' (2011) 87 (4) *International Affairs* 846.

⁶⁶⁰ Amnesty International Publications 'Amnesty International: 2012a. Libya: The forgotten victims of NATO strikes. London' Available at: <http://www.amnesty.ch/de/laender/naher-osten-nordafrika/libyen/nato-einsatz-dievergessenen-opfer/bericht-libya-the-forgotten-victims-of-nato-strikes--maerz-2012--22-seiten-6> (accessed 26 September 2023).

authorities.⁶⁶¹ A senior crisis response adviser for Amnesty International expressed deep disappointment with NATO's position, pointing out that NATO officials repeatedly stressed the importance of protecting civilians. It is unacceptable to simply dismiss civilian deaths without investigating them properly. Families of victims and victims who have been neglected feel abandoned and have no access to justice because of this treatment.⁶⁶²

Kuperman points out that by mid-March 2011, Qaddafi had regained most of control over Libya, and rebels had fled to Egypt, when NATO intervened.⁶⁶³ At that point, the number of casualties had reached about one thousand, including soldiers, rebels, and civilians. Due to NATO's intervention, the rebels resumed their attacks, resulting in seven months of war and seven thousand additional deaths. Due to this intervention, the conflict lasted six times as long and at least seven times as many people died.⁶⁶⁴ Thus, Kuperman and O'Connell convincingly argue that NATO's intervention in Libya significantly worsened humanitarian suffering rather than being a humanitarian success.⁶⁶⁵

NATO's intervention in Libya did not save lives by preventing or ending violent attacks on unarmed civilians in the short term, and as a result it was nothing but ineffective in protecting civilians. It is likely that Qaddafi's massacre was prevented by intervention, but it still increased the death toll by at least seven times, which means it cannot be considered as successfully ending "the supreme humanitarian emergency", which represents short-term success. The opposite happened, in this case, it backfired.

As far as long-term results are concerned, the intervention has led to even more civilian deaths.⁶⁶⁶ No victims of oppression were rescued nor were human rights protected following

⁶⁶¹ Amnesty International Publications 'Amnesty International: 2012a. Libya: The forgotten victims of NATO strikes. London' Available at: <http://www.amnesty.ch/de/laender/naher-osten-nordafrika/libyen/nato-einsatz-dievergessenen-opfer/bericht-libya-the-forgotten-victims-of-nato-strikes--maerz-2012.-22-seiten-6> (accessed 26 September 2023).

⁶⁶² Amnesty International, 2012b 'Libya: Civilian deaths from NATO airstrikes must be properly investigated' Available at: <https://www.amnesty.org/en/articles/news/2012/03/libya-civilian-deaths-natoairstrikes-must-be-properly-investigated/> (accessed 26 September 2023).

⁶⁶³ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 11.

⁶⁶⁴ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 11.

⁶⁶⁵ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 12.

⁶⁶⁶ Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical Analysis of NATO's Intervention in Libya' (2012) *Conflict trends* 48.

the intervention.⁶⁶⁷ Due to the fact that NATO's withdrawal resulted in a continuation of killing, this withdrawal cannot be considered successful from a long-term standpoint.

The outbreak of racial and ethnic violence increased in Libya following NATO's withdrawal in October 2011, causing further suffering. Following their victory, the rebels killed scores of villagers, tortured, and expelled more than thirty thousand mostly black residents of Tawergha, claiming they were 'mercenaries' for Qadhafi.⁶⁶⁸ The United Nations Mission of Inquiry, in its report from March 2012, found that these systematic and widespread abuses constituted crimes against humanity towards Tawerghans.⁶⁶⁹

As a result of the conflict between rival militias that arose following the 2011 civil war, the situation remained unstable. The two rival governments are exerting control over their own areas of territory, while armed groups divided along regional, ethnic, and ideological lines govern their own areas. Since the Libyan uprising in 2011, armed clashes have erupted in Tripoli more frequently than any other time since then. During the fighting, all conflicting parties used heavy weaponry in densely populated areas, which resulted in scores of civilian deaths and hundreds of thousands of civilian displacements.⁶⁷⁰

It appears that NATO's intervention in Libya did not result in any greater long-term protection for the Libyan population. The NATO intervention in Libya was, overall, a failure, both short-term and long-term, from the perspective of humanitarian standards, example, protecting life. This operation exacerbated humanitarian suffering beyond belief, contrary to its stated purpose.

4.6 SITUATION IN LIBYA AND THE ICC

The United Nations Security Council referred Libya to the ICC in February 2011 for investigation of alleged crimes against humanity after popular protests against Muammar Gaddafi's regime.⁶⁷¹ Libya is not a member of the Rome Statute, but the United Nations Security Council requested the ICC to investigate the situation in Libya. In March 2011, the

⁶⁶⁷ Iyi JM 'The Duty of an Intervention Force to Protect Civilians: A Critical Analysis of NATO's Intervention in Libya' (2012) *Conflict trends* 48.

⁶⁶⁸ Fridlund S 'Was NATO's intervention in Libya justified? Was it successful? What criteria are you using to judge this?' (2019) *International Security* 12.

⁶⁶⁹ Human Rights Council *Report of the International Commission of Inquiry on Libya* (2012) Advance Unedited Version A/HRC/19/68 13-14.

⁶⁷⁰ United Nations High Commissioner for Human Rights *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya and on related technical support and capacity-building needs* (2015) A/HRC/28/51. 5.

⁶⁷¹ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42:2 *International Interactions* 619.

ICC prosecutor opened an investigation into the situation in Libya.⁶⁷² A referral to the ICC to a non-member country like Libya, came a month after the UNSC unanimously referred the case to the Court.⁶⁷³ This referral condemns violence and the use of force against civilians, condemns the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expresses deep concern for the deaths of civilians and rejects unequivocally the incitement of hostility and violence against civilians by the Libyan government's highest officials.⁶⁷⁴

Libya's ICC case involves allegations of a 2011 state-level policy to suppress civilian protests against Muammar Gaddafi's government, including the use of lethal force.⁶⁷⁵ As a result of the uprisings in 2011, the UN Security Council referred this case unanimously to the ICC, which stressed that those responsible for attacking civilians should be held accountable.⁶⁷⁶ As part of its referral, the Security Council condemned violence and force against civilians, condemned the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressed deep concern for civilian deaths, and rejected unequivocally the high levels of the Libyan government's incitement to hostility and violence against civilians.⁶⁷⁷

Libyan case was handled by the ICC quickly. It took more than two years for the first arrest warrants to be issued in Libya.⁶⁷⁸ According to the referral, widespread and systematic attacks against civilians may constitute crimes against humanity.⁶⁷⁹ In Pre-Trial Chamber I, the court noted that governmental forces as well as organised armed groups and various other armed groups have been involved in armed conflict not of an international nature on Libyan territory since at least March 2011.⁶⁸⁰ It also produced three war crimes and crimes against humanity cases against five suspects. Three arrest warrants were issued by the Pre-Trial Chamber I on

⁶⁷² Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42:2 *International Interactions* 619.

⁶⁷³ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42:2 *International Interactions* 619.

⁶⁷⁴ United Nations Security Council United Nations Security Council Resolution 1970 (2011) S/Res/1970.

⁶⁷⁵ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (2) *International Interactions* 619.

⁶⁷⁶ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (2) *International Interactions* 619.

⁶⁷⁷ Mühlbacher A 'Security Council Referrals to the ICC and selected questions regarding the 'Situation in Libya' (2012) *Institute of Public International Law, Air Law and International Relations* LL.M. Thesis (London) 24.

⁶⁷⁸ Kersten M 'Between justice and politics: The ICC's intervention in Libya' In De Vos C, Kendall S & Stahn C (Eds.) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 465.

⁶⁷⁹ Kersten M 'Between justice and politics: The ICC's intervention in Libya' In De Vos C, Kendall S & Stahn C (Eds.) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 458.

⁶⁸⁰ Mühlbacher A 'Security Council Referrals to the ICC and selected questions regarding the 'Situation in Libya' (2012) *Institute of Public International Law, Air Law and International Relations* LL.M. Thesis (London) 24.

27 June 2011: one for Muammar Mohammed Abu Minyar Gaddafi, one for Abdullah Al-Senussi, Libya's intelligence chief, and one for Saif Al-Islam Gaddafi, the son of Muammar Gaddafi. Another arrest warrant was issued for Al-Tuhamy Mohamed Khaled in 2013 and another one for Al-Werfalli in 2017.⁶⁸¹ Muammar Gaddafi's arrest warrant was met with some criticism during the conflict. In response, the African Union mandated its member states not to collaborate with the ICC regarding arrest warrants, claiming it would seriously complicate the negotiation process.⁶⁸² The court has only heard three cases despite five arrest warrants being issued.⁶⁸³

4.7 ARREST WARRANTS FOR MUAMMAR GADDAFI AND HIS INNER CIRCLE

Among the three remaining cases, the Gaddafi Case is without a doubt the most prominent, Saif Al-Islam Gaddafi is accused of two counts of crimes against humanity, namely murder and persecution, according to articles 7(1) (a) and (h) of the Rome Statute, allegedly committed in Libya in 2011.⁶⁸⁴ According to these allegations, Libyan security forces attacked civilians taking part in anti-Gaddafi protests in February 2011. When the warrant against him was issued, he was acting as a de facto Prime Minister. The Hague Court has not taken custody of Gaddafi and he has avoided trial. Pre-trial proceedings were to continue until Gaddafi was captured and extradited.⁶⁸⁵ By arguing that he was already tried, convicted and sentenced to death in absentia by a Tripoli Court on 28 July 2015, Mr Gaddafi sought to challenge the admissibility of his case before the ICC.⁶⁸⁶ Gaddafi did not consider that the Tripoli judgment of 2015 was inadmissible because it did not meet the conditions of finality required by the Rome Statute. As a result, the case remains admissible before the Court, as the majority of the PTC I rejected Mr Gaddafi's admissibility challenge on 5 April 2019. Following his release in April 2016, he has remained at large ever since.⁶⁸⁷

Mauritania arrested Al-Senussi in March 2012. His extradition to Libya was completed in September 2012. Despite this, Libya's Supreme Court has not heard this case because the

⁶⁸¹ Saba R & Akbarzadeh S 'The ICC and R2P: Complementary or Contradictory?' (2021) 28:1 *International Peacekeeping* 91.

⁶⁸² Saba R & Akbarzadeh S 'The ICC and R2P: Complementary or Contradictory?' (2021) 28:1 *International Peacekeeping* 91.

⁶⁸³ Kersten M 'Between justice and politics: The ICC's intervention in Libya' In De Vos C, Kendall S & Stahn C (Eds.) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 463

⁶⁸⁴ Rome Statute Article 7(1) (a) and (h).

⁶⁸⁵ ICC 'Gaddafi Case Information' Available on <https://www.icc-cpi.int/libya/gaddafi> (Accessed on 7 November 2022).

⁶⁸⁶ Newton MA 'The Complementarity Conundrum: Are We Watching Evolution or Evisceration?' (2010) 8 *Santa Clara Journal of International Law* 127.

⁶⁸⁷ *Prosecutor v Saif Al-Islam Gaddafi* (2020) (ICC-01/11-01/11).

domestic prosecution rendered it inadmissible. A warrant of arrest is also out for Al-Tuhamy Mohamed Khaled for alleged war crimes committed between March 2011 and August 2011.

The ICC's Prosecutor issued the first arrest warrants against Al-Werfalli in 2017, alleging he killed 33 people in seven incidents as part of a war crime. According to the Libyan National Army, Al-Werfalli was arrested and was under investigation, but an eighth execution was filmed and circulated on social media that allegedly killed 10 more people. Two arrest warrants were issued by the Prosecutor on 4 July 2018 in the wake of these events. General Khalifa Haftar, commander of the Libyan National Army (LNA), is requested to facilitate the immediate surrender of Mr. Al-Werfalli to the ICC.⁶⁸⁸

The arrest warrant for Muammar Gaddafi was withdrawn on 22 November 2011 after he was killed.⁶⁸⁹ He was indicted for crimes against humanity while serving as commander of the Libyan Armed Forces, Leader of the Revolution, and acting Libyan Head of State at the time of the warrant.⁶⁹⁰

4.8 GADDAFI AND THE ICC

It remains to be seen whether the ICC will actually allow Libyan domestic courts to handle Saif's trial, even though the President of the ICC's Assembly of States Parties has publicly lauded the Libyan authorities for arresting Saif and taking a major step towards ensuring accountability in their regime.⁶⁹¹ It is unclear whether the ICC will conduct the trial, as Libyan leaders and citizens urge, or if the uncertainty surrounding the new government and the perceived need for swift, efficient justice require the ICC to participate.⁶⁹²

In the first instance, Saif can be tried by the Libyan judicial system. The Libyan authorities have stated that they want a trial, citing the significance that such a trial would have for Libyans and for the future of the country generally, since Saif's capture, especially during the Prosecutor's November trip to Libya.⁶⁹³ While the ICC and the Prosecutor have made it clear that the Libyans do not automatically have the right to try Saif, Libya's desire to do so does not

⁶⁸⁸ ICC 'Situation in Libya' Available at <https://www.icc-cpi.int/libya> (Accessed on 7 November 2022).

⁶⁸⁹ ICC 'Situation in Libya' Available at <https://www.icc-cpi.int/libya> (Accessed on 7 November 2022).

⁶⁹⁰ ICC 'Gaddafi Case Information' Available on <https://www.icc-cpi.int/libya/gaddafi> (Accessed on 7 November 2022).

⁶⁹¹ ICC 'Gaddafi Case Information' Available on <https://www.icc-cpi.int/libya/gaddafi> (Accessed on 7 November 2022).

⁶⁹² Al-Shaheibi R 'Gaddafi's Son Saif al-Islam Seized in Southern Libya' *Times* Available at: <http://www.time.com/time/world/article/0,8599,2099886,00.html> (Accessed 7 November 2022).

⁶⁹³ Prosecutor v. Gaddafi (2011) Case No. ICC-01/1 1-01/11.

entitle them to do so.⁶⁹⁴ The ICC has repeatedly emphasized that it is not for the Libyan government to decide whether a fair trial should be conducted in accordance with international law standards, despite repeated urgings from the Libyan authorities.⁶⁹⁵ The Rome Statute stipulates that Libya must formally challenge the admissibility of Saif's case before the ICC; Libya can only be allowed to try Saif at home if the ICC judges are satisfied that Libya displays an adequate commitment to justice.⁶⁹⁶ Nevertheless, the case would be in ICC's hands if the ICC deemed the case admissible, and Libya did not contest the admissibility issue.⁶⁹⁷

Despite being in control of the case, the ICC prosecutor says there may still be opportunities for Libya and the ICC to cooperate.⁶⁹⁸ It would be possible for Libya to cooperate by sequencing trials, so that Saif could be fully investigated and tried for crimes unrelated to those charged by the ICC before being handed over to the ICC, where he would then be tried for the more serious crimes.⁶⁹⁹ It is also possible for the ICC to bring Saif to Libya for trial. As opposed to prosecuting Saif in domestic courts, neither of these options appears to interest Libyan authorities.⁷⁰⁰

4.9 ICC AND THE PREVENTION OF VIOLATIONS IN LIBYA

As a result of the ICC's participation in Libya, Professor Hillebrecht investigated how the ICC's involvement in Libya affected civilian deaths.⁷⁰¹ As a result of these ICC actions, Professor Hillebrecht examines the level of violence in Libya. After the ICC intervenes in Libya, one would expect to see a decrease in violence in Libya as a result of its action.⁷⁰² A statistical model was used to examine whether civilian deaths decreased following ICC action.⁷⁰³ A number of variables were controlled for by Professor Hillebrecht in order to examine the

⁶⁹⁴ *Prosecutor v. Gaddafi* (2012) ICC-01/1 1-01/11.

⁶⁹⁵ *Prosecutor v. Gaddafi* (2012) ICC-01/1 1-01/11.

⁶⁹⁶ *Prosecutor v. Gaddafi* (2011) Case No. ICC-01/1 1-01/11.

⁶⁹⁷ *Prosecutor v. Gaddafi* (2011) Case No. ICC-01/1 1-01/11.

⁶⁹⁸ Guardian 'Saif al-Islam Gaddafi Could Be Tried in Libya, Says ICC Prosecutor' Guardian Available at: <http://www.guardian.co.uk/world/2011/nov/22/saif-al-islam-gaddafi-trial-libya> (Accessed 11 November 2022).

⁶⁹⁹ Kersten M 'Between justice and politics: The ICC's intervention in Libya' In De Vos C, Kendall S & Stahn C (Eds.) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 470.

⁷⁰⁰ *Prosecutor v. Gaddafi* (2011) Case No. ICC-01/1 1-01/11.

⁷⁰¹ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (2) *International Interactions* 616.

⁷⁰² Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (2) *International Interactions* 628.

⁷⁰³ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (2) *International Interactions* 629.

civilian death rate, including the intensity of the conflict between the Libyan government and rebels, NATO's military intervention, and the extent of global media coverage.⁷⁰⁴

4.10 ICC'S DETERRENT EFFECT IN LIBYA

The ICC primarily serves the purposes of punishing perpetrators and providing justice to victims, but one of its objectives is also to deter violence. Understanding how the ICC may affect the very conflicts to which it seeks to adjudicate is more important than ever as it expands its influence. According to the event count models used in Professor Hillebrecht article, the ICC can dampen the level of violent crime against civilians.⁷⁰⁵ So, even when conflict dynamics and media coverage are considered, the ICC can act as a deterrent during conflict.⁷⁰⁶ This is good news for those who support international justice, but it is important to understand the limitations of the data and their implications.

After the ICC opened investigations and issued arrest warrants in Libya, despite an ongoing conflict, the ICC served as both a retroactive law that affects the legal consequences of actions committed, that existed, before the law was enacted, and an instrument to prevent ongoing atrocity crimes and violence. Specific deterrence in the international mass atrocity prosecution context has its share of sceptics in the same way that immediate deterrence usually involves rational actor calculations.

In Libya, the Court appears to have a highly selective deterrent effect. Although the ICC's intervention may have helped bring the conflict to an end and prevented some atrocities, it clearly did not stop the rebels from committing acts that may have been war crimes, and it has not stopped some Libyan militias from arbitrarily detaining and torturing former pro-Gaddafi fighters.

As it stands, the ICC had little influence over Libyan affairs.⁷⁰⁷ A large part of the reason the ICC has little clout on the ground is that key NATO powers have abandoned it, who in the first

⁷⁰⁴ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 (2) *International Interactions* 631.

⁷⁰⁵ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42:2 *International Interactions* 637.

⁷⁰⁶ Hillebrecht C 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42:2 *International Interactions* 637.

⁷⁰⁷ The People, Ideas, and Things Journal 'Libya and the International Criminal Court: A Case Study for Shared Responsibility' Available at: <https://pitjournal.unc.edu/2023/01/15/libya-and-the-international-criminal-court-a-case-study-for-shared-responsibility/> (accessed 19 July 2024)

instance invoked its jurisdiction.⁷⁰⁸ The same powers seemed unconcerned or uninterested in human rights abuses in Libya, let alone any possible role for the ICC. As far as they are concerned, Libya is a success.⁷⁰⁹

Despite this, the ICC appears to have been unconcerned as well. There has been no movement toward investigating NATO for war crimes during this conflict, despite suggestions that it would be investigated. No investigation of anti-Gaddafi forces has been suggested.

In addition, the Court has said nothing about allegations of widespread arbitrary detentions and torture.⁷¹⁰ There needs to be an end to this silence. Nevertheless, the Commission of Inquiry and Amnesty International's allegations do not necessarily require an investigation.⁷¹¹ While the Court may not be able to conduct investigations into actions that are crimes against humanity, such as arbitrary detentions and torture, it should publicly remind all participants that it maintains its right to do so.⁷¹²

A key point to keep in mind here is that the jurisdiction of the ICC in Libya is indeterminate. There is no end to the Court's jurisdiction, so it could open new investigations in the future, including charges related to alleged crimes committed afterward.

In William Schabas's rightful observation, you can easily identify those who are not deterred but nearly impossible to determine those who are.⁷¹³ It will be measured against the empirical record for as long as advocates of ICJ believe the ICC has a deterrent effect.

4.11 CONCLUSION

United Nations Security Council on 26 February 2011 referred the Libyan situation to the ICC, a non-ICC member state. The first arrest warrant issued by the ICC in 2017 was unsealed on

⁷⁰⁸ The People, Ideas, and Things Journal 'Libya and the International Criminal Court: A Case Study for Shared Responsibility' Available at: <https://pitjournal.unc.edu/2023/01/15/libya-and-the-international-criminal-court-a-case-study-for-shared-responsibility/> (accessed 19 July 2024)

⁷⁰⁹ The People, Ideas, and Things Journal 'Libya and the International Criminal Court: A Case Study for Shared Responsibility' Available at: <https://pitjournal.unc.edu/2023/01/15/libya-and-the-international-criminal-court-a-case-study-for-shared-responsibility/> (accessed 19 July 2024)

⁷¹⁰ United Nations 'Human Rights Council requests Commission of Inquiry to conduct a Special Inquiry in the events in El Houleh' available at: <https://www.ohchr.org/en/press-releases/2012/06/human-rights-council-requests-commission-inquiry-conduct-special-inquiry> (accessed 19 July 2024).

⁷¹¹ United Nations 'Human Rights Council requests Commission of Inquiry to conduct a Special Inquiry in the events in El Houleh' available at: <https://www.ohchr.org/en/press-releases/2012/06/human-rights-council-requests-commission-inquiry-conduct-special-inquiry> (accessed 19 July 2024).

⁷¹² France Diplomacy 'Enforced disappearance, torture and arbitrary detention available at: <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/enforced-disappearance-torture-and-arbitrary-detention/> (accessed on 19 July 2024)

⁷¹³ Schabas W *An Introduction to the International Criminal Court* (2011) 79.

the 24th of April 2017. The warrant was unsealed to create new opportunities for the arrest and execution of Al-Tuhamy Mohamed Khaled for crimes against humanity and war crimes allegedly committed in 2011. As recently as July 2017, Mustafa Busayf al-Werfalli was charged with murder as a war crime in the second warrant issued in 2017. Despite international crimes and grave human rights violations, the two Libyan arrest warrants revealed in 2017 are an important part of the story of justice in the 21st century. To support justice and build a lasting peace, all actors whose responsibilities include ensuring international justice is delivered – including states, intergovernmental organizations, mechanisms such as the ICC, and civil society – have a role to play. The Human Rights Archive launched by Lawyers for Justice in Libya (LFJL) in December 2016 continues to gather evidence of human rights violations in the country, as LFJL shows in its first monitoring report. Transitional justice processes in ongoing conflict situations are built upon strengthened responses in the international legal order.

Since the ICC did not operate alone in Libya, it instead worked in co-ordination with the UNSC and NATO, the implications are from two perspectives. Due to its failure to outline the true objectives of its intervention in Libya, the NATO intervention was extremely controversial. However, NATO clearly placed regime change at the top of its agenda, even if its intervention was framed under Responsibility to Protect. However, this does not mean NATO failed to protect Libya's citizens. There is no doubt that NATO's short-term priority was regime change, excluding the initial justification under Responsibility to Protect, and it was accomplished. NATO's legitimacy, as well as that of the intervention, are called into question by this alteration of mission objectives.

Considering Qaddafi's uncertain future, the ICC worked with UNSC and NATO, and the OTP made an early and clear statement that it would investigate and prosecute any possible crimes committed in Libya. When these conditions exist, the ICC should act as a deterrent against conflict, but in the end it did not.

It is more important than ever to understand how the ICC might affect the very conflicts on which it seeks to adjudicate, as the ICC seeks to expand its influence. It is difficult to determine exactly what the effects of the ICC are, as they are mixed. Transferring the investigations at the Hague had an ameliorative effect on the conflict in Libya despite opening investigations leading to more conflict. Even though it is hard to parse the effects of the ICC, doing so is important, as they are numerous, complex, and interdependent.

The ICC's effectiveness in preventing, mitigating, and adjudicating conflicts is difficult to determine. The Libyan results, however, can be interpreted as an encouragement to act, to assess whether the ICC can exacerbate or mitigate conflict; to identify which ICC steps have ameliorative effects and which have the opposite effect; and to clarify how those who receive ICC orders view them, and whether they view them as credible forms of justice, shallow threats and mandates for revenge, or risky actions. To prevent human rights abuses and hold perpetrators of crimes against humanity accountable, the ICC should be a powerful voice. Nonetheless, understanding the full scope of the ICC's effects is essential for this vision to be realized.



CHAPTER 5

CONCLUSION

5.1 CONCLUSION

Since the ICC can try cases arising out of any events after 1 July 2002, potential perpetrators may realistically consider prosecution and punishment by the ICC.⁷¹⁴ A general deterrence theory was the basis for many of the early arguments about the ICC, arguing that leaders and subordinates would be deterred from committing atrocities under threat of prosecution by the ICC. As Payam Akhavan argues on the ICTY, the long culture of impunity paved the way for future human rights violations that international law could not prevent, but the ICTY was able to deter in some way.⁷¹⁵ According to him, targeting political and military leaders and threatening punishment or opprobrium can deter them immediately.⁷¹⁶

According to the preamble of the Rome Statute, the parties to the Rome Statute are determined to end impunity for the perpetrators of these crimes and to prevent them from occurring. It is theoretically possible for the ICC to prevent crimes in a variety of ways. The punishment can, for example, render abusers incapacitated through imprisonment, or it can be severe enough to reduce the likelihood of revenge attacks. The ICC's supporters, however, have emphasized that prevention can also be achieved by deterring future abuses. Deterrence is the principle that no rational actor should commit a crime if the perceived costs of that crime exceed the perceived gains. In its first Report to the UN, the ICC asserts that punishing individual perpetrators will contribute to deterring such crimes by deterring others from committing such crimes in the future. Additionally, the report emphasizes that establishing the ICC was a historic step towards holding perpetrators of international crimes accountable and deterring others from committing them. According to Leslie Vinjamuri, ICC supporters have increasingly stressed the deterrence argument and other such instrumental purposes of justice, rather than focusing on the moral and legal obligations to prosecute.⁷¹⁷

As of today, ICC jurisdiction extends to crimes committed after 2002 in more than 120 countries. The ICC is most likely to have a deterrent effect on member states, but since the UN

⁷¹⁴ Cronin-Furman K 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) *International Journal of Transitional Justice* 8.

⁷¹⁵ Akhavan P 'Justice in The Hague, Peace in the Former Yugoslavia?' (1998) 20(4) *Human Rights Quarterly* 748.

⁷¹⁶ Akhavan P 'Justice in The Hague, Peace in the Former Yugoslavia?' (1998) 20(4) *Human Rights Quarterly* 749.

⁷¹⁷ Vinjamuri L 'Deterrence, Democracy, and the Pursuit of International Justice' 24 (2010) *Ethics & International Affairs* 191.

can refer non-member cases for investigation, they may also deter non-members. The more reasonable claim, according to some scholars and experts, is that punishment exerts a deterrent effect, even with limited specific evidence, this is because humanity's core rationality implies that punishment should work. It is unfortunate that these hopes have not been realized. Despite ICC investigations and indictments, massive human rights violations have occurred in countries such as Syria and ongoing violations in Libya. This indicates that since the ICC was formed, it has only had a minimal deterrent effect.

There is still a significant role that the Court plays, despite certain setbacks. Deterrence theorists tend to claim that the ICC is perverse or futile when it comes to violence prevention. Civil wars are more likely to end in negotiation after ratification of the Rome Statute, and in some instances, it has marginalized violent opposition groups. As a result of ratification, repressive violence is less likely to occur, mass killing of civilians is less likely, and civil wars are less likely to commence. According to research, these correlations are the result of the Court's social effects. Leaders under the jurisdiction of the ICC improve their behaviour out of fear of losing their status and support because of ICC attention. It is critical to note, however, that the ICC does not have any pacifying effects that can be generalised in specific situations. The end of a war can sometimes be associated with it, and sometimes it is not. There are times when it leads to fewer violent incidents against civilians, and there are times when it does not. The Court's involvement should not be viewed with grandiose generalizations on this basis. Depending on the circumstances, the courts interventions may have a different impact.

In light of emerging empirical evidence, the ICC's potential to deter will vary according to the type of actor, the context, and its involvement level in a situation country.⁷¹⁸ Using conditional deterrence theory, Jo and Simmons found that deterring governments dependent on aid is easier than deterring governments that are more self-reliant.⁷¹⁹ Even rebels appeared to significantly reduce intentional civilian killing when they were threatened with prosecution by the ICC. A key finding of Jo and Simmons' study is that individuals, especially rebel groups, might only be deterred once the ICC has taken affirmative action.

Dutton and Alleblas describe three factors influencing the ICC's deterrent effect in a case study of Kenya: the domestic political context, the type of actor, and the level of intervention. Based

⁷¹⁸ Dutton Y and Alleblas T 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2013) 19 *St. Johns Law Review* 118.

⁷¹⁹ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity?' (2016) 70 (3) *International Organization* 37.

on their findings, Kenya's ratification of the ICC Statute alone did not necessarily deter violence, but the investigation and indictment of Kenyatta and Ruto appear to have had some deterrent effect, which contributed to the relatively peaceful elections in 2013. As a result of sustained engagement, the country's leaders were forced into a corner, and they took action to ensure that they would not be held accountable for any human rights violations. The findings in Kenya corroborate Jo and Simmons' conclusion that individuals are likely to be deterred once the ICC has taken affirmative steps to investigate them.

ICC ratification alone may produce some deterrent effects, according to some evidence. Studies suggest that human rights violations subside, and civil war hostilities pause after a government ratifies the ICC.⁷²⁰ In order to avoid ICC jurisdiction, Member States are encouraged to develop or strengthen domestic justice systems to take advantage of the ICC's complementarity provision. It is clear that states that implement ICC-consistent criminal laws have reduced the number of fatalities committed by government actors against civilians, which can be attributed in part to the ICC's presence.⁷²¹ While it may not be possible to tell whether the ICC itself or the new domestic laws have a deterrent effect, joining and engaging with it does seem to have some deterrent effect, directly or indirectly.

According to Beth Simmons and Allison Marston Danner, the involvement of the ICC in conflict zones is correlated with a pause in civil war hostilities following the ratification of the Rome Statute by a government.⁷²² It is an opportunity for governments to make costly and credible commitments to peace by recognizing the Court's jurisdiction. In a study comparing conflict states, Beth Simmons and Hyeran Jo found that the ICC jurisdiction has reduced violence against civilians in several conflict states.⁷²³ Their argument is that this effect results from both the likelihood that the Court will prosecute, as well as what they call social deterrence, or the ICC's ability to mobilize social pressure. Governments appear to benefit more from the ICC than rebels, according to the study. The effect of the Court relies on civil society actors who support accountability and monitoring of ICC interventions in both cases, ceasing hostilities or reducing civilian targeting.

⁷²⁰ Simmons BA and Danner A 'Credible Commitments and the International Criminal Court.' *International Organization* (2010) 226.

⁷²¹ ⁷²¹ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity? (2016) 70 (3) *International Organization* 37.

⁷²² Simmons BA and Danner A 'Credible Commitments and the International Criminal Court.' *International Organization* (2010) 226.

⁷²³ Jo H & Simmons B 'Can the International Criminal Court Deter Atrocity? (2016) 70 (3) *International Organization* 444.

According to Kim and Sikkink, human rights trials are valuable. Human rights prosecutions in transitional countries are less repressive than in countries that do not, cumulative prosecutions in countries with more prosecutions are less repressive than fewer prosecutions in countries with more prosecutions, and even countries with many neighbours with prosecutions are less repressive. Deterrence is based on both normative pressure and material punishment, and the combination is more effective than either one alone. ICC prosecutions may also have a normative effect. In comparison with other ICT's, the ICC gives victims a more prominent role. The ICC may influence the decisions of domestic or international bodies to increase victims' roles within prosecutions if it is seen as a model for how to prosecute human rights abuses.

There is a possibility that the deterrent effect of the ICC may arise from its ability to influence the behaviour of various groups, including those who are criminally inclined, thus preventing crimes from being committed. Norm setting can also serve as a preventive measure, in the strict sense, by incorporating core crimes into national legislation, and, in a broader sense, social deterrence. A new societal ethos may be instilled by the establishment and operation of the ICC, which instructs individuals that commissioning international crimes may make them liable to prosecution. In addition to this, it may cultivate respect for human rights, the rule of law, etc., and thus influence actors' behaviour by instilling them with a sense of morality, justice, or righteousness.

Warring parties may be intimidated into coming to the negotiating table by threats of ICC prosecution, thus negatively impacting peace processes. According to Ku and Nzelibe, prosecutions can discourage bargaining between warring parties, thus preventing amnesty's use and prolonging the conflict.⁷²⁴ According to some commentators, UN Security Council Resolution 1970 (2011) referring Libya to the ICC hindered a diplomatic solution and forced Gaddafi to fight to the bitter end instead of negotiating a settlement.⁷²⁵

One of the classical purposes of criminal punishment is deterrence. Given the system's resource constraints, criminal justice decision-makers strive to implement laws and strategies that will deter as much crime as possible. Although domestic systems have been tested for centuries,

⁷²⁴ Ku J and Nzelibe J 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' *Washington University Law Review* (2006) 821.

⁷²⁵ Dutton Y and Alleblas T 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2013) 19 *St. Johns Law Review* 118.

measuring the deterrent effect of a given policy can be challenging.⁷²⁶ International legal orders have now become increasingly concerned with criminal deterrence due to the rapid development of international criminal law over the last years.⁷²⁷ In the quest to prevent atrocities of international concern, the establishment of a permanent ICC represents an important step forward.⁷²⁸

In Snyder and Vinjamuri's view, prosecutions may undermine peace, when enforcement power is weak, rather than leading to perpetrators relinquishing their power and desisting from their abuses through pragmatic bargaining.⁷²⁹ It is suggested that this dynamic can be applied to the ICC; since the Court is frequently unable to exercise its power and prosecute its indictments, perpetrators have little incentive to relinquish power. This is why pragmatic bargaining is deemed necessary to achieve these goals. In addition, they point out that prosecutions can exacerbate peace processes, and they list several factors that make prosecuting perpetrators likely to result in violence and abuse. This includes weak political institutions, ongoing conflicts without a decisive winner, and potential spoilers that hinder the institutionalization of the rule of law.⁷³⁰

Cronin-Furman analyses the ICC's deterrent potential based on traditional criminological theory, which suggests that severe punishments and certainty of punishment affect deterrence. Regarding the first point, she suggests that the ICC can impose less severe punishments than what domestic courts would impose. The ICC's inability to impose the death penalty as well as its record of relatively light sentences may lessen its deterrent power. A defendant's home country might have better prison conditions than The Hague, thus minimising any deterrent effect.

Since the ICC lacks enforcement mechanisms, it has no choice but to rely on member states for arrests and turnovers. The ICC has indicted 42 people in its history, but only 10 have been convicted, and only two have been sentenced. Several suspects remain at large. There is no guarantee that punishment will happen, which may negatively affect the effectiveness of any

⁷²⁶ Robinson PH & Darley JM 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* 978.

⁷²⁷ Security Council Resolution 827 12 (1993) U.N.Doc. S/RES/827 (1993).

⁷²⁸ Aksar Y *Implementing International Humanitarian Law: The Ad Hoc Tribunals to a Permanent International Criminal Court* (2004) 56.

⁷²⁹ Dutton Y and Alleblas T 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2013) 19 *St. Johns Law Review* 12.

⁷³⁰ Snyder J & Vinjamuri L 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 *International Security Journal* 15.

deterrent effect. Under certain conditions, the ICC does in fact exert a deterrent effect, despite these theoretical arguments. The deterrent effect of the ICC may therefore be minimized by its reduced probability of prosecution, or confined to certain types of situations and individuals, but not eliminated.

The theory of deterrence is based on a rational actor model, according to which an individual calculates the perceived benefit from committing a crime to be less than its perceived cost. The ICC has jurisdiction over a wide range of crimes, and some have argued that those committing these crimes are not rational actors, and have a skewed view of the costs and benefits of their actions.⁷³¹ According to Cronin-Furman, aggression against civilians can be both ordered by leaders and allowed by subordinates.⁷³² Her study suggests that a cost-benefit analysis may not be able to properly deter those in the first category due to their overriding interests.⁷³³ Furthermore, if the threat of prosecution by the ICC is severe and certain enough, the latter may be deterred.

ICC investigations are shown to increase domestic prosecutions of low-level state agents who have committed human rights violations, as reported by Dancy and Montal in a paper presented to the American Society of International Law; on average, countries under investigation have three times more domestic prosecutions than others.⁷³⁴ As a result of ICC investigations, civil society actors are able to mobilize courts and demand reform under the watchful eye of the international community.

Most of these prosecutions are conducted under domestic criminal law, but some use international criminal law. Based on quantitative statistics, domestic prosecutions for human rights are strongly correlated with improvements in physical integrity rights. Repression is lessened even further in these countries when the judicial system can systematically issue guilty verdicts, perhaps because the rule of law is more firmly established. Retributive justice appears to work as intended: it appears to result in improvements in the very human rights practices that the prosecutions aimed to improve.

⁷³¹ Cronin-Furman K 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) *International Journal of Transitional Justice* 6.

⁷³² Cronin-Furman K 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) *International Journal of Transitional Justice* 13.

⁷³³ Cronin-Furman K 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) *International Journal of Transitional Justice* 13.

⁷³⁴ Dancy G & Montal F 'From Law Versus Politics to Law In Politics: A Pragmatist Assessment Of The ICC's Impact' 32(3) *American University International Law Review* 683.

Despite some blunders and opposition, the ICC has the potential to become a productive participant in local political interactions. There are a few important lessons to be learned from the consideration of evidence. ICC plays a marginally helpful role in bringing an end to civil wars, the metric by which it is often evaluated by political scientists, and it does not hinder peace as frequently as it is thought to. In general, ratifiers are no less likely to pass amnesties than nations that ratify the Rome Statute during fighting. It may be because the Court has at times been used to marginalize rebel opposition that ICC intervention is associated with shorter wars on average. There is no statistically significant association between ICC intervention and shorter wars. Although the Court has no overall negative impact, this is still a substantial finding. If anything, the ICC's presence in conflict zones has generally had a positive effect, even though it has received a great deal of criticism.

State parties should support the ICC prosecution to increase the consistency and credibility of the ICC prosecution so that this potential deterrent impact becomes more real than theoretical. Afterwards, it will begin to prove its founders' predictions that it will contribute to international crime prevention.

Maintaining independence is the most important thing the ICC must do. Assuring impartiality, non-political conduct, and purely judicial conduct could assist in accomplishing this. With an independent court, the international community can have confidence in the work of the ICC. Without this, the ICC will lose its credibility and will be used to settle political scores.

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