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# The International Criminal Court

## An Analysis of the Prevention and Deterrence of Atrocity Crimes

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Shanay M. Murdock

### ABSTRACT

This work examines the International Criminal Court (ICC) and its capacity for preventing and deterring atrocity crimes (genocide, crimes against humanity, and war crimes) in relation to its historical development and current standing. Prevention and deterrence at the international level are very difficult to measure empirically, so this work focuses on the perceived successes and challenges of the ICC's deterrent capacity as a "Court of last resort," in light of international legal and institutional norms. The Court, now in its thirteenth year, is the first of its kind, leaving it vulnerable to (sometimes) unrealistic criticisms and expectations as it builds a network of external cooperation and works to modify its procedures in favor of effectiveness and efficiency for the coming years. In analyzing the various claims, I argue that while deterrence is not total, the ICC has developed a growing preventative impact that will continue to progress alongside as well as shape the emerging field of international criminal law.

## Introduction

The International Criminal Court (ICC) is still described as being in its infancy since it became operational in 2002. Since it began thirteen years ago, efficiency has been difficult to measure, particularly in the realm of deterring and/or preventing atrocity crimes. Influenced heavily by twentieth-century international tribunals, the ICC is the first permanent international criminal court designed to end impunity for the perpetration of the gravest of crimes.

The Court was created through the negotiation efforts of representatives of the United Nations General Assembly in 1998 resulting in the Rome Statute, the ICC's founding document. According to the Rome Statute, the Court's jurisdiction covers three primary crimes: genocide, war crimes, and crimes against humanity.<sup>1</sup> As listed in the Rome Statute's preamble, the ICC is "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."<sup>2</sup>

There are mixed perspectives on whether or not the International Criminal Court can be seen as an institute of preventative measures and many scholars believe that prevention should not be an explicit goal of the Court. However, I argue that the Court is an institution with preventative and deterrent impact, perhaps in some ways subtler than others, and that we need to maintain realistic expectations of the Court and its potential. To do this, I explain the development and current state of the International Criminal Court, discuss methods of prevention and deterrence that have been used to date, examine the challenges to global deterrence of atrocity crimes, and review the realistic expectations of the Court at this stage of its existence.

## Methodology

The research for this project was done in multiple facets. The idea for this project developed in the Spring 2015 semester while taking POLS 389 – International Law and Organizations with instructor Dawn Willis, where I was able to conduct preliminary research through law and literature reviews on the topic.

Once the topic was solidified, I participated in a trip to The Hague, Netherlands with the Peace, Justice, and the International Courts study abroad program where I worked under the direct supervision of Dr. J.D. Bowers with additional guidance from Dr. Delia Popescu of Le Moyne College in Syracuse, New York. I used this visit to further my research using sources from the Peace Palace Library, the second oldest law-specific library in the world.

Visiting The Hague also allowed me to conduct one-on-one interviews with faculty members specializing in international law, transitional justice, and criminology. I first interviewed Dr. Maarten van Munster, senior lecturer in Human Rights Law and European Union Law at *De Haagse Hogeschool* (The Hague University of Applied Sciences). My second one-on-one interview was with Dr. Joris van Wijk, Associate Professor of Criminology and Executive Director of The Center for International Criminal Justice at *Vrije Universiteit* (VU) Amsterdam.

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<sup>1</sup> These crimes will be referred to collectively as 'atrocity crimes.' The ICC's jurisdiction also extends to crimes of aggression but as this crime has not been defined by consensus, it will be ignored for the duration of this paper, as it has not yet become a crime that is investigated or prosecuted by the Court.

<sup>2</sup> United Nations. Preamble of "Rome Statute of the International Criminal Court." Rome: United Nations, 1998.

In addition to one-on-one interviews, I was able to gain valuable information from guest lecturers, as they were part of the larger Peace, Justice, and International Courts program. At the NIOD Institute of War, Genocide, and Holocaust Studies in Amsterdam, Netherlands, I was able to speak with Dr. Johannes ten Houwink ten Cate and Dr. Kjell Anderson, Professor and Researcher/Coordinator Master of the Holocaust and Genocide Studies Program at University of Amsterdam respectively.

In The Hague, I received the opportunity to speak with a researcher from The Hague Institute for Global Justice (HIGJ) to include Dr. Eamon Aloyo, Senior Researcher, along with Dr. Anthony Lang and Dr. Andrea Birdsall, who would present together at a conference hosted by the HIGJ. Last but not least, I was also able to gain insight from employees of the Office of the Prosecutor from within the International Criminal Court, including Stanislas Talontsi, the Judicial Cooperation assistant, as well as the Lead investigator of three current ICC investigations. Due to the confidentiality necessary for such a position, I have agreed to respect this person's wish for anonymity.

## The Development and Current State of the ICC

As of July 2015, there are currently 123 State Parties that have both signed and ratified the Rome Statute. This means that more than 60% of sovereign states have willingly accepted the jurisdiction of the International Criminal Court and so far, none that have ratified have withdrawn from the ICC. However, there are more than 70 sovereign states have not signed or ratified the Rome Statute, including states such as Russia, China, India, and the United States, each of which contain large portions of the world's population. This means that over half of the global population is not protected by the jurisdiction of the ICC and that three of the Permanent Five (P5) UN Security Council states are not members.<sup>3</sup>

The ICC is the first of its kind in regards to being the first permanent, treaty-based international criminal court designed to hold individuals accountable for "the most serious crimes of concern to the international community."<sup>4</sup> The Court itself is modeled after the *ex post facto* and *ad hoc* courts that came before it. The earliest international tribunals include the Nuremberg Trials and the Tokyo Trials, both of which were set up by the Allied victors of World War II.<sup>5</sup> These began and ended in the 1940s in the aftermath of the Second World War in order to deal with the perpetrators of crimes that were larger in scale than the modern world had ever seen.

The two tribunals that most directly influenced the structure of the ICC are the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal

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<sup>3</sup> International Criminal Court, *State Parties to the Rome Statute (Chronological List)*. 2015. [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (accessed March 19, 2015).

<sup>4</sup> International Criminal Court, *About the Court*. [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx) (accessed April 2, 2015).

<sup>5</sup> Philippe Kirsch, "The Role of the International Criminal Court in Enforcing International Criminal Law." *American University International Law Review* 22, no. 4 (2007):540.

Tribunal for Rwanda (ICTR), both of which were created in the 1990s following the outbreak of wars that lead to genocides in both regions. These two *ad hoc* courts were set up directly by the United Nations Security Council for the purpose of direct participation and oversight by the UN.

When the International Criminal Court was created, it was developed to bear in mind the limitations that had been seen in the four aforementioned tribunals and to improve upon them where possible. To begin, these four tribunals had been created by only a few states each and were highly dependent on the political will of the time.<sup>6</sup> The ICC's creation was also dependent on the political will of the time, explaining why it was not created in 1937 under the efforts of the League of Nations where the concept originated. However, its design as a permanent court is meant to remove any further reliance upon timely political will.<sup>7</sup>

These four historic tribunals were limited to events in the past rather than ongoing conflicts (save the former Yugoslavia) and jurisdiction was limited to specific geographical locations and temporal constraints. The Nuremberg Trials dealt with war crimes committed by the ruling Nazi Party during World War II; the Tokyo Trials dealt with the leaders most responsible for the war crimes that had been perpetrated by the Empire of Japan during the same period; the ICTY deals with those most responsible for committing genocide, war crimes, and crimes against humanity within the territory that makes up the former Yugoslavia from 1 January 1991 through 2001; and the ICTR handles those accused of the same crimes committed in Rwanda between 1 January 1994 and 31 December 1994.<sup>8</sup>

The ICC was developed to keep in mind the exorbitant costs of establishing and pioneering *ad hoc* courts such as the ICTY and ICTR. These institutions often saw delays in procedural and operational development because they were the first of their kind, specifically meant for all operations to be completed and the tribunals closed after a predicted amount of time.<sup>9</sup> At its peak budget, the ICTY and ICTR made up a collective 10% of the United Nations annual operational budget. This includes factors such as translation costs that would not normally be found in the standard operating procedures of domestic courts and the two tribunals have been repeatedly subjected to public defenses of their budgets.<sup>10</sup>

In addition to these factors, it was a goal of international criminal tribunals to punish perpetrators and deter future atrocity crimes from happening but results have been limited.<sup>11</sup> The best-known failure to prevent atrocity crimes comes in the example of the genocide that occurred at Srebrenica, Bosnia-Herzegovina. The July 1995 massacre occurred after the ICTY was already operational (1993) and those most responsible, both Republika Srpska President Radovan

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<sup>6</sup> Kirsch, 540.

<sup>7</sup> Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*. (New York: The New Press, 2012), 503.

<sup>8</sup> David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*. (Princeton: Princeton University Press, 2012), 448.

<sup>9</sup> Kirsch, 540.

<sup>10</sup> International Criminal Tribunal for the former Yugoslavia, *The Cost of Justice*. 2015. <http://www.icty.org/sid/325> (accessed May 16, 2015).

<sup>11</sup> Kirsch, 541; Mariana Rodríguez-Pareja and Salvador Herencia-Carrasco, *At the ICC, There is no Deterrence without Resources*. June 10, 2015. <https://www.opendemocracy.net/openglobalrights/mariana-rodr%C3%ADguezpareja-salvador-herenciacarrasco/at-icc-there-is-no-deterrence-wit> (accessed June 10, 2015).

Karadžić and Bosnian Serb military leader Ratko Mladić, had already been indicted.<sup>12</sup> It has since become the mindset of the International Criminal Court to end the established culture of impunity and prevent atrocity crimes through various means.

In order to accomplish such an extensive goal, it is important to recognize where the Court differs from its predecessors. First, the UN General Assembly developed the ICC but once the Rome Statute was negotiated and completed, the ICC became an independent entity entirely.<sup>13</sup> This means that the ICC's budget is independent from the UN's annual budget with the funding coming from each of the 123 State Parties and is decided based on a budgetary system developed by the UN to determine each State Party's capacity to pay indicative of current financial situations.<sup>14</sup> This bears in mind that the UN only provides the system for determining each State's contribution but does not include any other input, enforcement, or financial support.

Second, the ICC is the first international court negotiated and created by an international treaty, allowing for the input and negotiation of all UN Member States.<sup>15</sup> A vast majority, 160 UN Member States, participated in the drafting of the Rome Statute and is formerly unprecedented for the intended nature of the Court's work. In the Rome Conference, the issue of individual criminal liability was heavily modeled around Article 3 of the 1949 Geneva Conventions because it is already widely accepted, sexual violence was explicitly branded a war crime, and "command liability" was clearly established as a basis for liability to reflect the evolution of the crime as dealt with by the ICTY.<sup>16</sup>

Following the Rome Conference, a Preparatory Committee met for over three years in order to develop the Court's functionality through the Rules of Procedure and Evidence, Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Financial Regulations, and the Agreement on the Privileges and Immunities of the Court.<sup>17</sup> While judges typically develop these procedures and details, the initial State Parties took it upon themselves to determine the specifics as a way to ensure that the Court's potentially universal jurisdiction would remain a purely judicial court and avoid any unnecessary influence of politics in the Court's decisions.<sup>18</sup>

To fully understand the International Criminal Court's overall impact in dealing with atrocity crimes, one needs to understand how cases enter the Court and what cases it has seen thus far. The ICC is able to begin cases in three ways: any State Party may refer a case happening on its own territory or by its own nationals, the UN Security Council may refer a case (whether it is a State Party or non-State Party), and the Prosecutor may begin an investigation of

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<sup>12</sup> Theodor Meron, "Answering for War Crimes: Lessons from the Balkans." *Foreign Affairs*, Jan/Feb 1997.

<sup>13</sup> Kirsch, 541.

<sup>14</sup> Coalition for the International Criminal Court. *Budget and Finance Record*. <http://www.iccnw.org/?mod=budgetbackground> (accessed June 25, 2015).

<sup>15</sup> Kirsch, 541.

<sup>16</sup> Robertson, 505.

<sup>17</sup> Kirsch, 541; Coalition for the International Criminal Court, *History of the ICC*. <http://www.iccnw.org/?mod=icchistory> (accessed July 5, 2015).

<sup>18</sup> Kirsch, 541.

their own will (*proprio motu*) of State Parties with the authorization of the Court's Pre-Trial Chamber.<sup>19</sup>

While the Court aims to end the impunity of individual perpetrators, the Court has historically sought out the highest-level perpetrators most responsible for the crimes within the Court's jurisdiction. Therefore, the cases are organized by the states where armed conflict is occurring, followed by a list of individuals within each state that have allegedly committed crimes under the jurisdiction of the Rome Statute to allow for standardized organization of investigations and findings.

Currently, five cases of self-referral sit before the Court, including the Democratic Republic of the Congo (DRC), Uganda, Mali, and two investigations in the Central African Republic (CAR & CAR II).<sup>20</sup> The Office of the Prosecutor (OTP) has initiated two investigations using the power of *proprio motu*: Kenya and Côte d'Ivoire, where it was found that the countries were either unwilling or unable to handle these crimes on a domestic level and they failed to refer themselves to the Court for judiciary assistance.<sup>21</sup> This power is significant because it is the first time in history that an international prosecutor has had the authority to independently open investigations in places where crimes have been committed.<sup>22</sup>

The UN Security Council is also responsible for the referral of two active cases to include the Sudanese government on suspicion of state-sponsored violence in Darfur and the Libyan government on charges of brutal repression of popular protests during the Arab Spring.<sup>23</sup> It is worthy to note that while State Parties and the OTP have rigid regulations for referring or opening a case, referrals by the UN Security Council do not have to meet any particular standards but face their own challenges in that a single P5 veto may terminate a referral before it ever reaches the Office of the Prosecutor.<sup>24</sup> Geoffrey Robertson (2012) notes the difficulties of passing an ICC referral through the Security Council, stating that UN Security Council referrals are more likely to occur if none of the individuals sought for allegedly committing atrocity crimes has a superpower supporter.<sup>25</sup> Both of the situations in Darfur and Libya passed through the UN Security Council to reach the OTP but others have failed.

The majority of the investigations thus far have been regarding internally armed conflicts rather than inter-state conflicts. This has important legal ramifications because whether the crimes are committed internally or between states, the nature of genocide, crimes against humanity, and war crimes exceed domestic law and enter the realm of international law in the event that domestic rule of law is unwilling or incapable of handling judicial proceedings.

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<sup>19</sup> William A. Schabas, *An Introduction to the International Criminal Court*. 4th Edition. (New York: Cambridge University Press, 2011).

<sup>20</sup> Andrew Novak, *The International Criminal Court: An Introduction*. (New York: Springer, 2015), 72-73.

<sup>21</sup> Novak, 72-73.

<sup>22</sup> Fatou Bensouda, "Setting the Record Straight: The ICC's New Prosecutor Responds to African Concerns." *Seminar Institute for Security Studies (ISS)*. Pretoria, 2012, 4.

<sup>23</sup> Terrence L. Chapman and Stephen Chaudoin. "Ratification Patterns and the International Criminal Court." *International Studies Quarterly* 57 (2013): 401; Novak, 72-73; United Nations Security Council. "Resolution 1593." 2005; United Nations Security Council. "Resolution 1970." 2011.

<sup>24</sup> Bensouda, "Setting the Record Straight," 6.

<sup>25</sup> Robertson, 507.

In addition to the twenty-two cases being built within the nine investigations aforementioned, there are nine preliminary examinations underway across the world. Honduras, Colombia, Guinea, Iraq, Afghanistan, Nigeria, Ukraine, Georgia, and Palestine have each been under careful watch and initial analysis by the OTP while it determines if the crimes brought forth are admissible under the Court's jurisdiction.<sup>26</sup> These include both domestic and inter-state conflicts and the OTP is working to determine if judicial proceedings within each state qualify as being properly handled by international standards.

The ICC's current agenda is both overbearing and underwhelming. The Court has active investigations going on in nine situations with preliminary examinations occurring in another nine situations and only two convictions have resulted in thirteen years of work. Resources are limited and international demands for global justice suggest this level of capacity does not meet expectations and so we must analyze what progress the Court has made in its mandate and what challenges currently hinder the ICC from operating at its optimal capacity.

## Methods of Prevention and Deterrence

### Deterrence through Ratification of the Rome Statute

The first and original method of deterrence of atrocity crimes is the ratification of the Rome Statute that declares a state's willing membership to abide by the Court's jurisdiction.<sup>27</sup> There are, however, dissenting views on what states are more or less likely to ratify the Rome Statute through pattern analysis and this more so pertains to state officials rather than individuals or rebel and/or paramilitary groups.

Beth A. Simmons and Allison Danner (2010) describe the patterns of Rome Statute ratification in the following way: "The states that are both the least and the most vulnerable to the possibility of an ICC case affecting their citizens have committed most readily to the ICC, while potentially vulnerable states with credible alternative means to hold leaders accountable do not."<sup>28</sup> This would be a viable explanation as to why more vulnerable states such as the African states of the Democratic Republic of the Congo, Central African Republic, and Uganda have joined as well as less vulnerable states such as The Netherlands, Finland, and Denmark, where vulnerability in this regard refers to a state's potential to see its nationals prosecuted by the ICC.

Simmons and Danner's argument concerning "potentially vulnerable states with credible alternative means to hold leaders accountable" would fit the reasoning behind the United States' conscious efforts to avoid ratification of the Rome Statute since the George W. Bush Administration. Because the United States features a strong rule of law in comparison to many developing states and the country feels very strongly about being responsible for handling the legal and judicial affairs of its own nationals, the U.S. removed its signature of the Rome Statute in order to allow the presidential administration (and subsequently the U.S. military) the ability to operate as it believes is needed, which may at times violate the nature of the crimes within the

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<sup>26</sup> International Criminal Court, "OTP Report on Preliminary Examination Activities 2014." Preliminary Examination, Office of the Prosecutor, International Criminal Court, The Hague, 2014.

<sup>27</sup> Eamon Aloyo and Agnese Macaluso, interview by Shanay Murdock. The Hague, (June 4, 2015).

<sup>28</sup> Beth A. Simmons and Allison Danner, "Credible Commitments and the International Criminal Court." *International Organization* 64, no. 2 (April 2010): 225.

jurisdiction of the Rome Statute. American exceptionalism is one of the main arguments against relinquishing any level of sovereignty to the ICC.<sup>29</sup> In addition, both Russia and China are on the UN Security Council P5 and are known for human rights abuses; they too have refrained from the ratification of the Rome Statute, wishing like the U.S. to maintain national sovereignty without relinquishing any power to the International Criminal Court.

Terrence L. Chapman and Stephen Chaudoin take a different approach in response to Simmons and Danner. Their research from 2013 states that “democracies with little internal violence are the most likely countries to join the ICC,” while “countries with the most to fear from ICC prosecutions—non-democracies with weak legal systems and a history of domestic political violence, tend to avoid ratification.”<sup>30</sup> Chapman and Chaudoin justify this in terms of the experiences of internal conflict in the 1990s, suggesting that states that ratified the Rome Statute experienced lesser civil violence than states that did not ratify the statute.<sup>31</sup> They argue that Sub-Saharan Africa is the exception to the pattern, despite a large number of Sub-Saharan African states having become State Parties (21 out of the 34 African states that ratified did so by the year the Court became operational) and despite this region dominating focus of the Court so far.<sup>32</sup>

Simmons and Danner also argue that ratification of the Rome Statute is equivalent to a credible commitment, signaling a desire to strengthen rule of law within each individual state and prevent the occurrence of the atrocity crimes within the Court’s jurisdiction.<sup>33</sup> They have also noted that those states seeing conflict prior to the ratification of the Rome Statute typically see a break in fighting upon ratification, particularly in civil or domestic armed conflict where attempts at peace negotiations may then occur which may or may not end successfully.<sup>34</sup> Designing their article as a response to Simmons and Danner, Chapman and Chaudoin further expand by stating that existing democracies are less in need of this commitment as their institutions should already be designed to refrain from atrocity crimes while non-democracies with recent histories of internal conflict are most in need of making this commitment and being held to it, yet commitments have been made by each extreme end of the continuum while others from each end have yet to ratify.<sup>35</sup>

### Deterrence through Norm-Setting

In a speech given in 2012, former ICC President Judge Sang-Hyun Song highlighted three categories of actions in which the International Criminal Court is seeking to prevent and deter atrocity crimes. He listed deterrence through norm setting, deterrence through prosecution

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<sup>29</sup>Philippe Lagassé, "The International Criminal Court and the Foreign Policies of the United States." *International Journal* (Sage Publications, LTD.) 59, no. 2 (2004): 430.

<sup>30</sup> Chapman & Chaudoin, 400.

<sup>31</sup> Ibid, 402-403.

<sup>32</sup> Ibid, 402; International Criminal Court, *African States*. 2013. [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx) (accessed July 14, 2015).

<sup>33</sup> Simmons & Danner, 225.

<sup>34</sup> Ibid, 253.

<sup>35</sup> Chapman & Chaudoin, 401.

and/or threat of prosecution, and deterrence through peace building and stabilization, each of which has several components to the concept.<sup>36</sup>

The first of which, norm setting, has the most potential for further growth and is the most in need of further development.<sup>37</sup> Katharine A. Marshall suggested in 2010 that the ICC has the ability to set the example for state conduct in regards to strengthening rule of law and refraining from such crimes but the ICC relies heavily upon international institutions, NGOs, and above all, State Parties to implement the norms established by the Rome Statute.<sup>38</sup>

Judge Song suggested that norm setting allows for the development of both legal and moral norms that are designed to make crimes both unacceptable and punishable in a number of ways. Stephen Pinker discusses a “growing intolerance of human society towards war, torture, and other forms of brutality, reflecting a normative [moral] shift in what is viewed as acceptable and part of the status quo.”<sup>39</sup> Sixty years ago, domestic concerns were far from the attention of the developing international community.<sup>40</sup> With this development in the global mentality, there has been a growth in international politics where a stronger demand for the protection of human rights has occurred. This has put greater pressure on international institutions to monitor the conduct of state leaders and to critique domestic affairs, essentially sidestepping the traditional ideas of sovereignty.<sup>41</sup> This reliance includes dependence on the success of conflict prevention and mediation tactics, whether to garner peace or negative peace, meaning the absence of conflict.<sup>42</sup>

While other international institutions such as Human Rights Watch and Amnesty International focus on the exposure of human rights violations in a variety of ways, the Rome Statute creates the opportunity to realize international justice by operating one standard to all its State Parties.<sup>43</sup> This removes any biases from dealing with any particular regions and ensures fair trials with predictable results. The Court has been criticized for this standard being too Western in design but this criticism will be addressed further in the following section regarding the challenges to affecting global deterrence of atrocity crimes.

Because of the nature of genocide, crimes against humanity, and war crimes, the last two decades have seen major developments and overlap in both international criminal law and

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<sup>36</sup> Judge Sang-Hyun Song, "From Punishment to Prevention: Reflections on the Future of International Criminal Justice." *Wallace Wurth Memorial Lecture*. Sydney, 2012: 6.

<sup>37</sup> Judge Sang-Hyun Song, "International Criminal Court: The Centrepiece of an Evolving System of International Criminal Justice." *Introductory Remarks at St. Petersburg State University*. St. Petersburg, 2013.

<sup>38</sup> Katharine A. Marshall, "Prevention and Complementarity in the International Criminal Court: A Positive Approach." *Human Rights Brief* 17, no. 2 (2010): 21.

<sup>39</sup> Stephen Pinker, *The Better Angels of Our Nature: The Decline of Violence in History and its Causes*. (London: Penguin Books, 2011); Nick Grono, *The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders*. October 5, 2012. <http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx> (accessed May 2015).

<sup>40</sup> Grono.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Bensouda, "Setting the Record Straight," 3.

international humanitarian law.<sup>44</sup> While humanitarian law has been developing since observers saw the brutality and severity of World War I, international criminal law is a whole new realm as the global community has recognized individual criminal liability for atrocity crimes rather than state-wide responsibility as the global community has grown to realize that governments and rebel groups do not always act in ways that represent the wishes and/or beliefs of the people.

The Office of the Prosecutor works directly with State Parties, providing for the development of international legal language and precedent by means of strengthening the rule of law in individual states. In the earliest years of the ICC, the OTP issued indictments of major actors in the Lord's Resistance Army (LRA) in Uganda. While ultimately unsuccessful, it was among the first attempts to break the culture of impunity in the Great Lakes region of Africa where conflict has occurred for decades.<sup>45</sup> It is worthy to note that the ICC has shown to have a stronger positive deterrent effect on governments than it has on rebel forces but this also relates to the fact that governments are typically held more accountable for negative actions within the international community while rebel groups maintain very little accountability outside of the group itself, as seen with the LRA in Uganda.

As Lead Prosecutor Fatou Bensouda stated in 2012, norm setting also allows the ICC to ensure proper national implementation of legal and judicial standards at the domestic level through close communication and collaboration. The ICC has used this relationship to verify if national proceedings are transpiring in places where known violations of the Rome Statute have occurred and the OTP has begun preliminary examinations in Guinea, Colombia, and Georgia for this reason.<sup>46</sup>

Reform, while weak, has been notable in Uganda, Kenya, and Côte d'Ivoire where jurisdiction mobilizes domestic actors and encourages necessary domestic reforms such as the implementation of the Rome Statute crimes in national level jurisdiction.<sup>47</sup> This has helped to set the precedent that there is no automatic immunity for government leaders, past or current, if responsible for atrocity crimes.<sup>48</sup>

Both increases in domestic proceedings and decreases in violence have occurred due to monitoring domestic investigatory practices. As of the 2014 OTP Report on Preliminary Examination Activities, the majority of countries under preliminary examination have received visits from the OTP to verify claims of cases of abuse, domestic proceedings, and to gather further information.<sup>49</sup> Between 2005 and 2006, Colombia implemented the Peace and Justice Law that worked to demobilize paramilitary and guerrilla groups in order for all three sides of a decades-long conflict that includes the Colombian government to help avoid any prosecutions by the ICC.<sup>50</sup> Nigeria, a state that is also under preliminary examination by the OTP, has set up a 22-member panel to investigate the pre- and post-election violence primarily in the Akwa Ibom

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<sup>44</sup> Johannes ten Cate, interview by Shanay Murdock. *NIOD Introduction* Amsterdam, (May 29, 2015).

<sup>45</sup> Grono.

<sup>46</sup> Bensouda, "Setting the Record Straight," 3.

<sup>47</sup> Hyeran Jo and Beth A. Simmons. "Can the International Criminal Court Deter Atrocity?" Working Paper, 2014: 3.

<sup>48</sup> Grono.

<sup>49</sup> International Criminal Court, "OTP Report on Preliminary Examination Activities 2014," 10, 13, 17, 23, 31, 36, 40, 50.

<sup>50</sup> Grono.

state since the 2011 general elections.<sup>51</sup> Even with the ICC dropping the case against Kenyan President Uhuru Kenyatta, many say there was a decrease in violence in the latest election due to the ICC's continual monitoring of activities in the state.<sup>52</sup>

In addition to the implementation of legal standards, norm setting promotes education and awareness designed to help individuals seek methods of conflict resolution rather than resorting to armed conflict. This transparency of OTP activities encouraged the increase of interest and work in both domestic and international NGOs in states such as Nigeria.<sup>53</sup> Since the opening of the preliminary examination in Honduras, the ICC has increased communications with the 2010-2011 Truth and Reconciliation Commission, the Inter-American Commission on Human Rights, the Office of the High Commissioner for Human Rights, domestic civil society organizations, as well as the government of Honduras.<sup>54</sup> Despite significant security challenges, the OTP has worked with the states where the ICC is most focused to keep affected communities aware of relevant judicial developments. Through the use of radio and television broadcasts systems, the OTP has been able to provide locals with hearing summaries and answers to the frequently asked questions that the Court has received.<sup>55</sup> The idea behind this transparency and active communication is that education plays a transformative role in building community resilience and preventing and easing violent conflict.<sup>56</sup>

The ICC has taken to investigating and prosecuting mid- and lower-level perpetrators where appropriate as this allows for the upwards strengthening of cases against those most responsible for atrocity crimes.<sup>57</sup> The prosecution of mid- and lower-level perpetrators is thought to increase the deterrent effect of the Court because it encourages potential perpetrators to realize that they may be vulnerable to the Court's jurisdiction and suggests a necessity to reconsider their strategies.<sup>58</sup> Of the various deterrent tactics the Court has used, indictments seem to be among the least effective as seen in both Libya and Sudan where sitting leaders have been defiant of the Court and have continually attempted to undermine the Court's legitimacy, yet neither Libya or Sudan have accepted the Court's jurisdiction and were referred by the UN Security Council.<sup>59</sup>

Over the course of the Court's development, the OTP has continued developing its operational approach and Strategic Plans while learning from past mistakes and limitations.

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<sup>51</sup> International Criminal Court, "OTP Report on Preliminary Examination Activities 2011." Preliminary Examination, Office of the Prosecutor, International Criminal Court, The Hague, 2011: 13.

<sup>52</sup> Geoff Dancy, Bridget Marchesi, Florencia Montal, and Kathryn Sikkink. *The ICC's Deterrent Impact -- What the Evidence Shows*. February 3, 2015. <https://www.opendemocracy.net/openglobalrights/geoff-dancy-bridget-marchesi-florencia-montal-kathryn-sikkink/icc's-deterrent-impac> (accessed May 2015).

<sup>53</sup> International Criminal Court, "OTP Report 2011," 13.

<sup>54</sup> *Ibid*, 10; International Criminal Court, "OTP Report 2014), 10.

<sup>55</sup> International Criminal Court, "Report of the International Criminal Court to the Assembly of State Parties." *Thirteenth Session*. New York, 2014: 5-6.

<sup>56</sup> The Hague Institute for Global Justice, "Conflict Prevention Program." The Hague.

<sup>57</sup> Fatou Bensouda, "Remarks to the 25th Diplomatic Briefing." The Hague, 2015.

<sup>58</sup> Joris van Wijk, interview by Shanay Murdock. Amsterdam, (June 9, 2015).

<sup>59</sup> Jo and Simmons, 3.

Facing setbacks such as the dismissal of charges against President Kenyatta due to concern of widespread witness intimidation and the acquittal of Congolese army colonel Mathieu Ngudjolo Chui, the Court has used these challenges to implement changes in investigatory strategies to help mitigate the reoccurrence of these types of challenges.<sup>60</sup> Part of the strategy has been to combine or separate collective trials when appropriate. The Court combined cases in Côte d'Ivoire and separated cases in the Uganda trials in order to make the trials more efficient because the apprehension of one alleged criminal without the rest delays the proceedings unless that individual is tried separately.<sup>61</sup>

Every three years, the OTP provides a three-year operational strategy that proposes desired objectives, transparency, and predictability in the Court's proceedings. Prosecutor Bensouda announced the 2016-2018 Strategic Plan to include "the development of a coordinated strategy with key partners to effectively investigate and prosecute perpetrators of mass crimes in order to close the impunity gaps."<sup>62</sup> This partnership with local, domestic, and international organizations helps not only to effectively investigate and prosecute those responsible for such crimes but also builds the Court's legitimacy as an international judicial institution that maintains the support of non-state actors in addition to the Assembly of State Parties.

Beyond the development of language and the strengthening of rule of law, the Office of the Prosecutor has worked tirelessly to increase the cooperation of states on an international field. As of 2012, African states, including non-State Parties, received over 50% of the Court's requests for cooperation and over 70% of those requests were met with a positive response.<sup>63</sup> In 2009, Lead Prosecutor Luis Moreno-Ocampo met with the President and Prime Minister of Kenya to establish cooperation and prevent any further violence following the general elections, which has helped greatly.<sup>64</sup> The presence of field offices has also greatly encouraged the collaboration of the ICC and state governments due to consistent monitoring and investigations occurring on a regular and local basis.<sup>65</sup>

Cooperation of the State Parties includes the much-needed increase of resources for the ICC. Increased funds and cooperation resulted in the diversification of methods of collection and the forms of evidence to include increased forensic and cyber evidence, enhanced analytical capacities for the investigation teams, the ability to facility PEACE-model trainings, permanent field presence of investigations where possible, and additional efforts to identify those who are willing to cooperate for the purpose of investigations.<sup>66</sup>

Impartiality in examinations and investigations is another large part of building cooperation between the ICC and its member states as it builds trust, standards of operation, and a legitimacy of objectivity by the Court. The ICC has made strong efforts to factually investigate

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<sup>60</sup> Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 3; Human Rights Watch, *World Report 2015: Events of 2014*. Annual World Report, Human Rights Watch, Human Rights Watch, 2015: 331.

<sup>61</sup> Human Rights Watch, *World Report 2015*, 175.

<sup>62</sup> Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 3.

<sup>63</sup> Bensouda, "Setting the Record Straight," 3.

<sup>64</sup> Luis Moreno-Ocampo, "Address to the Assembly of State Parties." *Eighth Session of the Assembly of State Parties*. The Hague, 2009: 5.

<sup>65</sup> International Criminal Court, "Report of the International Criminal Court to the Assembly of State Parties" 8.

<sup>66</sup> Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 3-4.

all sides of conflicts as to ensure fairness in any judicial proceedings and to guarantee predictability and universal application of the Court's actions.<sup>67</sup>

The International Criminal Court also maintains a potential for universal jurisdiction. The Court's permanence is an advantage in that the Court is able to act without the delay of creation, it is able to correct mistakes made in the past, and it is able to form long-term relationships with both state and non-state actors to address violence as it occurs.<sup>68</sup>

The Court has continuing temporal and geographic jurisdiction over a state following the state's ratification of the Rome Statute, however it is important to note that ratification does not automatically trigger an examination or investigation.<sup>69</sup> David Bosco described the permanence of the Court by stating "a standing court would present potential wrongdoers with the constant possibility of investigation and punishment."<sup>70</sup> At the start of the ICC's operation in 2002, Afghan warlord Abdul Rashid Dostum "reportedly called together all ninety of his senior commanders and required them to listen as an aide read out loud a human rights report detailing abuses they had committed."<sup>71</sup> It is suggested that Dostum warned his commanders that a permanent criminal court was about to come into existence and that they could be prosecuted for any further crimes committed.

If a state's conflict extends both before and after the time of its ratification, the Court's jurisdiction begins at the time of ratification/entry of force. Colombia has been experiencing an internal conflict that extends four decades with leftist rebel groups fighting right-wing paramilitary factions fighting the Colombian government where all sides have committed atrocity crimes resulting in approximately 3,000 deaths per year.<sup>72</sup> Moreno-Ocampo stated "thousands had been killed, went missing, were kidnapped or forcibly displaced since 1 November 2002" and so with the OTP's presence, the Colombian government has taken the examination very seriously and vowed full cooperation with the ICC.<sup>73</sup>

Since jurisdiction is based on willing membership through either ratification of the Rome Statute or the temporary acceptance of limited ICC jurisdiction, non-State Parties are able to utilize the ICC in the event that they opt to accept conditional jurisdiction from the Court such as

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<sup>67</sup> Bensouda, "Setting the Record Straight," 4; Anonymous Representative, International Criminal Court Investigation Team, Office of the Prosecutor, interview by Shanay Murdock. *International Criminal Court Visit The Hague*, (June 10, 2015); and Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 3.

<sup>68</sup> Wasana Punyasena, "Conflict Prevention and the International Criminal Court: Deterrence in a Changing World." *Michigan State Journal of International Law* 14 (2006): 39-40.

<sup>69</sup> James F. Alexander, "The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact." *Villanova Law Review* 54, no. 1 (2009): 3; International Criminal Court, *Palestine Declares Acceptance of the ICC Jurisdiction Since 13 June 2014*. January 5, 2015. [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx) (accessed July 9, 2015).

<sup>70</sup> David Bosco, "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?" *Michigan State Journal of International Law* 19, no. 2 (2011): 164.

<sup>71</sup> Bosco, "Byproduct or Conscious Goal?," 164.

<sup>72</sup> Punyasena, 67.

<sup>73</sup> *Ibid*, 67.

Ukraine has done. Ukraine's acting government has requested limited jurisdiction from the ICC for the period of 17 November 2013 to 22 February 2014 in order to investigate crimes committed in the country during that time, allowing the ICC to open a preliminary examination.<sup>74</sup>

The International Criminal Court is a court of last resort, operating on the basis of its Complementarity Clause, intervening in cases only if a State Party's national judiciary cannot or will not commit to legitimate judicial proceedings. As ICC President Song described, "The Rome Statute and the principle of complementarity enshrined in it give the International Criminal Court what its predecessors lacked: power of deterrence."<sup>75</sup> Thousands of communications have been brought forth to the Court as reports of violations of the Rome Statute laws and so the Court is responsible for determining admissibility of jurisdiction. "An admissibility determination is not a judgment or reflection on the national justice system as a whole. If an otherwise functioning judiciary is not investigating or prosecuting the relevant case(s), the determining factor is the absence of relevant proceedings."<sup>76</sup>

A state's national judiciary retains the right and primary duty to both investigate and prosecute violations of atrocity crimes as necessary. Positive complementarity is a concept used to describe the multitude of ways that the OTP works with States to ensure the Court stays a court of last resort. In states that are able but unwilling to handle proceedings domestically, the OTP has been effective by using more direct communication with states in order to motivate their own national-level proceedings through the expression of concerns but without the use of threats of escalation to the ICC.<sup>77</sup> Positive complementarity has also been effective in cases where states are willing but unable to prosecute by allowing the OTP the ability to actively enhance a state's capacity to complete investigations and prosecutions and assist in meeting international standards of justice.<sup>78</sup>

Guinea's domestic panel of judges has been investigating the stadium massacre and rapes that occurred in 2009 and with the help of the OTP's involvement, the state indicted former self-proclaimed president Captain Moussa Dadis Camara on 8 July 2015.<sup>79</sup> As of 2011, Colombian authorities have carried out a great number of proceedings relevant to the crimes being examined by the OTP. Encouraged by discussions from the OTP,

Colombia has an institutional apparatus available to investigate and prosecute crimes under the Rome Statute. Proceedings have been initiated against 1) illegal armed group

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<sup>74</sup> Human Rights Watch, *World Report 2015*, 569; International Criminal Court, "OTP Report on Preliminary Examination Activities 2014," 14.

<sup>75</sup> Song, "The Centrepiece of an Evolving System," 1.

<sup>76</sup> International Criminal Court, "Policy Paper on Preliminary Examinations." Policy Paper, The Office of the Prosecutor, International Criminal Court, The Hague, 2013: 12.

<sup>77</sup> Marshall, 22.

<sup>78</sup> Ibid, 23.

<sup>79</sup> International Criminal Court, "OTP Report 2011," 23; Human Rights Watch. *Guinea: Ex-Coup Leader Charged in 2009 Massacre: Major Step by Guinean Judiciary to Advance Justice*. July 9, 2015. <https://www.hrw.org/news/2015/07/09/guinea-ex-coup-leader-charged-2009-massacre> (accessed July 11, 2015).

leaders, 2) paramilitary leaders, 3) police and army officials, 4) politicians with alleged links to armed groups, and 5) there are investigations into false positive cases.<sup>80</sup>

In Georgia,

The Investigative Committee of the Russian Federation and the Chief Prosecutor of Georgia have been conducting separate investigations into incidents that could constitute crimes under the jurisdiction of the ICC. The proceedings have been the subject of regular consultations between the Office [of the Prosecutor] and the competent national authorities with a view to assessing whether they are actually willing and able to bring the perpetrators of crimes to justice.<sup>81</sup>

The OTP has also been very careful to avoid engaging in any investigations or prosecutions that are not “in the interest of justice” and drops any activities if this is the case. However, the interest of justice is not to be confused with the interests of peace and security. Peace and security are political considerations that remain outside of the Court’s mandate and the pursuit of justice allows the Court/OTP to remain within its legal boundaries. The international community has drawn clear boundaries in responsibility where the UN Security Council is responsible for maintaining peace and security while the ICC is responsible for international justice. Therefore the process of peace negotiations cannot be a dissuading factor in pursuing a case in the interest of justice.<sup>82</sup>

### Deterrence through (Threat of) Prosecution

The International Criminal Court maintains a permanent status as opposed to being an *ex post facto* or *ad hoc* court and so the Court is able to maintain a deterrent presence strictly through its continued existence.<sup>83</sup> This continuous and already established presence allows for timely intervention from the Prosecutor amidst early stages and reports of atrocity crimes. The transparency of OTP monitoring shows those who are being tracked that they are being watched on a global scale and the threat of possible prosecution may be enough to make an individual reconsider his or her strategic approach in some cases.<sup>84</sup>

Through the OTP’s power of *proprio motu*, the OTP maintains the ability to open informal preliminary examinations (which require no permission) and formal investigations upon the approval of the Pre-Trial Chamber. Neither preliminary examinations nor formal investigations are guaranteed to lead to trials before the ICC judges.<sup>85</sup> The OTP seeks to act as an early warning system where it proactively collects open source information on the execution of crimes that fall within the Court’s jurisdiction.<sup>86</sup> This early stage monitoring provides a means for early interaction with State Parties, NGOs, and other international organizations that may be able to verify the occurrence of crimes, encourage genuine national proceedings that meet the

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<sup>80</sup> International Criminal Court, “OTP Report 2011,” 16.

<sup>81</sup> *Ibid*, 20.

<sup>82</sup> Bensouda, “Setting the Record Straight,” 5.

<sup>83</sup> Song, “The Centrepiece of an Evolving System,” 2.

<sup>84</sup> Song, “From Punishment to Prevention,” 7.

<sup>85</sup> *Ibid*, 8.

<sup>86</sup> International Criminal Court, “Policy Paper,” 24; Anonymous Representative, International Criminal Court Investigation Team, Office of the Prosecutor, interview by Shanay Murdock.

standards of international proceedings, and help to prevent the reoccurrence of such atrocity crimes.<sup>87</sup>

The ICC's involvement in three African cases highlight that judicial involvement of the Court "is more likely to help prevent atrocities than impede peace, even if arrest warrants cannot be executed."<sup>88</sup> In Côte d'Ivoire for instance, simply the threat of an ICC investigation helped prevent the further escalation of an inter-ethnic conflict by putting an end to state-sponsored incitement to hatred and ethnic division.<sup>89</sup>

In Uganda, the arrest warrants of LRA leaders helped to deter Sudan from continuing to deliver a long-standing safe haven for the rebel group.<sup>90</sup> The LRA still remains active in Uganda, South Sudan, the Central African Republic, and the Democratic Republic of the Congo with allegations of abductions and murders but Human Rights Watch has recorded these as occurring much less now than in previous years.<sup>91</sup> The ICC's attempts at keeping the LRA accountable for its actions has created a momentum that has "embedded criminal accountability and victims' interests in the structure and vocabulary of the peace process," making justice about both accountability and victims' needs.<sup>92</sup> And while atrocity crimes occurring in Darfur, Sudan are truly severe, the internal political divisions and political maneuvering have made the execution of atrocity crimes much more costly in recent years.<sup>93</sup>

The threat of prosecution plays into the Rome Statute's Complementarity Clause, first and foremost because it allows the Court to prompt national authorities to begin investigations as to avoid the escalation of atrocity crimes to the international level.<sup>94</sup> Domestic investigations typically increase once states are aware of being monitored by the ICC or the ICC has initiated preliminary examinations.<sup>95</sup> In Africa alone, State Parties that are under investigation experience an estimated three times the number of trials per year than African states experiencing atrocity crimes that have not accepted the Court's jurisdiction.<sup>96</sup> This increase in investigations has been

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<sup>87</sup> International Criminal Court, "Policy Paper," 24.

<sup>88</sup> Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism." *Human Rights Quarterly* (The Johns Hopkins University Press) 31 (2009): 624-625.

<sup>89</sup> Akhavan, 625.

<sup>90</sup> Ibid, 625.

<sup>91</sup> Human Rights Watch, *World Report*, 567.

<sup>92</sup> Grono.

<sup>93</sup> Akhavan, 625.

<sup>94</sup> Christopher W. Mullins and Dawn L. Rothe. "The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment." *International Criminal Law Review* 10 (2010): 784; Kjell Anderson, interview by Shanay Murdock. *NIOD/UvA Introduction* Amsterdam, (May 29, 2015).

<sup>95</sup> Kevin Burke, *The Deterrent Effect of the International Criminal Court*. March 2, 2015. <http://globalsolutions.org/blog/2015/03/Deterrent-Effect-International-Criminal-Court#.VZmLjXiprZJ> (accessed May 2015); Geoff Dancy and Florencia Montal. "Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions." Working Paper, Tulane University; University of Minnesota, 2015: 1.

<sup>96</sup> Dancy & Montal, "Unintended Positive Complementarity," 23.

seen the world over through the ICC's involvement in Georgia, Kenya, Guinea, South Korea, Nigeria, Côte d'Ivoire, and Mali.<sup>97</sup>

Because of the Complementarity Clause, the Office of the Prosecutor is required to verify the occurrence of any national level proceedings prior to opening its own investigations and so open communications with State Parties is a mandatory role of the OTP.<sup>98</sup> In 2012, Kenya was pushing to commit to domestic investigations as to avoid ICC involvement in the prosecution process. This was both an attempt to secure domestic support from Kenya's various ethnic groups while also demonstrating to senior leaders that the use of violence would not be tolerated as a form of retaining power during elections.<sup>99</sup>

In addition to prompting and verifying domestic investigations, the OTP has both the ability and responsibility to determine the presence of national-level sham investigations and/or trials and to verify that proceedings are completed at the standards of the international level. The rules of double jeopardy do not apply in the event that the Court determines that domestic proceedings were completed under false pretenses.<sup>100</sup> Because the state of Libya was unable to detain Saif al-Islam Gaddafi for the purposes of trial, the ICC was able to deem the case admissible before the Court.<sup>101</sup> Both the ongoing armed conflict and the collapse of the central government authority have created an absence of rule of law in a number of regions within the country, leaving Human Rights Watch to call upon further expansions in the ICC's investigations as it is currently limited to just the events of 2011 dealing with the previous Gaddafi government. Human Rights Watch has continued to monitor human rights abuses in the country and have declared that strictly "focusing on Gaddafi-era officials is no longer sufficient."<sup>102</sup> Furthermore, the preliminary investigations occurring in Georgia involve the non-State Party of Russia and so the ICC has been monitoring the investigations being conducted from both sides in regards to the armed conflict that occurred in 2008 over South Ossetia to verify the validity of each investigation.<sup>103</sup>

The Complementarity Clause was designed with the mindset that the Court's State Parties would harmonize their domestic criminal legislation with that of the Rome Statute.<sup>104</sup> While it is up to the individual states to adapt the criminalization of atrocity crimes, State Parties also require a strong rule of law to enforce the apprehension and proceedings of alleged criminals. The Philippines passed laws criminalizing torture in 2009 and because of a lack of domestic rule of law, torture is still regularly reported with 80% of reported tortures being committed by police

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<sup>97</sup> International Criminal Court, "Policy Paper on Preliminary Examinations," 24-25.

<sup>98</sup> Bensouda, "Setting the Record Straight," 5.

<sup>99</sup> Grono.

<sup>100</sup> Shai Dothan, "Deterring War Crimes." *North Carolina Journal of International Law and Commercial Regulation* XL (2015): 746; Robertson, *Crimes Against Humanity*, 528.

<sup>101</sup> International Criminal Court, *ICC Appeals Chamber Confirms the Admissibility before the ICC of the Case Against Saif-Al-Islam Gaddafi*. May 21, 2014. [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/pages/pr1005.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1005.aspx) (accessed July 11, 2015).

<sup>102</sup> Human Rights Watch, *Libya: New ICC Investigation Needed Amid Crisis: Court Prosecutor to Brief UN Security Council*. May 11, 2015. <http://www.hrw.org/news/2015/05/11/libya-new-icc-investigation-needed-amid-crisis> (accessed July 11, 2015).

<sup>103</sup> Human Rights Watch, *World Report 2015*, 452.

<sup>104</sup> Song, "The Centrepiece of an Evolving System," 2.

officers.<sup>105</sup> The Complementarity Clause essentially allows us to see “a decentralized but interactive global system of accountability, in which international tribunals and international criminal law interacts with domestic institutions and national and transnational civil society groups to help deter future crimes.”<sup>106</sup>

Beyond the structure of the Complementarity Clause, the UN Security Council has the capacity to warn states of the potential to be referred to the ICC. The possibility of referral has the potential to increase the prospects of changed behavior, prevention of crimes, and the prevention of further escalation of violence.<sup>107</sup> In October 2014, heavy pressure was placed on North Korea at the UN General Assembly meeting in New York in regards to the human rights violations that are occurring in the country. The UN’s suggestion that North Korea could become a referral to the ICC prompted a first-ever meeting of North Korean diplomats and Marzuki Darusman, the Human Rights Council special rapporteur on human rights in North Korea.<sup>108</sup>

As members of the International Criminal Court’s Assembly of State Parties (ASP), those states that have ratified the Rome Statute are bound by obligation to arrest and surrender individuals who have been indicted by the ICC if they are found in the territory of a State Party.<sup>109</sup> Utilizing the transparency of the Court, international attention to those individuals with arrest warrants allows for neighboring states to apply diplomatic pressures on the state of the wanted national. This may be done through shaming, shunning, or the exclusion of profitable relationships both domestic and international and allows for the ability to vocally address crimes that may otherwise go ignored.<sup>110</sup> This also prevents leaders from relinquishing power but seeking asylum with a State Party’s territory.<sup>111</sup>

When a state accepts the jurisdiction of the Court, every one of that State’s nationals is subject to the jurisdiction of the Court if thought responsible for violations of the Rome Statute’s crimes. This includes both government and non-governmental personnel to include leadership positions and even rebel or paramilitary groups.<sup>112</sup> The ICC is unprecedented in its efforts to indict, arrest, and try sitting heads-of-state such as Sudanese President Omar al-Bashir. While the Court has received a significant amount of criticism for indicting al-Bashir, it demonstrates an institutional steadfastness in the pursuit of justice and that international law supersedes sovereignty when human rights violations are occurring.

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<sup>105</sup> Amnesty International. *Above the Law: Police Torture in the Philippines*. December 4, 2014. <https://www.amnesty.org/en/latest/news/2014/12/above-law-police-torture-philippines/> (accessed July 28, 2015).

<sup>106</sup> Dancy, et al. “The ICC’s Deterrent Impact”; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing the World*. New York, New York: W. W. Norton & Company, Inc., 2011.

<sup>107</sup> Bensouda, “Setting the Record Straight,” 6.

<sup>108</sup> Human Rights Watch, *World Report 2015*, 408.

<sup>109</sup> United Nations. Article 89, *Rome Statute of the International Criminal Court*. Rome: United Nations, 1998.

<sup>110</sup> Marshall, “Prevention and Complementarity,” 25; Burke, “The Detering Effect.”

<sup>111</sup> Chapman & Chaudoin, “Ratification Patterns,” 401.

<sup>112</sup> *Ibid*, 401.

As seen to date, senior leaders are the least likely to be held accountable for their crimes but in cases where senior leaders have been indicted, their prosecution is most likely to have the greatest deterrent effect.<sup>113</sup> When it comes to the indictment or issuing of an arrest warrant of leaders in weak or failing states, leaders are typically more focused on staying alive and in power than being prosecuted or criticized by the ICC or the overall global community.<sup>114</sup> Because it has been typical that leaders responsible for atrocity crimes most often evade the grip of domestic or international justice, the ICC's Prosecutor has made a continuous effort to prioritize the highest-level perpetrators with the greatest culpability and the biggest potential for future deterrence.<sup>115</sup>

The Democratic Republic of the Congo is the home of the ICC's first convict, Thomas Lubanga Dyilo. Because of the Court's ability to threaten prosecution, media coverage has shown that a number of ex-combatants in the DRC have seen changes in behaviors of rebel commanders that are designed to avoid the possibility of any further ICC indictments in areas such as Ituri, where the ICC has focused its attention within the DRC so far.<sup>116</sup> This fear of the ICC has become known as "Lubanga Syndrome" and has created a fear of arrest within the Congolese Army.<sup>117</sup>

The next case to watch in regards to threats of prosecution includes Palestine since its ascension to the ICC. With an ongoing-armed conflict between Palestine and Israel, Israel's non-State Party status only protects Israel's nationals if Israelis commit no further atrocity crimes on Palestinian territory. If further atrocity crimes occur, the Court's mandate may apply to both states.<sup>118</sup>

### **Deterrence through Peace Building and Development through Stabilization**

This last section of deterrent efforts discusses deterrence through the use of peace building and development towards stabilization and includes the advocacy of peace, justice, and accountability.<sup>119</sup> According to former Judge Song, attempts at conflict management and peace negotiations have been used adjacent to ICC investigations and prosecutions.<sup>120</sup> ICC Prosecutor Fatou Bensouda suggested in 2012 that deferring judicial proceedings on the basis of peace and security may have unwanted side-effects: "Succumbing to pressure to restrain justice may send out a message to perpetrators that arrest warrants can be stayed if only they commit more crimes or threaten regional peace and security."<sup>121</sup> In an effort to preserve its impartiality, the OTP cannot participate in any peace initiatives. However, it is made clear that any proposed solutions

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<sup>113</sup> Schabas, William A. *An Introduction to the International Criminal Court*. 3rd Edition. (New York, New York: Cambridge University Press, 2007), 243.

<sup>114</sup> Anonymous Representative, International Criminal Court Investigation Team, Office of the Prosecutor, interview by Shanay Murdock. *International Criminal Court Visit The Hague*, (June 10, 2015).

<sup>115</sup> Novak, 27.

<sup>116</sup> Grono.

<sup>117</sup> Burke; Mark Kersten, *The International Criminal Court and Deterrence: The 'Lubanga Syndrome'*. April 6, 2012. <http://justiceinconflict.org/2012/04/06/the-international-criminal-court-and-deterrence-the-lubanga-syndrome/> (accessed July 5, 2015).

<sup>118</sup> Human Rights Watch, *World Report 2015*, 7.

<sup>119</sup> Song, "The Centrepiece of an Evolving System," 2.

<sup>120</sup> Bensouda, "Setting the Record Straight," 7.

<sup>121</sup> *Ibid*, 7.

must be compatible with the Rome Statute if either party involved is a State Party to the Rome Statute.<sup>122</sup>

Additional efforts at peace building and development come from outside organizations that call for non-State Parties to ratify the Rome Statute. Amnesty International, Human Rights Watch, the International Committee of the Red Cross, and the American Non-Governmental Organizations Coalition for the International Criminal Court are among a number of NGOs supporting the efforts of the Court and accepting the Court as a new international and judicial norm. The Coalition for the International Criminal Court (CICC) has placed pressure on Ukraine to ratify the Rome Statute and to accept full (rather than limited) jurisdiction of the ICC in order to “deter grave crimes.”<sup>123</sup> The CICC recently reported that Benin, a state that has supported the ICC since its inception, has a bill that allows for domestic prosecution of atrocity crimes that has been stuck in the president’s office since 2006.<sup>124</sup> The CICC gathers public support to place pressure on governments such as Benin to make their legislation compatible with the Rome Statute ideals.

An essential part of peace building and the development of stability includes strengthening the rule of law. Dancy et al. stated, “When the judicial system is able to systematically issue guilty verdicts, repression lessens even more, perhaps because it signals that the rule of law is more firmly in place in these countries.” Furthermore, retributive justice against former state officials seems to work as intended in the sense that it is typically associated with improvements to the same human rights that have been the focus of the Court.<sup>125</sup> The Court works persistently to develop and expand policies that are aimed at the improvement, protection, and rights of various groups. Currently the Court is working on a policy paper aimed for release in 2015 that works to advance the protection and rights of children.<sup>126</sup>

Lastly, the Court makes significant efforts to advance the empowerment of victims. The Court has encouraged the participation of surviving victims in ways beyond just acting as witnesses through the implementation of simplistic applications and through increasing the exposure of information, training activities in affected communities, and becoming prosecutorial actors.<sup>127</sup> The ICC’s legal documents expansively codify certain crimes against women and ensure that each organ of the Court works to defend the safety, psychological health, dignity, and confidentiality of its female victims and witnesses.<sup>128</sup>

The ICC has also helped to develop realistic expectations for victimized groups, to include expectations around reparations and the Court provides journalistic workshops to

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<sup>122</sup> Bensouda, “Setting the Record Straight,” 7.

<sup>123</sup> Coalition for the International Criminal Court, *Ukraine: Deter Grave Crimes by Joining ICC*. February 20, 2015. <https://cicglobaljustice.wordpress.com/2015/02/20/ukraine-deter-grave-crimes-by-joining-icc/> (accessed June 21, 2015).

<sup>124</sup> Coalition for the International Criminal Court. *Benin: Adopt ICC Law to Prosecute Grave Crimes at Home*. July 14, 2015. <https://cicglobaljustice.wordpress.com/2015/07/14/benin-adopt-icc-law-to-prosecute-grave-crimes-at-home/#more-2736> (accessed July 15, 2015).

<sup>125</sup> Dancy, et al. “The ICC’s Deterrent Impact.”

<sup>126</sup> Bensouda, “Remarks to the 25<sup>th</sup> Diplomatic Briefing,” 5.

<sup>127</sup> International Criminal Court, “Report of the International Criminal Court to the Assembly of State Parties,” 8.

<sup>128</sup> Song, “From Punishment to Prevention,” 8.

encourage and ensure the accurate portrayal of events and access to media reports.<sup>129</sup> One of the most elaborate and necessary strategies of the Court has been the implementation of the Trust Fund for Victims (TFV), an organ of the Court designed to provide services for victims. Services of the TFV include reconstructive surgeries, trauma-based counseling, services for victims of sexual violence, and literacy and vocational training. As of 14 Feb 2014, over 40,000 people were direct beneficiaries of the Fund.<sup>130</sup> The purpose of the TFV is to keep the victims as the central focus of judicial proceedings. While paying reparations to individuals may or may not provide a deterrent effect, a compensatory mechanism within the Court is a groundbreaking development in international law. “Potentially, individual reparations could reduce harm to victims, restore individual dignity to assist with reintegration into society, and trigger or support a broader process of societal reconciliation.”<sup>131</sup>

## Challenges & Limitations to Global Deterrence of Atrocity Crimes

To begin this section, there are methodological shortcomings in measuring prevention and deterrence quantitatively. These include the difficulties in obtaining empirical data through comparisons of justice administered and the absence of atrocity crimes. National-level data is often easier to obtain than international-level data. We must also bear in mind that atrocity crimes are unique in context—while sharing some characteristics, the circumstances, causes, historical and political settings are ultimately unique to each individual conflict and an understanding of the context is necessary. This makes both empirical data and control experiments difficult to obtain and impractical to conduct.<sup>132</sup>

The Court receives many criticisms, many of which are fair, others of which are unfounded based on the fact that the institution is so young and still developing its strategies within a field as young as international criminal law. One of the foremost arguments, however, is the focus of the Court’s work thus far. Many critiques argue that the ICC is too Sub-Saharan African-centric and is biased against Africa.<sup>133</sup> While the Court is based in The Hague, Netherlands, the majority of the Court’s work has occurred in Africa and so the Court has been described as being too Western in nature and too far removed both culturally and geographically from the conflicts. The Court’s judicial approach has been criticized for its forceful application of Western ideology, however it is the most universally accepted method as it allows for democratically negotiated practices, the application of a single standard, and the development of precedent.

While preliminary examinations are occurring outside of the African continent, the only cases to make it to investigation and trial stages are those from Africa. Because of this, both the

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<sup>129</sup> International Criminal Court, "Report of the International Criminal Court to the Assembly of State Parties," 9-10.

<sup>130</sup> Song, “From Punishment to Prevention,” ; International Criminal Court, "Report of the International Criminal Court to the Assembly of State Parties," 9.

<sup>131</sup> Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities, and Limitations*. (Boston: Martinus Nijhoff Publishers, 2010): 41-42.

<sup>132</sup> Joris van Wijk.

<sup>133</sup> Song, “From Punishment to Prevention.”

Court and the OTP has received accusations of politicization.<sup>134</sup> In response to this, Dancy and Montal indicate “recent ICC history suggests that the Judges are much harder to portray as politically motivated than the Prosecutor, who has been accused of an anti-African bias by some and of being too lenient to governments by others.”<sup>135</sup>

What is important here is that the majority of the criticisms come from state governments within Africa, receiving criticisms from both autocratic governments such as Sudan and democratically elected governments such as South Africa and Kenya.<sup>136</sup> However, African states are not the only ones to question the Court’s African-centric focus and there appears to be a general consensus that the ICC needs to take “a road out of Africa” by accepting other cases that will begin to appease those who feel the ICC is targeting Africa.

A large problem with the idea that the ICC is biased against Africa is that the arguments have been both too simplistic and too misleading to fully understand the complexity of the relationships with African states. Many state governments denouncing the Court have condemned the ICC as being neo-colonial, racist, and even went so far as to describe it as a “race hunting” institution, resonating with various constituencies for political and historical reasons.<sup>137</sup>

In response, the ICC has been too simplistic in its responses to such accusations by explaining in simplistic terms that the Court is not a court against Africa but a court for Africa. Many observers and critics of the Court have been fruitless in assessing and dissecting the relationship of the Court and Africa and “teasing out its political complexities.”<sup>138</sup> Africa’s international presence struggles with its various goals to include developing national and international human rights norms, the expansion and security of its international influence, deep-rooted anti-colonial sentiments, and the strong authoritarian presence residual in many African countries that both undermine these goals and have good reason to fear further progression of these goals and new norms.<sup>139</sup>

Further pertaining to accusations of politicization, it is a small group of mostly Western states that possess the most influence on the budget, which can impact the choice of what situations to investigate.<sup>140</sup> David Bosco explains “the political implications of case selection are a far greater obstacle for the ICC than the predecessor *ad hoc* tribunals.”<sup>141</sup> These various criticisms, however, do not take into account that five of the nine active investigations were state-referrals to the ICC, and two of the other four were referrals made to the Court by the UN

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<sup>134</sup> Marshall, 21.

<sup>135</sup> Dancy & Montal, “Unintended Positive Complementarity,” 43.

<sup>136</sup> Kersten, Mark. *The Africa-ICC Relationship: More and Less than Meets the Eye (Part I)*. July 17, 2015. <http://justiceinconflict.org/2015/07/17/the-africa-icc-relationship-more-and-less-than-meets-the-eye-part-1/> (accessed July 17, 2015).

<sup>137</sup> Kersten, “The Africa-ICC Relationship.”

<sup>138</sup> *Ibid.*

<sup>139</sup> Kurt Mills, ““Bashir is Dividing Us”: Africa and the International Criminal Court.” *Human Rights Quarterly* 34, no. 2 (May 2012): 406.

<sup>140</sup> Elizabeth Evenson and Jonathan O’Donohue, *The International Criminal Court at Risk*. May 6, 2015. <https://www.opendemocracy.net/openglobalrights/elizabeth-evenson-jonathan-o'donohue/international-criminal-court-at-risk> (accessed July 11, 2015).

<sup>141</sup> David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*. (Oxford: Oxford University Press, 2014): 94.

Security Council. Nor is there a single one of these cases that should not have been opened.<sup>142</sup> The Central African Republic, who already has two separate investigations underway, is demonstrating further need by creating an additional hybrid court to work in cooperation with the ICC for more expeditious results.<sup>143</sup>

Essentially, Aurelia Frick argues that the only way to eliminate criticisms of case selection and an African bias within the Court is for all non-State Parties to ratify the Rome Statute and allow full universal jurisdiction. Until then, only the UN Security Council receives the full responsibility to end impunity through its ability to refer non-State Parties in violation of Rome Statute crimes to the ICC.<sup>144</sup> For all the places that the global community wishes to see intervention and accountability (i.e. Syria, North Korea, Burma/Myanmar), the ICC does not have jurisdiction. Only through the UN Security Council can the ICC gain jurisdiction to such places; this is a structural problem, not a choice of the Court.<sup>145</sup> The Court does indeed experience geographical limitations of jurisdiction. There is an absence of many states that are experiencing ongoing internal conflict but it is necessary to recognize that the ICC has begun preliminary examinations and investigations in some of them such as Afghanistan, Colombia, the Central African Republic, and the Democratic Republic of the Congo.<sup>146</sup>

The International Criminal Court faces other challenges, such as the issue of the punishment of offenders of Rome Statute crimes.<sup>147</sup> Most of those who have been indicted by the ICC have not been arrested and are not yet facing trial.<sup>148</sup> So far, only a small number of cases have been completed yet despite the variety of outcomes, have been beneficial to the Court in terms of establishing and developing procedures.

In terms of convictions, there is a large dissatisfaction with the Court's sentencing structure. Currently, the Court's structure allows for a maximum sentence of 35 years with life sentences being reserved if "justified by the extreme gravity of the crime."<sup>149</sup> This is not an ideal structure but the lack of a blanket life sentence does offer incentive for alleged perpetrators to cooperate with the Court. However, the punishment of perpetrators of genocide, war crimes, and crimes against humanity is especially low as compared to a domestic jurisdictions' punishment of rape, homicide, and/or torture. Critics argue that the Court's sentencing structure is too lenient to be considered retributive justice and that judges rely heavily on mitigating factors that

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<sup>142</sup> Kersten, "The Africa-ICC Relationship."

<sup>143</sup> Mark Kersten, *Why Central African Republic's Hybrid Tribunal Could be a Game-Changer*. May 14, 2015. <http://justiceinconflict.org/2015/05/14/why-central-african-republics-hybrid-tribunal-could-be-a-game-changer/> (accessed May 15, 2015); Human Rights Watch, *World Report 2015*, 147.

<sup>144</sup> Aurelia Frick, *The International Criminal Court Deserves Better*. July 17, 2015. [http://www.huffingtonpost.com/dr-aurelia-frick/the-international-criminal-court-deserves-better\\_b\\_7813960.html](http://www.huffingtonpost.com/dr-aurelia-frick/the-international-criminal-court-deserves-better_b_7813960.html) (accessed July 21, 2015).

<sup>145</sup> Kersten, "The Africa-ICC Relationship"; Mark Kersten, *Yes, the ICC is in Crisis. It Always has Been*. February 24, 2015. <http://justiceinconflict.org/2015/02/24/yes-the-icc-is-in-crisis-it-always-has-been/> (accessed February 24, 2015).

<sup>146</sup> Novak, 33; Rodríguez-Pareja & Herencia-Carrasco.

<sup>147</sup> Bosco, "Byproduct or Conscious Goal?," 197; Mullins & Rothe, 771-772.

<sup>148</sup> Rodríguez-Pareja & Herencia-Carrasco.

<sup>149</sup> Novak, 93; Talonsti, Stanislas. The Hague, (June 11, 2015).

influence sentencing objectives such as deterrence or restorative justice.<sup>150</sup> However, the creation of deterrence requires the certainty of swift and fitting punishment for crimes as they occur and this ability is largely absent in international law.<sup>151</sup>

The ICC also lacks any type of rehabilitative measures for those it convicts. “Rehabilitation has never been significant in determining a sentence before an international criminal tribunal; rather, retribution and deterrence are the primary sentencing rationales cited in international criminal jurisprudence.”<sup>152</sup> There has never been a shortage of desire to punish perpetrators but many trials come at the cost of destroying victims’ credibility.<sup>153</sup>

Another challenge the Court faces is the ongoing debate of how to approach the prosecution of a political leader: sometimes leaders facing threats of prosecution prolong conflict in order to keep themselves in power whereas immunity may provide the initiative and incentive to end further crimes, leading back to the “peace vs. justice” debate once more.<sup>154</sup> Some scholars argue that the Court may be responsible for the exacerbation of humanitarian atrocities by prosecuting those individuals whose political cooperation is necessary to conducting successful peace negotiations in weak or failed states.<sup>155</sup> Examples of this include both Sudan and Libya where some NATO allies suggest that exile might produce more expedient ends to the conflicts than arrest warrants.<sup>156</sup> However, this suggestion is based on an optimistic belief that the leaders of these states would work legitimately to complete peace negotiations.

This debate is an increasingly important consideration as the global community has pushed for the end of conflicts through peace negotiations and soft-power tactics rather than military intervention.<sup>157</sup> The problem with relying solely on peace negotiations and diplomacy is that efforts require cooperation where negotiations may not necessarily be effective and participants may not always be sincere yet tactics such as sanctions often push criminals closer together.<sup>158</sup> Tribunals are now used, whether correctly or incorrectly, as a substitute for using force as a way to end atrocity crimes.<sup>159</sup>

Arguably, the largest limitation of the Court comes from its lack of resources and universal credibility.<sup>160</sup> When it comes to resources, the lack of an enforcement team is a major

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<sup>150</sup> Steven Glickman, "Victims' Justice: Legitimizing the Sentencing Regime of the International Criminal Court." *Columbia Journal of Transnational Law* 43 (2004): 92.

<sup>151</sup> Anderson.

<sup>152</sup> Dana, Shahram. "The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?" *Penn State Journal of Law and International Affairs* 3 (2014): 48.

<sup>153</sup> ten Cate.

<sup>154</sup> Akhavan, 625.

<sup>155</sup> Julian Ku & Jide Nzelibe. "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" *Washington University Law Review* 84, no. 4 (2006): 781.

<sup>156</sup> Chapman & Chaudoin, 401.

<sup>157</sup> Akhavan, 625.

<sup>158</sup> Dothan; Anonymous Representative, International Criminal Court Investigation Team, Office of the Prosecutor.

<sup>159</sup> Akhavan, 625.

<sup>160</sup> Marshall, 24.

burden on the Court because it requires that all indictments and arrest warrants be fulfilled by the voluntary surrender or release of wanted nationals.<sup>161</sup> Comparing this international court to national level courts is a poor association for the fact that the ICC does not possess the same enforcement tools as national courts.<sup>162</sup> This then requires the Court to work closely with international organizations and various institutions to both promote similar interests and respect for the Court's mandate. The ICC relies heavily upon both State and non-State Parties to cooperate and submit nationals if within the State's territory. This has been a particularly difficult venture in places such as Sudan, Libya, and Côte d'Ivoire.<sup>163</sup> As of the time of writing, twelve arrest warrants still remain active but this remains a failure of the Assembly of State Parties rather than of the Court itself.<sup>164</sup> It is expected that the International Criminal Court act as a deterrent force to prevent further atrocity crimes but the full extent of the deterrent impact is partially reliant on the cooperation and capability of strong states to support the Court.<sup>165</sup>

Among the lack of resources includes the lack of political, diplomatic, and financial support for the Court to carry out its mandate as originally intended.<sup>166</sup> Nick Grono stated, "One of the main challenges for international policymakers in their efforts to resolve conflicts or reduce human rights abuses is that they often lack effective incentives or sanctions (diplomatic, legal, military, or economic) of sufficient credibility to influence the calculations of the warring parties." Grono further explains that international policymakers assume that leaders, whether government or rebel, wish to maintain or attain access to domestic power and that leaders do so through rational, goal-oriented decision-making processes. However, government leaders assume culpability for the crimes committed under their command, which then poses a threat to the power they have achieved which ideally should deter the use of atrocity crimes if the leader wishes to maintain power.<sup>167</sup>

The Court experiences a lack of full cooperation from State Parties as well. While State Party cooperation is typically positive, it falls short of expectations in a number of key areas: the execution of arrest warrants, the facilitation of access to evidence and witnesses, and witness protection.<sup>168</sup> These are all important functions to maintain effectively if the Court is to be expected to complete full proceedings quickly, effectively, and in line with the Court's mandate.

The independent relationship of the ICC and the UN Security Council has also seen considerable strain due to its lack of full support. Thus far, only two cases have made it through the Security Council to a successful referral to the ICC, as seen in the cases of Sudan and Libya. In the ten years since the Darfur referral, six arrest warrants have been issued and only one individual has faced the court while one died prior to arrest and the other four continue to evade

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<sup>161</sup> Anderson.

<sup>162</sup> Frick.

<sup>163</sup> Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 7.

<sup>164</sup> Frick.

<sup>165</sup> Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence." *Human Rights Quarterly* 30, no. 3 (2008): 560.

<sup>166</sup> Rodríguez-Pareja & Herencia-Carrasco.

<sup>167</sup> Grono.

<sup>168</sup> International Criminal Court, "Report of the International Criminal Court to the Assembly of State Parties," 14.

arrest. Despite being referred to the Court by the Security Council, Sudan still continues to reject the jurisdiction of the Court.<sup>169</sup>

United Nations Member States have not been cooperative in assisting with or executing arrest warrants despite the UN Security Council being the one to refer the cases of Darfur and Libya. Others question the inconsistency of the UN's referral of cases, especially regarding the Occupied Palestinian Territories, where the UN directly undermines the Court's legitimacy. Referrals involve specific people rather than Carte blanche access to any alleged perpetrators within a state; in the referrals it *has* made, the Security Council has determined who to investigate—a task typically left to the OTP—begging the question of why some alleged criminals are chosen and why others are not. Referring back to the General Assembly's lack of cooperation, each referral made to the Court is done through a resolution adopted by the Security Council, suggesting that all UN Member Parties are responsible for abiding by the resolution, not just State Parties of the ICC.<sup>170</sup>

An additional problem with the ICC/UN Security Council relationship is that the Court receives no additional funding if cases are referred by the Security Council, allowing the financial burden to fall to the Assembly of State Parties, even when the situation is of a non-State Party. The UN's funding decisions go through the Fifth Committee of the General Assembly as so the Security Council has no direct access to or influence on funding.<sup>171</sup> Lead ICC Prosecutor Fatou Bensouda publicly announced the OTP's decision to hibernate the ICC's investigation in Sudan due to the lack of cooperation and enforcement by the UN Security Council and the Libya situation continues to descend out of control as resources are too scarce to allow focus.<sup>172</sup>

Funding is one of the largest constraints on the ICC's mandate, requiring that the Court be particularly strategic in determining which cases to pursue and which to defer to national-level judiciaries.<sup>173</sup> When Prosecutor Bensouda announced the hibernation of the Darfur case in December 2014 and explained that she would “shift resources to other urgent cases,” this statement reflected both the underwhelming resources made available to the ICC as well as the lack of commitment by the UN Security Council to follow through on the steps necessary to affect any change.<sup>174</sup>

In May 2014, the UN Security Council had addressed the possibility of referring the Syria case to the ICC but was vetoed by both Russia and China, both of whom have interests in Syria. Mariana Rodríguez-Pareja and Salvador Herencia-Carrasco suggest that perhaps the veto of Syria was good for the Court, indicating that accepting the case at this level of the Court's international status would have weakened the international justice system due to inadequate resources, the lack of political support, and it would have financially burdened the ICC beyond its existing capacity in an effort to carry out suitable investigations and arrests.<sup>175</sup>

Even the surrender of Dominic Ongwen in January 2015 required the shifting and re-prioritizing of prosecutorial and investigative activities as well as the re-deployment of resources

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<sup>169</sup> Rodríguez-Pareja & Herencia-Carrasco.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Human Rights Watch, *Libya: New ICC Investigation Needed*.

<sup>173</sup> van Wijk.

<sup>174</sup> Rodríguez-Pareja & Herencia-Carrasco,.

<sup>175</sup> Ibid.

at the expense of other cases. This was done in order to meet judicial deadlines and to be ready for the confirmation of charges; while the ICC is closer to achieving some justice in Uganda, it meant the temporary scaling-back of time, effort, and resources on other cases.<sup>176</sup>

Funding constraints even come from within the Assembly of State Parties (ASP). Between 2009 and 2011, a number of the highest-contributing State Parties requested zero growth in the annual budget contributions despite a significant growth in the Court's activities.<sup>177</sup> Bensouda has even had to scale back resources for the ongoing crimes occurring in Libya in order to allow the progress of other situations to become trial ready. Resource constraints have been the cause of holding back overdue progress in Côte d'Ivoire where investigations are needed to determine responsibility for the 2010-2011 election violence. The lack of equal headway on all situations ends up creating further criticisms for the Court. This includes equal progress within the same case, where the Court was critiqued for making progress on the Laurent Gbagbo case in Côte d'Ivoire in 2014 while lacking in development in the allegations of crimes committed by pro-Ouatara forces.<sup>178</sup>

The budget going forward needs to be determined based on a common ASP idea of what the Court should be accomplishing at optimal capacity where its current method is designing a budget with a cap, not knowing the Court's full capabilities. This would require further negotiations and compromises between the Court itself and the ASP.<sup>179</sup>

As Héctor Olásolo put it, "The fact that the Rome Statute is a legislative act of the State Parties, and not of the international community, does not mean that the Rome Statute does not have an authentic universal aspiration and that in the future it cannot turn into an authentic legislative act of the international community."<sup>180</sup>

In addition to lacking political, diplomatic, and financial support, the Court is still working to establish its legitimacy despite being operational for 13 years. Beyond needing help from State Parties in enforcing the Court's activities, the Court relies on State Parties to solidify its role within international law as well as the legitimacy and enforcement of international criminal law. Some State Parties are lacking in providing support to the Court, allowing it to become an institution that "moves from one breaking-point of legitimacy to another" and being a member of the "crisis industry."<sup>181</sup> Some State Parties even allow wanted individuals to roam freely from state to state without legitimate worry of being apprehended, such as with the case of Omar al-Bashir, who recently visited South Africa but was allowed to escape and return to Sudan prior to the passing of any legislation that might legally force South Africa to execute the arrest warrant and surrender al-Bashir to The Hague.<sup>182</sup>

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<sup>176</sup> Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 6.

<sup>177</sup> Evenson & O'Donohue, *The International Criminal Court at Risk*.

<sup>178</sup> Human Rights Watch, *World Report 2015*, 174.

<sup>179</sup> Evenson & O'Donohue.

<sup>180</sup> Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*. (Leiden: Martinus Nijhoff Publishers, 2005), 21.

<sup>181</sup> Kersten, "The Africa-ICC Relationship"; Barrie Sander, *The ICC's Crisis Mentality and the Limits of Global Justice*. March 9, 2015. <http://justiceinconflict.org/2015/03/09/the-iccs-crisis-mentality-and-the-limits-of-global-justice/> (accessed July 17, 2015).

<sup>182</sup> Rodríguez-Pareja & Herencia-Carrasco.

Since the issuing of his arrest warrant in 2009, al-Bashir has been allowed to travel to 17 UN Member States where he has not been detained based on his evasion of enforcement officials and the apprehension of state governments to be responsible for arresting a sitting head-of-state.<sup>183</sup> This reasoning undermines the ICC and its goal of deterrence and creates an undesired culture that past and current heads-of-state are immune to the ICC's jurisdiction.

Besides states' roles in impacting the Court's legitimacy, the Court receives additional criticisms because of the existing length and inefficiency of trials. In order to combat this, the OTP is two years into implementing strategies from the current three-year Strategic Plan and the Registry is working diligently to streamline and reorganize many aspects of the Registry Office, as it is responsible for a large portion of the Court's operations.<sup>184</sup> Also worth considering are limitations in the Court's current approach of seeking out only individuals with alleged criminal responsibility in that this eliminates any potential of seeking out those responsible for committing atrocity crimes as part of a corporation, state, or international organization.<sup>185</sup>

Defiance is currently a large obstacle for the ICC to overcome. First off, we have to realize that defiance is enabled through "the silence of the majority, the acquiescence of the bystander, and the complicity of those neighbors who avert their gaze."<sup>186</sup> Other forms of defiance include the obstruction of investigations and judicial proceedings, lack of Rome Statute ratification by world superpowers, and the reluctance or non-cooperation of both State and non-State Parties.

Two primary examples are given in the matter of defiance through obstruction of investigations and judicial proceedings, beginning with the case of Sudanese President Omar al-Bashir. In 2007, the ICC indicted high-ranking Sudanese officials Ahmad Harun and Ali Kushayb and al-Bashir's response was to promote Harun to the position of Minister of State for Humanitarian Affairs of Sudan. Al-Bashir's own indictment came in 2009 where his reaction to the ICC was, "You can eat it."<sup>187</sup> Kenya, CAR, Chad, and South Africa have all allowed al-Bashir to travel freely into their territories since his arrest warrant was issued in March 2009.<sup>188</sup> Since then, he has continued to defy the arrest warrant and the UN Security Council's call to end the violence occurring in Darfur. By 2012, al-Bashir had expelled 13 international aid agencies including Médecins Sans Frontières and Oxfam as well as shutting down domestic human rights groups.<sup>189</sup>

Second, Uhuru Kenyatta of Kenya utilized a close election win to garner the ability to obstruct the investigations occurring in Kenya, successfully promoting the ICC to drop the case against him as of 5 December 2014. The Court's inability to provide the necessary level of

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<sup>183</sup> Rodríguez-Pareja & Herencia-Carrasco.

<sup>184</sup> Judge Silvia Fernández de Gurmendi, "Remarks to the 25th Diplomatic Briefing: ." The Hague, 2015.

<sup>185</sup> Sander.

<sup>186</sup> Marshall, 25.

<sup>187</sup> Robertson, 554.

<sup>188</sup> Chapman & Chaudoin, 401.

<sup>189</sup> Grono.

witness protection resulted in witness tampering that ultimately and adversely undermined the efforts of the Court.<sup>190</sup>

The fact that three of the five Permanent Five members of the UN Security Council have not signed the Rome Statute acts as a form of defiance meant to undermine the Court in its current status, referring to the U.S., Russia, and China. As mentioned before, Russia and China have used their veto power to keep Syria outside of the ICC's jurisdiction despite being endorsed by 65 countries. The issue of addressing Syria has reached the Security Council each year since 2011 and has been vetoed each time.<sup>191</sup> Over 100 NGOs have put pressure on the UN Security Council to refer Syria to the ICC and 13 of the 15 Security Council voted in favor of an ICC referral.<sup>192</sup> In spite its veto, China has called for "political solutions" in Syria, Sudan, and South Sudan but has played a role in prolonging the occurrence of atrocity crimes in all three states and is repetitively called to address its own human right violations.<sup>193</sup>

Many UN Member States have also been reluctant to heed the resolutions passed by the UN Security Council regarding referrals.<sup>194</sup> This has been most evident in the Darfur case where the Court has received little cooperation despite the number of African countries that are State Parties to the Rome Statute and their supposed commitment to ending the impunity of those responsible for atrocity crimes.<sup>195</sup>

Recent years have shown a growing reluctance to cooperate with the Court, largely by an increasing number of African leaders.<sup>196</sup> This includes the hesitancy of South Africa to detain Omar al-Bashir following the African Union leadership summit that occurred in June 2015, where he was ultimately allowed to return to Sudan.<sup>197</sup> In June 2014, South Africa garnered support for "an amendment to a protocol creating an African Court that provides immunity from prosecution for serving heads-of-state and senior government officials, including war crimes, crimes against humanity, and genocide."<sup>198</sup> The African Union has undergone a major ideological change from originally supporting full African ratification of the Rome Statute to now actively undermining the Court and considering withdrawal from the Court's jurisdiction.<sup>199</sup>

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<sup>190</sup> Dancy, et al. "The ICC's Deterrent Impact"; Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 7.

<sup>191</sup> Human Rights Watch, *World Report 2015*, 4.

<sup>192</sup> *Ibid*, 523.

<sup>193</sup> *Ibid*, 165.

<sup>194</sup> Rodríguez-Pareja & Herencia-Carrasco.

<sup>195</sup> Mills, 445.

<sup>196</sup> Adam Taylor, *Why So Many African Leaders Hate the International Criminal Court*. June 15, 2015. <http://www.washingtonpost.com/blogs/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/> (accessed June 18, 2015).

<sup>197</sup> Meredith Barges, *ICTJ: South Africa Allows Bashir to Depart, Dealing Grave Blow to Victims' Rights and International Justice*. June 15, 2015. <https://www.ictj.org/news/south-africa-bashir-depart-international-justice> (accessed June 15, 2015).

<sup>198</sup> Human Rights Watch, *World Report 2015*, 494; Amnesty International, *Amnesty International Report 2014/2015: The State of the World's Human Rights*. Annual World Report, Amnesty International, (London: Amnesty International Ltd., 2015), 7.

<sup>199</sup> Mills, 405.

The African country of Senegal was the first country to ratify the Rome Statute but now calls on State Parties not to cooperate with the Court.<sup>200</sup> As previously stated, the conflicting agendas amongst the African leadership has led to a sort of political cognitive dissonance as the continent builds democratic support of human rights standards in some regions while maintaining high levels of authoritarianism and human rights abuses in other regions. While the continent attempts to speak collectively with an influential and authoritative voice, it is a continent ripe with division.<sup>201</sup>

We must also look at how patterns of opportunity affect the potential of perpetration as those who commit atrocity crimes in weak or failing states do so because of more opportunity to do so, not necessarily more inclination.<sup>202</sup> As Mary Robinson describes,

Where domestic law and order has broken down, individuals may feel that they can commit even the most atrocious crimes without fear of legal sanction. When this happens, there is an urgent need to re-establish the principle of individual responsibility for crimes. If serious human rights violations are not addressed and a climate of impunity is permitted to continue, then the effect will be to stoke the fires of long-term social conflict. Where a community splits along religious or ethnic lines, such conflict can vent itself through cycles of vengeance over decades, and even centuries.<sup>203</sup>

Most theories in criminology assume that persons committing atrocity crimes are rational decision-makers that base their decisions on a cost-benefit analysis that can be predictable yet this predominant theory does not explain why some offenders may not respond in the ways expected when threatened with international sanctions. Tom Buitelaar of the Hague Institute for Global Justice states that “deterrence is achieved when the potential offender perceives the disincentive of the legal sanction threat to be so strong that it outweighs the incentives of the crime under consideration.”<sup>204</sup> Genocidal leaders have in many cases flaunted their crimes openly, undeterred by international reactions, which they believe will vary from deliberate blindness (which is best case scenario from their perspective) to diplomatic scorn (seen as worst case scenario).<sup>205</sup> Genocidal behavior can be understood in simplistic terms as a means to achieve goals seen as desirable or to avoid situations seen as undesirable.<sup>206</sup>

Nick Grono suggests that there is a range of considerations for potential perpetrators to weigh. These include the possibility of internal opposition, financial consequences, the probability of military success, any international disapproval shy of prosecutions, and the

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<sup>200</sup> International Criminal Court, "State Parties to the Rome Statute (Chronological List)"; Mills, 405; Simmons & Danner, 225.

<sup>201</sup> Mills, 406.

<sup>202</sup> Ku & Nzelibe. 780.

<sup>203</sup> Mary Robinson, "Genocide, War Crimes, Crimes Against Humanity." *Forham International Law Journal* 23, no. 2 (1999): 275, 277-278.

<sup>204</sup> Tom Buitelaar, "The ICC and the Prevention of Atrocities." Working Paper, President's Office, The Hague Institute of Global Justice, The Hague, 2015: 3-4.

<sup>205</sup> Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. (Ardsley, NY: Transnational Publishers, Inc., 2002): 49.

<sup>206</sup> Jakob von Holderstein Holtermann, "A "Slice of Cheese" -- a Deterrence-Based Argument for the International Criminal Court." *Human Rights Review* 11 (August 2010): 295.

possibility of sanctions or other coercive measures. However, there is substantial evidence to suggest that national leaders are becoming increasingly aware of the chance of ICC prosecution if found to be in violation of any Rome Statute Crimes. Therefore, it is not unreasonable to conclude that awareness of the ICC and its reaches may prevent the occurrence of crimes included in the Rome Statute. It is also likely that the ICC may be better equipped to suppress the use of atrocity crimes if the leader allegedly responsible for the crimes does not feel that his or her life is being threatened but this also requires that leaders and high-ranking officials have an appropriate and accurate understanding of international relations, the international legal system, and international criminal liability in order for them to fully weigh their strategic options. One also has to contextualize the regime type in its attempt to predict an outcome, as smaller ruling parties are typically more vulnerable to outside pressures like economic sanctions.<sup>207</sup> It is also more likely for violence to occur in a state if that state (or one of its immediate neighbors) has experienced conflict in the recent past.<sup>208</sup>

The final category of limitation to be discussed in this paper is that of the likelihood of gender-based violence reaching the ICC. So far, sexual and gender crimes are often the crimes least likely to reach the Court and for a number of reasons.<sup>209</sup> First of all, mid- to lower-level perpetrators are most likely to commit gender-based crimes. The first high-level official to be apprehended based on sexual violence was Jean-Pierre Bemba of the Central African Republic as his arrest warrant included charges of rape.<sup>210</sup>

Second, in investigative terms, there is a “golden hour” that is ideal for evidence collection and as rape and sexual violence are both underreported and often times reported after a significant amount of time has passed, the collection of physical evidence can be extremely challenging.<sup>211</sup> Third, sexual violence happens so frequently under the guise of war because it is an inexpensive and readily available weapon of war. Unfortunately, there are even cases of rape reported against UN Peacekeepers, those sent to establish and maintain peaceful interactions between conflicting groups.<sup>212</sup>

Deterrence of sexual and gender-based violence is difficult to accomplish because there is low probability of perpetrators being punished. Cumulative charges are easier to prove but are deemed unfair to the Defense teams because each reported instance requires its own set of evidence. Because of this, Jean-Pierre Bemba’s cumulative charge was dropped.<sup>213</sup> The lack of

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<sup>207</sup> Grono.

<sup>208</sup> The Hague Institute for Global Justice, "The Hague Approach: Six Principles for Achieving Sustainable Peace in Post-Conflict Situations." The Hague Institute for Global Justice, The Hague, 2013: 7.

<sup>209</sup> Laurie Green, "First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court." *International Criminal Law Review* 11 (2011): 529.

<sup>210</sup> *Ibid*, 532.

<sup>211</sup> Anonymous Representative, International Criminal Court Investigation Team, Office of the Prosecutor.

<sup>212</sup> Melanie O'Brien, "Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes." *International Criminal Law Review*, 2011: 803-827.

<sup>213</sup> Green, 533-534.

justice that occurs on behalf of these crimes enables the discrimination and marginalization of these victims, which may at times be the exact intent of committing these crimes as rape is at times used for the purposes of humiliating and/or dishonoring the victims.<sup>214</sup> Prosecutor Bensouda maintains a steadfast role in applying charges of sexual- and gender-based violence to the majority of current cases as they apply in an attempt to end the culture of impunity around such crimes. She has also noted that the OTP has been collaborating with national systems to advance their ability to handle these crimes domestically.<sup>215</sup>

## Conclusion

The International Criminal Court has seen some truly great successes while also being burdened by a great number of limitations, challenges, and critiques. The ICC has gone to great lengths to collaborate with as many officials, leaders, civilians, and victims as it can in order to promote the Court's mission as well as to attempt to offer alternative means for conflict resolution rather than the use of brutal force that result in atrocity crimes.

While prevention itself cannot be measured empirically in the case of the ICC, we can certainly look at what empirical data we do have and use that to formulate both realistic expectations and conclusions about the Court. Between 1 November 2013 and 31 October 2014, the OTP received 579 communications relating to Article 15 of the Rome Statute. Of those 579 communications, 462 were deemed to be outside of the Court's jurisdiction, 44 merited further analysis, 49 were linked to already active situations being analyzed by the Court, and 24 were connected to an already active investigation or prosecution.<sup>216</sup> As of 19 November 2014, 11,239 communications have reached the Court to date since July 2002, undeniably signifying that the Court *is* being utilized.<sup>217</sup> With the annual numbers being completed thus far only through 2014, we can see that the Court maintained its busiest year in terms of trials with 6 different cases throughout, 4 different situations reaching the trial stage, 22 cases being monitored or investigated over 9 different situations, and 9 additional situations receiving preliminary examinations.<sup>218</sup>

Using the same date range (1 November 2013 to 31 October 2014), the ICC completed three preliminary examinations. The preliminary examination in CAR was escalated to a full-scale investigation referred to as CAR II. Both the examinations in the Republic of Korea and the Registered Vessels of Comoros, Greece, and Cambodia were deemed to have not met the required criteria to escalate the situations to investigations under Article 53(1) of the Rome Statute.<sup>219</sup> Amongst the closing of three examinations was the opening/re-opening of two cases for examination. The ICC opened examinations in Ukraine and re-opened its examination in Iraq based on the receipt of new evidence. The OTP has also prioritized seeking information from

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<sup>214</sup> Green, 530.

<sup>215</sup> Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 5.

<sup>216</sup> International Criminal Court, "OTP Report on Preliminary Examination Activities 2014," 5.

<sup>217</sup> International Criminal Court, "Report of the International Criminal Court to the Assembly of State Parties," 2.

<sup>218</sup> Bensouda, "Remarks to the 25<sup>th</sup> Diplomatic Briefing," 5.

<sup>219</sup> International Criminal Court, "OTP Report on Preliminary Examination Activities 2014," 5-6.

national-level proceedings to ascertain that thorough investigations and prosecutions of gender-based violence are occurring domestically.<sup>220</sup>

Methodologically, it can be very easy to pick out the cases where deterrence and prevention have not occurred and it is much more challenging to establish where it has worked. Deterrence of atrocity crimes can manifest itself in a number of ways and often depends on successful mediations and conflict prevention, which may essentially only appear as the absence of conflict.<sup>221</sup> This makes it difficult for some to believe that deterrence should be part of the Court's explicit mandate.<sup>222</sup> Some scholars have suggested that the Court focus more on completing prosecutions and trials efficiently and to do so more to the expectations of the global community; by establishing its capacity to finish cases and finish them well, deterrence will be a consequence.<sup>223</sup>

It is of great importance, however, that both the ICC's supporters and critics specify with clarity what is expected of the Court, which is to "deter a significant crime category within its jurisdiction."<sup>224</sup> Some deterrence is of course possible but it is unrealistic to believe that the ICC is capable of preventing all atrocity crimes everywhere as the Court was not built upon this expectation. Part of the problem with the current expectations of the Court's deterrent impact stem from a belief that the Court may work as a relatively "cheap" instrument in handling conflicts as opposed to more robust interventions such as the use of military force.<sup>225</sup> Philipp Kastner describes the dangers of unrealistic expectations as such:

The Court is seen to have failed because supporters inflate hopes and expectations about the Court's usefulness as a conflict management tool. This is all the more problematic because the short-term failure of justice to deliver an end to hostilities might decrease perceptions about the independent value of justice in the long term.<sup>226</sup>

We must recognize that while the Court has failed in its efforts at deterrence in some circumstances, it does not mean the Court does not have a deterrent effect or cannot improve as time goes by and lessons are learned. Observers have made the mistake of focusing too much on "specific deterrence," a belief that the threat of prosecution may stop leaders who have already committed Rome Statute crimes from committing them again in the future. While this is an ideal outcome, the more likely outcome is that threatening leaders who are actively committing such crimes may only escalate the intensity of the crimes as a tactic of self-preservation to remain in power. This is most clearly seen in the case of Omar al-Bashir whose defiance since the 2009 issuing of his arrest warrant has escalated human rights abuses in Sudan.<sup>227</sup>

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<sup>220</sup> International Criminal Court, "OTP Report on Preliminary Examination Activities 2014," 6.

<sup>221</sup> Grono.

<sup>222</sup> Grono.; van Wijk; and Maarten van Munster, interview by Shanay Murdock. The Hague, (June 1, 2015).

<sup>223</sup> van Munster; van Wijk.

<sup>224</sup> Jo and Simmons, 37.

<sup>225</sup> Buitelaar, 2.

<sup>226</sup> Philipp Kastner, "Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations." *Journal of International Criminal Justice* 12, no. 3 (July 2014): 479.

<sup>227</sup> Grono.

Unfortunately, the ICC's deterrent effect will always be "hostage to the immediate domestic context" as each conflict is once again unique in its circumstances and causes and because the desires and approaches of each leader varies. However, the worldwide knowledge of the ICC is growing and its goals and norms are becoming more deeply entrenched and supported as the global community shifts to a more moralistic stance on human rights. Both government leaders and rebel leaders are becoming more aware of the work the Court is doing and are recognizing the very real possibility of appearing before the Court. Considering the number of high-profile leaders that have been indicted, arrested, or convicted, it has become a worthy consideration for leaders when deciding to either "crush a growing opposition with violence, or negotiate, or address the underlying grievances."<sup>228</sup> Rather than fight his conviction through the appeals process, the DRC's Germaine Katanga accepted the ICC's judgment and issued an apology to his victims.<sup>229</sup>

Effective deterrence relies upon both normative pressures and material punishment.<sup>230</sup> The ICC is able to utilize prosecutions to contribute to developing culpability norms that deter atrocity crimes by making them condemnable by the status quo of international standards and more costly for perpetrators in terms of relationships and economics.<sup>231</sup> With prosecutions of human rights violators comes the improvement of human rights standards, which has the added benefit of acting as a deterrent force that goes beyond just the state in question.<sup>232</sup>

However, a deterrent effect is only reachable if the ICC is confident that it has the necessary political, financial, and legal support from the international community that allows for the Court to fulfill its mandate in effective and efficient ways.<sup>233</sup> This process works on a cyclical basis, as deterrence is also dependent on successful prosecutions, meaning the administration of international justice is dependent on both the ICC and support from and interaction with the international community.

The fact of the matter is that impunity fuels conflict.<sup>234</sup> Rather than looking solely at "specific deterrence" the ICC needs to shift its focus to balance longer-term deterrence goals in order to prevent future generations from utilizing atrocity crimes for strategic purposes.<sup>235</sup> Beyond this, it needs to be recognized that deterrence is only one facet of the ICC's overall goals—"justice for victims and reconciliation for war-torn countries are among its many priorities."<sup>236</sup> International criminal justice is largely cost-effective when compared to tremendously expensive campaigns that aim to alter the deep structural causes of human rights violations, which often include poverty, civil war, inequality, and corruption.<sup>237</sup> For as valiant as

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<sup>228</sup> Grono.

<sup>229</sup> Human Rights Watch, *World Report 2015*, 191.

<sup>230</sup> Hunjoon Kim & Kathryn Sikkink. "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries." *International Studies Quarterly* 54, no. 4 (2010): 942.

<sup>231</sup> Grono, "The Deterrent Effect."

<sup>232</sup> Kim & Sikkink, 939.

<sup>233</sup> Rodríguez-Pareja & Herencia-Carrasco.

<sup>234</sup> Amnesty International, *Amnesty International Report 2014/2015*, 10.

<sup>235</sup> Grono.

<sup>236</sup> Burke.

<sup>237</sup> Dancy, et al. "The ICC's Deterrent Impact."

many of those efforts are, they are often ineffective and require new strategies for how to address these deep-rooted issues. “Without justice, there can be no inclusive and lasting peace.”<sup>238</sup>

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<sup>238</sup> Frick.

## Appendix I – Alphabetical List of State Parties<sup>i</sup>

Afghanistan	Finland	Palestine
Albania	France	Panama
Andorra	Gabon	Paraguay
Antigua and Barbuda	Gambia	Peru
Argentina	Georgia	Philippines
Australia	Germany	Poland
Austria	Ghana	Portugal
Bangladesh	Greece	Republic of Korea
Barbados	Grenada	Republic of Moldova
Belgium	Guatemala	Romania
Belize	Guinea	Saint Kitts and Nevis
Benin	Guyana	Saint Lucia
Bolivia	Honduras	Saint Vincent and the Grenadines
Bosnia and Herzegovina	Hungary	Samoa
Botswana	Iceland	San Marion
Brazil	Ireland	Senegal
Bulgaria	Italy	Serbia
Burkina Faso	Japan	Seychelles
Burundi	Jordan	Sierra Leone
Cambodia	Kenya	Slovakia
Canada	Latvia	Slovenia
Cape Verde	Lesotho	South Africa
Central African Republic	Liberia	Spain
Chad	Liechtenstein	Suriname
Chile	Lithuania	Sweden
Colombia	Luxembourg	Switzerland
Comoros	Madagascar	Tajikistan
Congo	Malawi	The Former Yugoslav Republic of Macedonia
Cook Islands	Maldives	Timor-Leste
Costa Rica	Mali	Trinidad and Tobago
Côte d'Ivoire	Malta	Tunisia
Croatia	Marshall Islands	Uganda
Cyprus	Mauritius	United Kingdom
Czech Republic	Mexico	United Republic of Tanzania
Democratic Republic of the Congo	Mongolia	Uruguay
Denmark	Montenegro	Vanuatu
Djibouti	Namibia	Venezuela
Dominica	Nauru	Zambia
Dominican Republic	Netherlands	
Ecuador	New Zealand	
Estonia	Niger	
Fiji	Nigeria	
	Norway	

## Appendix II – Transcribed Interview with Dr. Maarten van Munster<sup>ii</sup>

1 June 2015

**Note:** Dr. van Munster’s expertise lies primarily in transitional justice in Rwanda, focusing mainly on the gacaca courts specific to the aftermath of the Rwandan genocide. He specifically stated that his expertise does not include the International Criminal Court.

**The first question I have, I was reading a presentation that President Song had done in 2013 and he had mentioned that atrocity prevention was a goal of the ICC. I’m wondering if you think that that’s something that should be something the ICC is trying to attain and is that even a realistic goal?**

I think in the first part of your question, “should it be a goal of the ICC,” I think when it was created it was basically created in the aftermath of the atrocities in Rwanda and in the Balkans and the idea of at least the NGOs, civil society and other actors that were involved in creating the ICC was definitely to do so—to have this institution, to prevent future atrocities. You need some sort of mechanism that could have that effect. If you ask me, “should it have that as a goal”—what do you mean, legally in the Statute or just in general?

**Should the institution, whether formally or informally, work to try to prevent atrocities? Should that be within its mandate to try to prevent crimes or should it just handle the aftermath?**

While I think the latter. It should be a legal institution that deals with atrocities and prosecutes the suspects of these atrocities and the most responsible for the most serious crimes—the top layer of the people involved. And then an effect of that—the prosecutions—could be deterrence. Whether it actually does, maybe that’s one of your later questions. That’s a difficult one of course. I don’t think it should be a specific goal of the institution per se.

**The Court itself has come under criticisms including lack of legitimacy and credibility. Do you have any ideas as far as how the Court can establish itself in terms of greater legitimacy within the realm of international law and international justice?**

Yeah, you’re hinting at the bias on Africa?

**There has definitely been the critique that it has been very Sub-Saharan African-centric but even a lot of the Western nations or the U.S, Russia, China—those that have not ratified the Rome Statute—tend to undermine the authority and the legitimacy of the Court when it suits them. In your opinion, I’m wondering if there’s anything the Court can do to further establish or build its legitimacy as an international legal institution?**

Yeah, I think the only thing it can do—because it’s not under the influence of the Court to directly influence its own membership—it’s a member-based organization so the Member States, the Parties of the ICC—they make the Court and if some state is not a part of it, it’s nothing the Court can influence. I think the only way it can influence something is by doing its work very well and showing through its judgments and through its approach. Mainly I think the OTP should be very good in the sense that it clearly explains why it takes its positions and what the legal grounds are for prosecuting or not prosecuting. And if it does that well, that could help in convincing other Member States who are a bit reluctant perhaps, to understand what positions or

what direction the Court will take and convince these States to participate. That's about it, I think. There's not a lot more it can do.

Maybe people from around the Court, perhaps a judge, can convince other states to join more actively through political mechanisms or through diplomatic norms.

**Because Moreno-Ocampo had been the Prosecutor for nine years, how did his tenure position the ICC for its future endeavors? Did he put the Court at an advantage or a disadvantage?**

That's a difficult one because he was quite a flamboyant figure so in a way I think that's good because it puts the ICC on the map and in that sense didn't go by unnoticed by most of the documentaries and the famous people that went to the Court as well. On the other hand I think he was maybe a bit too much of a politician and not so much a prosecutor in a certain way with some of the things he said in press conferences were... "activistic" almost. And that harmed the institution I think. I think a legal institution has more strength if it acts in a way a bit boring—being led by evidence, being led by the law and not too much by political motives. I'm not saying that he had a political agenda but sometimes he came across as a bit too flamboyant and a bit too political in that sense. Like the things he said about Bashir for example.

**How do you see criticisms that say the ICC is either losing support, could fail, or become obsolete? For instance, the Central African Republic is going through the UN to set up an additional *ad hoc* court, even despite the fact that the ICC is already established.**

Well I don't have a crystal ball so I don't know whether it will become obsolete but it's quite clear that it's facing a lot of difficulties. And how that will develop, no one really knows. And even the African Union I think adopted a resolution on the addition of the special court. Those are sort of empirical indications that they are losing support or at least that there are some countries in Sub-Saharan Africa are less enthusiastic than they used to be when the ICC started and of course the fact that heads of state were prosecuted, like in Sub-Saharan Africa like with Kenyatta, the President of Kenya and Omar al-Bashir, the President from Sudan. That didn't help but I have to say in defense of the ICC here that it's also a bit, maybe inevitable, that this happens because if your objective is to prosecute the most responsible for the most serious crimes, then you will end up with top leading officials and it's also not a secret that most of the internal warfare and civil wars and so on, they are on the African continent and very often one of the leaders of the government is involved and indicted for these crimes and it's not a surprise that people who are indicted become defensive and also try to undermine the legitimacy of the Court. So maybe it's already implicitly very difficult to do it right and to not lose legitimacy in that sense. I think to some extent, it did lose some legitimacy but impossible not to lose this legitimacy.

**Prosecutor Bensouda has dismissed the Darfur case because of lack of support from the UN. How do you think that affects the status or the perception of the ICC?**

She called it a "hibernation" I think and the case is basically hibernating so the arrest warrants are still there but there's no progress basically. That definitely impacts the status of the ICC because when they started out, the idea that heads of state or other suspects of these kinds of crimes—they cannot travel anymore and are confined to their own country—and now it's happened that [Bashir] has traveled to other countries and other ICC Member States. That also weakens of course the idea of deterrence and also maybe the legitimacy of the Court. Again, this

is also something that has to do with lack of having a police force or basically a strong-arm support of the law. So yes, to answer your question I think it does weaken the position of the ICC unfortunately.

**Do you think it affects the situation in Darfur directly?**

Initially, I think it could have had some impact on Bashir himself and could have moderated his behavior a little bit or that of the administration. I think at this point it's probably not so much the case anymore. I think what he also did in his administration was testing the waters to see what happened and reality showed that nothing really happened and that also gives the leader the feeling that it's more or less safe.

**More than half the world's population is not protected under the ICC's jurisdiction. There are 123 States that have joined but because of the majorly-population countries such as the U.S., Russia, China, and India, there are so many people that are not protected by the jurisdiction. What need to happen in order to increase the participation and cooperation of states that have so far been reluctant and/or defiant of the Court?**

All it can do is do its work very well, be transparent and try to show that there's no political agenda as much as possible. Though that's very hard. We know through other examples—the Yugoslavia Courts [ICTY] for example—the Prosecutor was also actively looking for perpetrators on the other side to balance the books a little bit. And I think maybe that's the key problem—that the ICC is a legal institution and it tries to stay away from politics but that's more or less impossible. If you prosecute these kinds of crimes you will be drawn into a political game where people will accuse of all kinds of biases and so on. And the only thing I think you can do is do your work as transparently as possible and objectively as possible as far as is feasible. I think that would be the greatest help to the Court to do these things in a good way. And of course you need to communicate and talk about it. Member States that are on board should also reach out to others and show what the Court is doing. And that could slowly, gradually improve the situation.

**You've worked so closely with the gacacas, which are very culturally specific to Rwanda's perception of justice. Do you feel the ICC has maintained an appropriate level of cultural sensitivity and relevance in its investigations and proceedings?**

I do not know enough to answer that specifically. I do know that at the start, the LRA case in Uganda, that they sent very young prosecutors, some of them even placement students or at least very young and recently graduated from Western countries. They sent them to Uganda and had them do all sorts of interviews to collect evidence with victims and family members of victims. And apparently that was not always the best approach because if you say someone from say, law school in The Netherlands or somewhere else who's 23 or 22 to interview someone who was the victim of a rape in an African village, that's maybe not the best way to do it. I'm not sure if it's still going like that—I don't think so. They learned from those criticisms and feedback that was given to them. But how do you do it right? It's difficult to gain entry to countries, get access to visas, and so on. You're also dependent on the external circumstances to some extent.

## Appendix III – Transcribed Interview with Dr. Joris van Wijk<sup>iii</sup>

9 June 2015

**The preamble of the Rome Statute specifically mentions contributing to the prevention of atrocity crimes through ending impunity of perpetrators. This concept has been reinforced through statements by [Prosecutor] Moreno-Ocampo and [former] President Song. So first I'd like to determine, should prevention of atrocity crimes be an explicit goal of the Court? And is this a realistic goal?**

Maybe before I kick off, I'll give the usual reservation that academics make—I don't consider myself to be a real expert on this issue on goals of international criminal justice but at the same time, I've been in the field for quite a long time focusing on other issues but I think I do have some thoughts on this.

I think, and this goals for many of the other goals as well, as to international criminal justice that this might be a bit dangerous to set such far-reaching, broad goals and I think we've seen that now. Everyone sees it happening that some of the other goals are difficult to meet and in particular this one—prevention. I can see politically why they argue it but in actual practice it might be not so wise to do it after all. It might be much more wiser to say 'we hold people accountable for what they did. Period. That's it. And don't bother us with possible negative effects that we can have or the fact that we don't meet up to certain other goals. What we do is hold people accountable.' That would, in retrospect, have been the best but at the same time I can imagine that politically you want money, all kinds of parties to support your project, and then it makes much more sense to formulate broader goals. And if I just may add to that, I think it's already quite—it might be interesting to look at that if you compare ICC to ICTY where ICTY had an explicit goal of reconciliation, ICC already ditched that goal because I think that ICTY had been critiqued a lot and that it might have had a contrary effect of reconciliation. So if this is true, and if this is a reason for not including the goal of reconciliation, it might suggest that they'd given it some thought while drafting the Rome Statute about what rules they would formulate and still they've done this one so they do feel that it has this deterrent effect. So in answer to your question, I don't think it's wise.

**Twelve trials that have been completed and only two have ended in convictions. When it comes to prevention, what is the ICC doing beyond trying to end impunity in preventative terms?**

I think in essence the argument the ICC is using is that by holding people accountable and fighting impunity, this in itself has a preventative function. But I think apart from those, the ICC is not engaged in any other activities that might have a preventative function. Although, you do see—and there's discussion about that as well as to whether this is wise or not—you do see that the Prosecutor (because that is who represents the ICC) does implicitly at times warn States or individuals or groups not to commit any atrocities because the ICC is watching. Well, giving out those kinds of communications you could argue is an activity which aims to prevent people from committing further crimes. But then you can have the discussion about whether or not this is something the ICC Prosecutor *should* do. Is it part of its mandate to politically—because you enter the realm of politics much sooner if you make such claims—should they do that or not? But I think that comes closest to other activities but prosecuting as such could have preventive action. But one of the other things—and this is perhaps a reservation I'd like to make with regards to the first answer—I do think that if you talk about deterrence and in particular you look

at the two cases which have been convicted, and in particularly in the child-soldiering case, this might come the closest to actually having a deterrent effect. I think deterring crimes against humanity is a broad concept—and prosecuting people is quite difficult. It's not that you quickly have in a real case scenario, 'Let's not structurally kill big groups of people if they're political enemies because that might amount to a crime against humanity and then the ICC might step in.' I don't see that happening, but I do see it happening that if you're a local militia leader that you might say, 'Well, we can recruit a lot of young men but beware and don't get young boys because then I might be in trouble.' And I think in the Lubanga case, I do trust that fighting child soldiering might be one of the best cases where it might have a deterrent effect because it's such a rational choice to either recruit these youngsters or not whereas related to these other crimes, it's not that obvious.

**The Court itself has received a lot of criticism in regards to international law and justice. How can the Court establish more legitimacy in the eyes of those who have criticized it so far?**

It depends. I think you first have to see why and what type of critique was given in relation to the lack of legitimacy. It could be that some are saying that the ICC only targets Africa and so then the argument would be to try to focus on cases outside of Africa. That's one of the main claims and problems with legitimacy because the fact that they are incapable to prosecute individuals often does not really relate to legitimacy questions but rather than to practical issues. So another way to gain more legitimacy obviously is to get many more States on board with the Statute. So as to legitimacy, I think it is more those types of political dimensions which play an important role.

**How do you view Bensouda's hibernation of the Darfur case? How does this impact the status or perception of the ICC and how might this affect the situation in Darfur?**

I've discussed with colleagues how to understand hibernation in the sense that it's not a legal concept. It's clear what she means with it: 'We're not going to invest any more money or capacity on it' but at the same time the case is still open so you could also wonder why explicitly mentions this. I don't see a reason because I think in essence; the case has been hibernating for many years. So what's the difference between now and two years ago? I don't know if there is a real difference. But coming to your question 'how does it affect,' well, I think she wanted to make a very clear political signal that 'listen, this is not going to work without cooperation of a lot of countries, including African countries who are Parties to the Rome Statute—who do still seem to support Sudan—who don't expect us to succeed in any way. And I think it does negatively affect the situation in Darfur. I'm not much actively keeping track of Darfur but as I understand, atrocities are still ongoing and with the hibernation—and I think that might be an important consequence of her saying that—it's not likely that we'll see new suspects coming up from Darfur. This has, over the past years, happened that another minister was indicted or so and probably, that won't be the case.

On a much broader level, I think it does strengthen the idea that the ICC is not as powerful as many had hoped.

**Do you see her hibernation of the case as a statement on where the [UN] Security Council is and their lack of support since they made the referral?**

Yeah, I can't understand the active communication of Bensouda if it was not for that more political purpose. In legal terms, there is no need to publicly say 'we are going to hibernate this case.' Strategically, it's unwise. In a normal, domestic setting, if you're after a big organized crime suspect, it's not likely that a Prosecutor would say 'Well, we are going to hibernate this case because we can't catch him.' No, you only do so if you think that has some sort of political effect.

**One hundred twenty-three countries have ratified the Rome Statute yet more than half the world's population is not protected under the jurisdiction of the ICC. The Court has the potential for 'universal jurisdiction,' but countries like the U.S., Russia, China, and India—some with massive human populations have not signed. What needs to happen to increase the participation and cooperation of states that have been reluctant and/or defiant of the ICC so far?**

I guess for that reason, the ICC should only focus on important African states. I think that's the biggest chance of these other countries signing up as well. So there is a very cynical answer. I think the more important the ICC becomes the less high the chances are that these important countries will ever sign. So the more toothless the tiger gets, the more likely that they will sign I think. There is no interest whatsoever for these countries to sign. Unless that they see that they can use it to their benefit and it is not to their benefit if it is powerful. And I think if you look at the latest signatories, they're all very small countries.

**Like many Western-created institutions, the ICC has been critiqued for its approach to justice. Does the Court maintain an appropriate level of cultural sensitivity or is it too Western-centric?**

First of all, I think it's good to note that the institute as such—be it based on common law or civil law—is Western by nature. So the idea that there is a Prosecutor representing the State, etc. is a Western conception but at the same time, through colonialism, etc. it now takes place in virtually every country in the world. So the idea of having a Court with the various actors related to it has Western origins but is as such by now, not necessarily a Western thing. Then when you look at how that Court functions and to what extent does it take cultural aspects sufficiently into account, that question in particular comes to light when witnesses are testifying that not enough attention is given to the cultural context of where they come from and to what extent they use concepts of time the way we do, etc.

At the same time, I find it very difficult because I wonder how in their national jurisdictions, if they applied a formal type of law and court system, that there too it does matter if someone was at a certain place, on a certain date, and at a certain time. These are just issues that in the court context matter. So I do see the cultural challenges but I don't think that the Court is disregarding them. I think they're trying to cater to these challenges where possible but they will be an intrinsic problem of the Court.

**So the Central African Republic is now setting up a hybrid Special Criminal Court to work in cooperation with the ICC, where two active investigations already exist. The goal of the SCC is to more rapidly address the crimes being committed in the territory. Is the need for the SCC a reflection of the ICC or a reflection of a strong need of a judicial body and rule of law in CAR?**

To be honest, I don't know much about this new hybrid court. But I do think that in general, I do see this happening in the future more often for very practical reasons as well. The ICC is under budget and if you can find some other budget to set up another institution, that's very easy. And at the same time, the ICC is pushing much more of the argument that 'this is international criminal justice and we are just one element of it. It's also domestic with the use of complementarity and domestic justice is most important.'

I do think that we might see in the future more hybrid types of courts appearing for those practical courts. I really wonder if it's a positive development because one of the main issues is that all of these hybrid tribunals will develop their own case law and because of that, it will be much more complex to come to some kind of a uniform harmonized body of international criminal law and I think that's one of the side effects.

**Empirical data is difficult to obtain at the international level. Each conflict is unique in its context, trials are slow moving, we can't measure what we can't see, and there's really no way to set up a control experiment on an international basis. Keeping this in mind, how do we go about measuring the success of the ICC's prevention efforts and from that, can we determine if the ICC is an effective preventative/deterrent institution?**

I think what you could do and what would come closest—and this is more of a theoretical argument—but you can see in the domestic context what we know about effectiveness in terms of prevention. As criminologists we know that a reaction has to be swift, so fast and certain. If it's swift and certain, and possible also where there's more discretion about the sanctioning being harsh—the chances are that it has a high preventative effect. Of course, if in Singapore you over speak and there are a lot of people around and you get busted—and the chance of getting busted is very high—a week later you're in court and you get a very hot sentence, then the chances are limited that your neighbor will do what you did and few people will do it as well.

Then the theoretical argument with the ICC is that the chance of getting caught is very low, the reaction is very slow, and even as to punishment you could argue that it isn't very severe. In regards to Lubanga, he was sentenced to 12 and 14 years. So in that sense, based on the theoretical argument and some sort of empirical argument that it's also slow, you could argue that it is not likely to have a preventive function and I really wouldn't know how to otherwise do empirical research apart from, for example—I've been thinking about how to set up a research lab like that—you could do interviews with mid-level commanders in militias in Africa to ask if they have heard their commanders referring to Lubanga and the fact that they should recruit/hire child soldiers or not. Something like that. So I guess going to mid-level commanders, asking 'what did your superiors want from you and did they ever mention the ICC'—that could come closest I guess to some sort of research. If you get a lot of people who respond one way, you have quite a good argument.

**The most consistent argument I've come across in support of the ICC's existing preventative nature is the 2006 reference to Uganda and the fact that the LRA settled more so along the DRC border rather than Northern Uganda and was willing to come to the negotiation table. At this point, the LRA is still operating and Joseph Kony is still wanted so I'm wondering if it's still accurate for scholars to call this example a success case of prevention**

No, and I've argued that it's the other way around in Uganda. Did Kony come to the table—I think the peace accords were in 2006—because of the ICC warrant? In certain cases you can

really see that involvement of the ICC is likely to have a negative effect on stopping the violence taking place. I think in Libya for example, with the ICC very quickly issuing an arrest warrant for Gaddafi, it made it very difficult for them to start peace negotiations with him because Jacob Zuma, for example, the South African President, in Libya at the time of the ICC warrant, wanted to barter a peace deal whether it would have been successful or not. But the ICC made the arrest warrant—what can you offer the guy? So it is often the contrary, particularly with Uganda.

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