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**The Relevance of the International Criminal Court
and Its Possible Deterrent Effects of International
Crimes**

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Abstract

Purpose: The ICC was established for the primary purpose of ensuring that the most serious crimes of concern to the international community as a whole do not go unpunished and to contribute to the prevention of such crimes. Thus, this paper seeks to determine the possible deterrent effects of international crimes by the ICC through its investigations, prosecutions, sanctions and other activities.

Methodology: The study adopted the doctrinal research method. Both primary and secondary sources like Statute, Case Law, textbooks, journals and internet are used.

Finding: Finding reveals that the Court has not been effective in deterring and preventing international criminality due to lack of cooperation from States and lack of universal jurisdiction.

Recommendation: In order for the Court to effectively deter the commission of international crimes, there is need to alleviate the factors hindering the proper discharge of the Court's functions like lack of cooperation from states, a standing police force and universal jurisdiction.

Keywords: ICC, International Crimes, Deterrence, Prosecution, Investigation

1.0 INTRODUCTION

The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. The ICC is an independent international organisation, and is not part of the United Nations system. Its seat is at The Hague in the Netherlands. Although the Court's expenses are funded primarily by States Parties to the Rome Statute, it also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities.¹

The international community has long aspired for the creation of a permanent international court and, in the 20th century, it reached a consensus on definitions of genocide, crimes against humanity and war crimes. The Nuremberg and Tokyo trials addressed war crimes, crimes against peace, and crimes against humanity committed during the Second World War. In the 1990s after the end of the Cold War, tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were the result of consensus that impunity is unacceptable. However, because they were established to try crimes committed only within a specific timeframe and during a specific conflict, there was general agreement that an independent, permanent criminal court was needed. On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries.²

The permanent International Criminal Court is the first new major international institution of the twenty-first century.³ The Rome Statute which was adopted on July 17, 1998 provided for the establishment in The Hague of an International Court that can prosecute individuals from common soldiers to Heads of State for genocide, crimes against humanity, war crimes and aggression. The ICC is considered a milestone in the ongoing transition towards an international legal order that is less based on State sovereignty and more oriented towards the protection of all citizens of the world from abuse of power.⁴ The ICC was established for the primary purpose of ensuring that the most serious crimes of concern to the International Community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.⁵

The ICC has jurisdiction over the most serious crimes of concern to the international community as a whole, namely genocide, crimes against humanity and war crimes, when committed after 1 July 2002, as well as the crime of aggression, as of 17 July 2018, under specific conditions and procedures. Each of these crimes is clearly defined in the Rome Statute and other relevant texts. The Court may exercise jurisdiction over such international crimes only if they were committed on the territory of a State Party or by one of its nationals. These conditions, however, do not apply if the United Nations Security Council, whose resolutions are binding on all UN member states, refers a situation to the Prosecutor or if a State makes a declaration accepting the jurisdiction of the Court. The Court is intended to complement, not to replace, national criminal justice systems. It can prosecute cases only if national justice systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to carry out such proceedings genuinely. This fundamental principle is known as the principle

¹ The ICC at a Glance. Available at: <https://www.icc-cpi.int/sites/default/files/ICCAatAGlanceEng.pdf> Accessed: 11/07/2023

² *Ibid.*

³ Dominic, M et al (eds). 2004. *The Permanent International Criminal Court*. Oxford: Hart Publishing.p.40

⁴ Marlies, G. 2006. *The International Criminal Court*. New York: Routledge.p.xiii

⁵ Johan, D. V. 2011. "Prosecuting the President of Sudan: A Dispute between the African Union and the International Criminal Court".unpublished.p.698

of complementarity.⁶ The Prosecutor can initiate an investigation or prosecution in three different ways: States Parties to the Statute of the ICC can refer situations to the Prosecutor; the United Nations Security Council can request the Prosecutor to launch an investigation; the Office of the Prosecutor may initiate investigations *proprio motu* (on its own initiative) on the basis of information received from reliable sources. In this case, the Prosecutor must seek prior authorization from a Pre-Trial Chamber composed of three independent judges.⁷

The Rome Statute in its preamble states that, the State parties to this Statute are:

“Conscious that all people are united by common bonds... and while recognizing that... grave crimes threaten the peace, security and well-being of the world... are determined to put an end to impunity for the perpetrators of these crimes”.⁸

The preamble is a natural starting point for identifying the objectives and purpose of a treaty. The ICC Appeals Chamber has stated that the aims of the Statute “may be gathered from its preamble and general tenor of the treaty.” The Statute’s Preamble contains several principal statements from which objectives can be derived. As the Appeals Chamber has stated, perhaps the most obvious objective is the punishment of core international crimes. This purpose can also be derived from the Statute as a whole, providing a substantive and procedural framework for the prosecution of such crimes.⁹ Paragraph 4 of the Preamble states that: “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.” The “most serious crimes” refer to the crimes under the Court’s subject-matter jurisdiction under Article 5 of the Statute, also commonly referred to as “core,” “grave,” or “atrocities” crimes. The reference to measures at the national level is linked to the principle, more clearly expressed in paragraph 10 of the Preamble, that the ICC shall be complementary to national jurisdictions.¹⁰

In a similar vein, paragraph 5 of the Preamble reads: “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” Being framed as a purpose of ending impunity, prevention is sometimes viewed as the supreme objective of the ICC. However, ending impunity and preventing crimes can also be seen as distinct, albeit closely linked, objectives. While ending impunity primarily relates to the punishment of crimes committed, prevention is forward-looking. Moreover, ending impunity can have purposes besides prevention, such as retribution, rehabilitation, stigmatization, and redress.¹¹ Thus, an inventory of potential objectives of the ICC includes ending impunity, preventing crimes, improving respect for international law, restoring international peace and security, creating a historical record, providing redress for victims and other interrelated objectives.¹²

In line with the above objectives, the Court has carried out investigations, prosecutions, sanctions, outreach and other activities. Despite the efforts of the ICC to meet up with this purpose, there are still ongoing violations of these crimes with some perpetrators still at large which bring to question the Court’s effectiveness in preventing international criminality.

⁶ The ICC at a Glance. Available at: <https://www.icc-cpi.int/sites/default/files/ICCAtAGlanceEng.pdf> Accessed: 11/07/2023. See also Articles 5, 12, 13, 14, 17 of the Rome Statute of the ICC, 1998

⁷ *Ibid.* See Article 15, Rome Statute of the ICC, 1998

⁸ Miroslav, B. 2003. “The Establishment of the International Criminal Court: Institutionalizing Expedience?”. *Hertfordshire Law Journal*.p.2

⁹ Lovisa, B and Mark, K. 2017. “The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting situations and cases at the International Criminal Court”. *Georgetown Journal of International Law*. Vol. 48. P.650

¹⁰*Ibid.*

¹¹ *Ibid.*pp.650,651

¹² *Ibid.*p.649

The purpose of this present study is to determine the possible deterrent effect of international crimes by the ICC through its investigations, prosecutions, sanctions and other activities. This analysis is done in relation to its objectives. The overarching question is if the ICC can actually deter the commission of these crimes. This question will be answered taking into consideration the objectives of the ICC, the functions of the different organs, the fight against international crimes through its prosecutions and the factors hindering the Court's proper discharge of its functions.

The Organs of the ICC and Their Functions

The ICC is the first permanent international criminal Court and is treaty based.¹³ It has power to exercise its jurisdiction over persons for the “most serious crimes of international concern”, as referred to in its statute and shall be complementary to national criminal jurisdictions.¹⁴ The ICC came into existence on July 1, 2002. The court has jurisdiction over genocide, crimes against humanity, war crimes and aggression but the court can only try international crimes committed on or after 1, July 2002. Recognising that millions of people have been victims of unimaginable atrocities that deeply shocked the conscience of humanity, the parties to the statute felt that these acts threatened the peace, security and well-being of the world. It is hoped that by putting an end to impunity for these types of crimes, the International Community can contribute to preventing such crimes.¹⁵ The Court has four main organs: the Presidency, the Office of the Prosecutor, the Chambers, and the Office of the Registrar.

i. The Presidency

The Presidency has three main areas of responsibility: judicial/legal functions, administration and external relations. In the exercise of its judicial/legal functions, the Presidency constitutes and assigns cases to the Chambers, conducts judicial review of certain decisions of the Registrar and concludes Court-wide cooperation agreements with States. With the exception of the Office of the Prosecutor, the Presidency is responsible for the proper administration of the Court and oversees the work of the Registry. The Presidency coordinates and seeks the concurrence of the Prosecutor on all matters of mutual concern. Among the Presidency's responsibilities in the area of external relations is to maintain relations with States and other entities and to promote public awareness and understanding of the Court.¹⁶

In accordance with article 38 of the Rome Statute, the judges of the Court elected the Presidency on 11 March 2021. It is composed of Judge Piotr Hofmański (Poland), President, Judge Luz del Carmen Ibáñez Carranza (Peru), First Vice-President and Judge Antoine Kesia-Mbe Mindua (Democratic Republic of the Congo), Second Vice-President.¹⁷

ii. The Office of the Prosecutor (OTP)

The Office of the Prosecutor is one of the four organs of the International Criminal Court (ICC). It is headed by the Prosecutor, Karim A. A. Khan QC, who was elected by the Assembly of States Parties.

¹³ Fabian, O. R. (2008). *General Principles of Law in the Decisions of International Criminal Court and Tribunals*, (Leiden: Martinus Nijhoff Publishers) .p.149

¹⁴ Cyril, L. (2007). *The Annotated Digest of the International Criminal Court*, (Netherlands: Martinus Nijhoff Publishers.p.1

¹⁵ Mark S. E. 2002. “The International Criminal Court and Its Implications for Domestic Law and National Capacity Building”, *Florida Journal of International Law*.p.1

The definitions and the conditions for the exercise of jurisdiction over the crime of aggression were adopted by consensus at the 2010 Kampala Review Conference by the State Parties to the Court. The court may exercise its jurisdiction over the crime of aggression in one or all of the following ways; state referral, *proprio motu* and Security council referral. Available on <https://en.m.wikipedia.org/wiki/crime-of-aggression> last accessed: 11/07/2023

¹⁶ <https://www.icc-cpi.int/about/presidency> Accessed:11/07/2023

¹⁷ *Ibid.*

The Prosecutor has full authority over the management and administration of the Office, including its staff, facilities and other resources. The Prosecutor took office on 16 June 2021 and succeeds Ms Fatou Bensouda, who was the Court's second Prosecutor after Moreno Ocampo.¹⁸

The Office of the Prosecutor is headed by the Prosecutor, who is assisted by a Deputy Prosecutor. Both are elected by the Assembly of States Parties. The mandate of the Office is to receive and analyze referrals and communications in order to determine whether there is a reasonable basis to investigate, to conduct investigations into genocide, crimes against humanity and war crimes and to prosecute persons responsible for such crimes.¹⁹ The Prosecutor and his Office gather information about crimes and present evidence against an accused before the Court. The Prosecutor's Office acts independently as a separate organ from the Court.²⁰

The Prosecutor of the International Criminal Court (ICC) has a unique role in the proceedings before the Court. It is the organ primarily tasked with choosing among the numerous situations and cases under the Court's jurisdiction. The legal criteria for situation and case selection, provided in the Rome Statute and related regulations, are relatively open as to allow the Prosecutor a considerable degree of discretion. In order to guide this discretion, the Office of the Prosecutor (OTP) has developed certain policies and strategies. The role of the Prosecutor in selecting situations and cases to investigate and prosecute is certainly pivotal for the functioning of the ICC. Indeed, the Prosecutor has been dubbed the "gatekeeper" of the ICC.²¹

The ICC Prosecutor is independent like the prosecutors of the ad hoc tribunals. This is stipulated in Article 42(1) of the Statute, and it includes not seeking nor acting on instructions from outside actors. What makes the ICC Prosecutor unique is primarily the permanent and global nature of the Court. The Court's jurisdiction is limited in subject-matter to "the most serious crimes of concern to the international community," defined in Article 5 of the Statute as war crimes, crimes against humanity, genocide, and aggression.²² The following are the functions of the OTP:

a) Initiation of Investigations and Proceedings by the ICC Prosecutor

Article 34(b) of the ICC Statute establishes the OTP - Office of The Prosecutor - as one of the organs of the court. Article 42(1) of the ICC Statute establishes the OTP as an independent organ. The OTP is headed by an independent Prosecutor who acts independently and impartially. The prosecutor is elected by secret ballot and by majority of the Assembly of State Parties (ASP).²³

The ICC system provides for a broader triggering mechanism for initiation of investigations into alleged violations of international criminal law and International Humanitarian Law. The OTP is 'the first point of call when atrocities are committed hence the leading organ in fulfilling the mandate of the court to combat impunity'. Article 42 of the ICC Statute does outline the responsibilities and duties of the prosecutor. The same provision does protect the functional independence of the OTP from external pressure and influence. It should be noted that the independence of the OTP is not a right but rather a responsibility. The Prosecutor is therefore expected to exercise his discretion judiciously.²⁴

¹⁸ <https://www.icc-cpi.int/sites/default/files/Publications/otpENG.pdf> Accessed: 11/07/2023

¹⁹ The ICC at a Glance: Available at: <https://www.icc-cpi.int/sites/default/files/ICCAAtAGlanceEng.pdf> Accessed: 11/07/2023

²⁰ Human Rights watch. 2004. "The International Criminal Court: How Non-Governmental Organisations can contribute to the Prosecution of War Criminals". Human Rights Watch. P.10

²¹ Lovisa, B and Mark, K. 2017. "The Gatekeeper of the ICC: Prosecutorial Strategies for selecting Situations and Cases at the International Criminal Court". Georgetown Journal of International Law. Vol. 48. P.642

²² *Ibid.* pp.648, 649

²³ David, B. 2018. "Prosecutorial Discretion and Independence of the ICC Prosecutor: Concerns and Challenges".

Revisita Academica Oscola Superior do Ministerio Publico do Ceara.p.177

²⁴ *Ibid.* p.178

The Statute bestows on the Prosecutor *proprio motu* powers to independently initiate investigations into any given situation within the jurisdiction of the Statute. However, this power is not absolute as the Prosecutor requires authorization from the Pre-Trial Chamber to commence a given investigation. Moreno Ocampo (Former Prosecutor of the ICC) asserts that the novelty of the ICC legal regime moved the court out of the ambit of the United Nations Security Council or from the whims of the States. That, unlike the international prosecutors to the “Ad hoc” tribunals to whom situations selected by politicians were referred, the ICC does enjoy independence to select the situations to investigate. It is argued that the Statute ushered onto the international plane an independent actor whose mandate is to ensure that the rule of law prevails. When it comes to referrals by the Security Council, the Prosecutor has a duty to initiate investigations but has discretionary power to conclude, after preliminary examination that there is no reasonable basis on which to proceed. In contrast, it is argued that prosecutorial discretion under the Rome Statute is inconsistent with the functions and powers of the Security Council.²⁵

b) Selection of Cases Out of a Situation

Article 53(1) of the ICC Statute outlines the considerations for the Prosecutor when selecting a situation which must meet the threshold, that is, there must be a high probability that a crime listed in Article 5 of the ICC Statute was or is being committed. The Prosecutor must consider whether the situation is admissible according to Article 17 ICC Statute. The gravity of the crime must be taken into account, as well as the interests of the victims and whether or not the investigation would be in the interest of justice. The selection of cases is very challenging but an unavoidable process as it is not practicable in terms of resources for the ICC to handle all cases. In instances where the prosecutor decides not to proceed with the investigation in a case referred by a State or the Security Council (SC), this can be reviewed by the referring State or the Security Council or by the Pre-Trial Chamber (PTC) on its own motion. Given that independent or private prosecutions are not envisaged by the Rome Statute, it follows that after review, the PTC would refer the matter to the Prosecutor for reconsideration.²⁶

c) Conduct of Investigations

The Prosecutor is enjoined with the duty to establish the truth through conducting objective investigations. In the same vein, he is permitted to execute agreements to facilitate cooperation with the states as well as organisations. The agreements may contain confidentiality provisions not to disclose information made available by the supplier but rather to use the information only as a ‘spring board’ for obtaining new evidence.²⁷

The investigative stage consists of three phases:

- i. **Pre-Investigative Phase** under which the Prosecutor evaluates the information immediately after it has been made available to him and determines whether or not there is a ‘reasonable basis’ to proceed and commences investigations or closes the investigations as the case may be. The Prosecutor is empowered to seek cooperation by requesting for information from States, the UN, governmental organizations, or any other reliable sources. This phase is crucial as it acts as the sieving process for credible information that would merit investigation and protects the rights of individuals as it also facilitates the proper identification of the actual suspects. It follows that the Prosecutor is not permitted to embark on ‘fishing expeditions’ to the detriment of individual rights or State sovereignty.

²⁵ *Ibid.*

²⁶ *Ibid.*p.180

²⁷ *Ibid.*

- ii. **The investigation phase** follows after the questioning of the suspects and where the Prosecutor evaluates the information and determines whether or not there is a sufficient basis to proceed, commences prosecution or as the case may end the investigation. Furthermore, under this phase, the Prosecutor develops one or several cases out of a situation and collects both incriminating and exonerating material in respect to the individual suspect.
- iii. **The prosecution phase** involves the Prosecutor conducting further investigations and preparing the case for the confirmation of the charges.²⁸

The OTP has carried out a number of investigations and prosecutions from its inception. These cases were either referred by the state parties, through SC referral or Acceptance of jurisdiction by a State that has not yet ratified the Rome Statute. Some of the states where the prosecutors have carried out investigations and/or prosecutions inter-a-lia include; the Democratic Republic of Congo, Uganda, Darfur – Sudan, Central African republic, Kenya, Libya, Ivory Coast, Mali, Georgia, Burundi, Palestine, Bangladesh/Myanmar, Afghanistan, Philipines, Venezuela, Ukraine.²⁹

The Chambers

The judicial functions of the Court are carried out by Chambers. The Chambers are each composed of several judges. The Court has three Chambers; the Pre-Trial Chamber (with seven judges), the Trial Chamber (with six judges) and the Appeals Chamber (with five judges). The Pre-Trial Chamber decides whether the Prosecutor is allowed to start a formal investigation into a case. The Trial Chamber decides whether the accused person is guilty as charged and if they find him or her guilty, will assign the punishment for the crime and any damages to be paid to the victims. It also must ensure that a trial is fair and expeditious, and is conducted with full respect for the rights of the accused with regard for the protection of victims and witnesses. When the Prosecutor or the convicted person appeals against the decision of the Pre-trial or Trial Chambers, the case comes to the Appeals Chamber. The Appeals Chamber may decide to reverse or amend a decision, judgment, or sentence. It can also order a new trial before a different Trial Chamber.³⁰

The Registry

The Registry provides judicial and administrative support to all organs of the Court and carries out its specific responsibilities in the areas of defense, victims and witnesses, outreach and detention. The Registrar (Osvaldo Zavala Giler) who is the principal administrative officer of the Court and oversees various offices and sections that perform specific administrative and supportive tasks heads it.³¹

In addition to providing all administrative support for the Court's activities both at the headquarters in The Hague and in the field, the Registry has specific responsibilities in particular areas of the Court's mandate. In the area of defense, the Registry protects the rights of defendants by administering the legal aid program for indigent defendants and providing various forms of assistance to defense Counsel. The Registry provides a similar counsel support function to victims as well as ensuring the safety and support of witnesses and victims. The Registry also performs an essential outreach function by ensuring that affected communities in situations subject to investigation or proceedings can understand and follow the work of the Court through the different phases of its activities. The Registry is also responsible for administering and coordinating the detention of all those detained under the ICC's authority.³²

²⁸ *Ibid.* p.181

²⁹ <https://www.icc-cpi.int/situations-under-investigations> Accessed: 11/07/2023

³⁰ Human Rights watch. 2004. "The International Criminal Court: How Non-Governmental Organisations can contribute to the Prosecution of War Criminals". Human Rights Watch. P.10

³¹ <https://www.aba-icc.org/about-the-icc/structure-of-the-icc/> Accessed: 11/07/2023

³² *Ibid.*

The above organs of the ICC are given the responsibility to ensure that the objectives of the Court as stipulated in the preamble of the Statute is realized. These organs therefore work in close collaboration to ensure that the ICC is effective in its fight against impunity for the most serious crimes of concern to the international community. From its entry into force in July 2002, the Court through these organs has carried out a series of investigations, prosecutions, sanctions/punishment and outreach activities which have helped in the fight against impunity for these international crimes and hence deter to an extent the commission of these crimes.

The ICC and the Fight against Impunity for International Crimes

The preamble of the Rome Statute of the ICC affirms that the most serious crimes of concern to the International Community as a whole must not go unpunished.³³ Also, the aim of the ICC is to put an end to impunity for the perpetrators of these crimes and thus, to contribute to the prevention of such crimes.³⁴ It also has the responsibility to maintain peace, security and well-being of the world recognising that such grave crimes threaten the peace and security of the world.³⁵

The ICC is a permanent international body established to prosecute those responsible for war crimes, crimes against humanity and genocide.³⁶ The court has jurisdiction over the “most serious crimes of international concern” as stated in article 5(1).³⁷ Article 12(2) of the Statute provides that before the court can exercise jurisdiction over the alleged conduct, there must be a nexus between such conduct and the state where the conduct was committed or the state of the accused person nationality. Either of these states must be a party to the Statute. The only way the court can exercise jurisdiction where these states are not parties to the statute is by either of them making a declaration under article 12(3) accepting the jurisdiction of the court with respect to the crime in question.³⁸

Under the Statute,³⁹ the court does not have jurisdiction over non-party states except when the situation is being referred to the court by the UN Security Council. Article 21 requires the court to apply ‘in the first place’ the Statute, the elements of crimes and its rules of procedure and Evidence.⁴⁰ The court is also required to apply ‘in the second place’ treaties and principles and rules of international law, including national laws consistent with the statute and with internationally recognised norms and standards.⁴¹ In line with the objectives of the Court outlined in its Statute to prevent impunity and the commission of international crimes, the Court has carried out investigations and prosecutions, meted out sanctions on those found guilty and carried out outreach and other activities that help in the achievement of its goals.

Investigations

The ICC system provides for a broader triggering mechanism for initiation of investigations into alleged violations of international criminal law and International Humanitarian Law. The OTP is ‘the first point of call when atrocities are committed hence the leading organ in fulfilling the mandate of the court to combat impunity’. Article 42 of the ICC Statute does outline the responsibilities and duties of the prosecutor. The same provision does protect the functional independence of the OTP from external pressure and influence. It should be noted that the independence of the OTP is not a right but

³³ Kriangsak, K. (2003). *International Criminal Law*, (Oxford: University press).p.2.

³⁴ Preamble, Rome Statute of the International Criminal Court, 1998.

³⁵ *Ibid.*

³⁶ Nicholas, W and Phil, C. (2008). “Courting Conflict? Justice, Peace and the ICC in Africa”, *Royal African Society*.p.7

³⁷ Robert, C et al. (2010). *An Introduction to International Criminal Law and Procedure*, 2nd ed., (Cambridge: University press).p.150.

³⁸ A. Hays, B. (2000). “The Doctrine of Universal Jurisdiction: A Review of the Literature”, *Criminal Law Forum*.p.1.

³⁹ Article 13(b), Rome Statute of the International Criminal Court, 1998.

⁴⁰ Robert C, *op.cit.*, footnote 37.p.152.

⁴¹ *Ibid.*p.153.

rather a responsibility. The prosecutor is therefore expected to exercise discretion judiciously. The Statute bestows on the prosecutor *proprio motu* powers to independently initiate investigations into any given situation within the jurisdiction of the Statute. However this power is not absolute as the prosecutor requires authorization from the Pre-Trial Chamber to commence a given investigation.⁴² Upon referrals by States Parties or by the UNSC, or on its own initiative and with the judges' authorization, the Office of the Prosecutor (OTP) conducts investigations by gathering and examining evidence, questioning persons under investigation and questioning victims and witnesses, for the purpose of finding evidence of a suspect's innocence or guilt. OTP must investigate incriminating and exonerating circumstances equally.⁴³

The OTP has carried out investigations into a number of situations *proprio motu*, upon referral by a State party, acceptance of jurisdiction and Security Council's referral.

The Situation in Ukraine

Ukraine is not a State Party to the Rome Statute, but it has twice exercised its prerogatives to accept the Court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to article 12(3) of the Statute. The first declaration lodged by the Government of Ukraine accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014. The second declaration extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards. On 28 February 2022, the ICC Prosecutor announced he would seek authorization to open an investigation into the Situation in Ukraine, on the basis of the Office's earlier conclusions arising from its preliminary examination, and encompassing any new alleged crimes falling within the jurisdiction of the Court.⁴⁴

On 2 March 2022, the Prosecutor announced he had proceeded to open an investigation into the Situation in Ukraine on the basis of the referrals received. In accordance with the overall jurisdictional parameters conferred through these referrals, and without prejudice to the focus of the investigation, the scope of the situation encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards.⁴⁵

On 11 March 2022, the Prosecutor confirmed that two additional States, Japan and North Macedonia, have referred the Situation in Ukraine to the Office. On 21 March 2022, Montenegro further informed the Office of its decision to join the group State Party referral, and on 1 April 2022, the Republic of Chile joined the group State Party referral of the situation.⁴⁶

On 17 March 2023, ICC Pre-Trial Chamber II issued warrants of arrest for two individuals in the context of the situation in Ukraine: Mr Vladimir Vladimirovich Putin, President of the Russian Federation, and Ms Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. Based on the Prosecution's applications of 22 February 2023, Pre-Trial Chamber II considered that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.⁴⁷

⁴² David, B, *Op.cit.*, footnote 23.pp.178, 179

⁴³ <https://www.icc-cpi.int/situations-under-investigations> Accessed: 13/07/2023

⁴⁴ <https://www.icc-cpi.int/situations/ukraine> Accessed: 13/07/2023

⁴⁵ *Ibid.*

⁴⁶ *Ibid*

⁴⁷ *Ibid.*

The Situation in Bangladesh/Myanmar

On 14 November 2019, the International Criminal Court authorized the Court's Prosecutor to investigate alleged international crimes occurring during a wave of violence in Rakhine State, Myanmar in 2016 and 2017. The investigation follows a brutal campaign of violence by Myanmar's security forces against Myanmar's Rohingya Muslims. These so-called "clearance operations" were conducted through widespread and systematic murder, rape and sexual violence, and other abuses that forced more than 740,000 Rohingya to flee to Bangladesh. The ICC Prosecutor's investigation, and any prosecutions that result, is one process among many aimed at accountability for crimes committed by Myanmar's security forces (Tatmadaw). While somewhat limited in scope, the investigation carries the potential to hold individuals responsible for grave violations against the Rohingya and other ethnic minorities.⁴⁸

The Situation in Venezuela I

On 27 September 2018, the Office of the Prosecutor received a referral from a group of States Parties to the Rome Statute namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru regarding the situation in the Bolivarian Republic of Venezuela since 12 February 2014. Pursuant to article 14 of the Statute of the International Criminal Court (ICC), the referring States requested the Prosecutor to initiate an investigation on crimes against humanity allegedly committed in the territory of Venezuela. On 28 September 2018, the Presidency assigned the Situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I. On 19 February 2020, the Presidency reassigned the Situation in the Bolivarian Republic of Venezuela I to Pre-Trial Chamber III.⁴⁹

In 2020, the Office concluded that there is a reasonable basis to believe that crimes against humanity, particularly in the context of detention, have been committed in Venezuela since at least April 2017. On 3 November 2021, the Prosecutor announced that the preliminary examination had been concluded with a decision to proceed with investigations. The Prosecutor's announcement was coupled with an agreement between the Bolivarian Republic of Venezuela and Office of the Prosecutor to continue to foster means and mechanisms to support and promote genuine national proceeding in Venezuela, while undertaking to establish mechanisms to enhance cooperation between the parties to facilitate the discharge of the Prosecutor's mandate on the territory of Venezuela.⁵⁰

On 16 April 2022, the Prosecutor notified the Pre-Trial Chamber that he had received a request from the Bolivarian Republic of Venezuela to defer the Office's investigations in favour of the actions carried out by the national authorities of Venezuela, pursuant to article 18 of the Rome Statute. In the same notification, the Prosecutor also informed the Pre-Trial Chamber of his intention to apply, as soon as possible, for authority to resume the Office's investigations, having reviewed the basis of the deferral request. On 1 November 2022, the Prosecutor filed an application before Pre-Trial Chamber I seeking authorisation to resume the investigation in the Situation in the Bolivarian Republic of Venezuela ("Venezuela"). Venezuela deposited its instrument of ratification of the Rome Statute on 7 June 2000. Thus, the ICC may exercise its jurisdiction over Rome Statute crimes committed on the territory of Venezuela or by its nationals from 1 July 2002 onwards.⁵¹

The Situation in Afghanistan

⁴⁸ Global Justice Center. (2020). "The International Criminal Court Investigations into the situation in Bangladesh/Myanmar". FaceSheet.p.1

⁴⁹ <https://www.icc-cpi.int/venezuela-i> Accessed: 13/07/2023

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

A preliminary investigation of crimes committed in Afghanistan since the country joined the court in 2003 had been underway for more than a decade, before a full investigation was authorized and then suspended in favour of an Afghanistan-led process. That investigation included crimes committed by all parties to the conflict, marking the first time the ICC probed crimes committed by U.S. forces, which in Afghanistan include extrajudicial killings, drone strikes that killed an untold number of civilians, and torture.⁵²

On 5 March 2020, the Appeals Chamber of the International Criminal Court decided unanimously to authorize the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan. The Appeals Chamber's judgment amended the decision of Pre-Trial Chamber II of 12 April 2019, which had rejected the Prosecutor's request for authorisation of an investigation of 20 November 2017 and had found that the commencement of an investigation would not be in the interests of justice. The Prosecutor had filed an appeal against that decision. The Appeals Chamber found that the Prosecutor is authorised to investigate, within the parameters identified in the Prosecutor's request of 20 November 2017, the crimes alleged to have been committed on the territory of Afghanistan since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan.⁵³

On 15 April 2020, the Prosecution notified the Chamber of the Government of Afghanistan's request of 26 March 2020 seeking a deferral, pursuant to article 18(2) of the Rome Statute of the Prosecution's investigation into the Afghanistan Situation. On 27 September 2021, the Prosecution requested authorisation to resume its investigation under article 18(2) of the Rome Statute. On 31 October 2022, Pre-Trial Chamber II of the International Criminal Court (ICC) authorised the Prosecution to resume investigation into the Afghanistan Situation. The judges considered that Afghanistan is not presently carrying out genuine investigations in a manner that would justify a deferral of the Court's investigations and that Afghanistan authorities are not showing an interest to pursue the deferral request it submitted on 26 March 2020. On 4 April 2023, the Appeals Chamber issued its Judgment on the Prosecutor's appeal amending the Pre-Trial Chamber II's decision to align with the scope of the Prosecutor's investigation in the Afghanistan situation as previously determined by the Appeals Chamber.⁵⁴

In addition to the above cases of investigation, the ICC has equally carried out other investigations in other countries which inter-a-lia include; The case of Democratic republic of Congo (for alleged war crimes and crimes against humanity in 2004); Uganda in 2004 (alleged war crimes and crimes against humanity), Darfur, Sudan in 2005 (alleged genocide, war crimes and crimes against humanity), Kenya in 2010 (*proprio motu* investigation into alleged crimes against humanity), Libya in 2011 (alleged crimes against humanity and war crimes), Ivory Coast in 2011, Mali in 2013(alleged war crimes), CAR II in 2014 (alleged war crimes), Georgia in 2016 (alleged crimes against humanity and war crimes), Burundi in 2017 (alleged crimes against humanity), State of Palestine and Republic of Philippines (alleged crimes against humanity).⁵⁵

Prosecutions

Article 5 of the Statute of the ICC grants subject-matter jurisdiction to the court over genocide, crimes against humanity, war crimes and the crime of aggression. These offenses are considered “the most serious crimes of concern to the international community as a whole”. Before the jurisdiction of the

⁵² <https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/> Accessed: 13/07/2023

⁵³ <https://www.icc-cpi.int/afghanistan> Accessed: 13/07/2023

⁵⁴ *Ibid.*

⁵⁵ https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf Accessed: 13/07/2023

court is triggered, the core crimes must satisfy a rigorous set of preconditions and survive stringent obstacles.⁵⁶

When a crime is committed, it is important to carry out prosecutions for a number of reasons;

- a) First, prosecutions can renew a society's faith in the concept that the rule of law protects the inherent dignity of the individual, and can "establish a new dynamic in society, 'an understanding that aggressors and those who attempt to abuse the rights of others will henceforth be held accountable'.⁵⁷
- b) Second, because the rule of law is integral to democracy itself, some proponents of criminal trials argue that prosecutions are necessary to strengthen fragile democracies and popular support for their governments. A failure to prosecute may encourage 'vigilante justice', create feelings of distrust towards the new government and the political system and encourage cynicism towards the rule of law.⁵⁸
- c) Also, proponents of prosecutions argue that trials can provide a public forum for a judicial confirmation of the facts. Such fact-finding can educate the populace as to the extent of the wrong-doing and prevent revisionism.⁵⁹
- d) Finally, supporters of criminal trials argue that criminal accountability can provide victims of abuse and their families 'with a sense of justice and catharsis, a sense that their grievances have been addressed and can hopefully be put to rest, rather than smoldering in anticipation of the next round of conflict'. One Commentator noted that "Society cannot forgive what it cannot punish".⁶⁰
- e) Prosecution equally has a deterrent effect on future perpetrators

In order to fight against impunity and prevent the commission of international crimes, the ICC has carried out a number of prosecutions. The ICC has prosecuted 31 cases with a majority from Africa, with four(4) convicted cases, three (3) acquitted, seven(7) in ICC custody, nine(9) perpetrators atlarge and nine(9) closed cases.⁶¹

The Case of Democratic Republic of Congo (DRC)

In the case of DRC, conflict broke out and over the four years up to July 2003, the violence in Ituri was estimated to have claimed the lives of an estimated 50.000 and to have displaced 500.000. Rape had been a particularly widespread element of the conflict in Kivu and elsewhere in the DRC. The UN reported 27.000 rape cases in 2006. The recruitment of child soldiers had also been pervasive among many armed groups in north and south Kivu and Ituri.⁶² In March 2004, the government of the DRC referred the situation there to the ICC. The Prosecutor opened an investigation two months later. The first case to arise from the situation in DRC was that of Thomas Lubanga Dyilo.⁶³ He was charged with the war crimes of conscripting and enlisting children under the age of 15 years and using them to

⁵⁶ Kelly, D. A. (1999). "Crimes within the Jurisdiction of the International Criminal Court", *Criminal Law Forum*.pp.1,2

⁵⁷Diba,M. (2002). 'Peace or Justice? Amnesties and the International Criminal Court'. *Melbourne Journal of International Law*. p.3

⁵⁸*Ibid*

⁵⁹*Ibid*.p.4

⁶⁰ *Ibid*.

⁶¹ <https://www.icc-cpi.int/cases> Accessed: 13/07/2023

⁶²International Refuge Rights Initiative. (2008). "In the Interest of Justice? Prospects and Challenges for International Justice in Africa". *Unpublished*.pp.77,78. Also available at: <http://www.refugee-rights.org/2008/in-the-interest-of-justice-propects-and-challenges-for-international-justice-in-africa/> Accessed: 13/07/2023

⁶³*The Prosecutor v. Thomas Lubanga Dyilo* – ICC – 01/04 – 01/06. Available at: <https://www.icc-cpi.int/pages/record.aspx?uri=266175> Accessed: 13/07/2023

participate actively in hostilities.⁶⁴ Thus, in November 2006, the ICC in pursuit of the quest for justice began its first ever hearing before the Pre-Trial Chamber (PTC).⁶⁵ Bosco Ntaganda⁶⁶, Germain Katanga and Mathieu Ngudjolo Chui⁶⁷ were also issued warrants of arrest for war crimes and crimes against humanity.

On 14 March 2012, the Trial Chamber I of the ICC delivered its first judgment in the first completed trial in the case against Thomas Lubanga Dyilo. Lubanga was found guilty as a co-perpetrator in the conscription and enlistment of children under the age of fifteen years and using them to participate actively in hostilities.⁶⁸

The Case of Mali

The referral of the situation in Mali after January 2012, represents the first opportunity for Fatou Bensouda to define the court's new direction under her leadership.⁶⁹ Mali signed the Rome Statute on 17 July 1998 and deposited its instrument of ratification on 16 August 2000. As such, the ICC has jurisdiction over crimes against humanity, war crimes and genocide committed on the territory of Mali or by its nationals from 1 July 2002 onwards. On 18 July 2012, a delegation from the government of Mali led by the Minister of Justice Malick Coulibaly, transmitted a letter by which the government of Mali as a state party to the court referred "the situation in Mali since January 2012" to the Office of the Prosecutor (OTP) and requested an investigation to determine whether one or more persons should be charged for crimes committed. The government of Mali claimed that the Malian courts were unable to prosecute or try the perpetrators.⁷⁰

The investigations in Mali focused on alleged war crimes committed since January 2012, mainly in 3 northern regions of Gao, Kidal and Timbuktu with incidents also occurring in the South of Bamako and Sevare.⁷¹ In opening the investigation in January 2013, the OTP issued an Article 53(1) report.⁷² The report indicated that the rebellion in the north involved deliberate damaging of shrines of muslim saints in the city of Timbuktu, attack of military bases in Gao, Kidal and Timbuktu, alleged execution of between 70 and 153 detainees at Anguelhok and incidents of looting and rape. Separately, incidents of torture and enforced disappearances were reported in the context of the military Coup.⁷³

The Prosecutor alleged that there is a reasonable basis to believe that the following crimes have been committed in Mali; war crimes including murder, mutilation, cruel treatment and torture, intentionally directing attacks against protected objects, the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, pillaging and rape.⁷⁴

⁶⁴ International Refugee Rights Initiative, *op.cit.*, footnote 62.p.7

⁶⁵Kamari, M. C. (2009). *Fictions of Justice*, (Cambridge : University Press).p.1

⁶⁶ICC – 01/04 – 02/06. Available at: <https://www.icc-cpi.int/drc/ntaganda> Accessed: 13/07/2023

⁶⁷ICC – 01/04 – 01/07. Available at: <https://www.icc-cpi.int/drc/katanga> Accessed: 13/07/2023

⁶⁸Triestino, M. (2012). '*Prosecutor v. Thomas Lubanga Dyilo* : The first judgment of the International Criminal Court's Trial Chamber'. *International Human Rights Law Review*. p.1

⁶⁹ Jan, W and Kenneth, C. 2012. "Policies, Not Politics: The Pursuit of Justice in Prosecutorial Strategy at the International Criminal Court". *Leuven Centre for Global Governance Studies*.p.16

⁷⁰ David, H. (2014). *Justice Denied :The Reality of the International Criminal Court*, (London : The African Research Centre).p.370.

⁷¹<https://www.icc-cpi.int/mali> Accessed: 13/07/2023

⁷²It stated that "In 2012, the situation in Mali was marked by 2 main events: first the emergence of rebellion in the north on or around 17 January, which resulted in northern Mali being seized by armed groups; and second, a Coup d'Etat by a military junta on 22 March, which led to the ousting of President Toure shortly before presidential elections could take place, originally scheduled for 29 April 2012. Available at: <https://www.icc-cpi.int/mali> Accessed: 13/07/2023

⁷³<https://www.icc-cpi.int/mali> Accessed: 13/07/2023

⁷⁴*Ibid*

As the first person who pleaded guilty to a charge of ICC, Al-Mahdi⁷⁵ made a statement expressing remorse. On the 27 September 2016, Al-Mahdi was sentenced to 9 years imprisonment for war crimes; intentionally directing attacks against building dedicated to religion, destruction of cultural world heritage in the Malian city of Timbuktu.⁷⁶

Another ICC convict is Germain Katanga of DRC. Found guilty, on 7 March 2014, as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC. The judgment is final, as both the Defence and Prosecution withdrew their appeals on 25 June 2014. Sentenced to a total of 12 years' imprisonment; time spent in detention at the ICC between 18 September 2007 and 23 May 2014 – was deducted from the sentence.⁷⁷

Also convicted are Jean Pierre Bemba, Jean Jacque Mangenda and Kilolo. Guilty verdicts were pronounced on 19 October 2016 and sentences on 22 March 2017. Appeals on verdict and sentence was made on 8 March 2018. New sentences for Mr Bemba, Mr Mangenda and Mr Kilolo pronounced on 17 September 2018. Convictions and acquittals in relation to all five accused are now final. Imprisonment sentences were served.⁷⁸

In addition to the above convicted cases, the ICC has prosecuted other cases with acquittals (like the case of Laurent Gbagbo, Ble Goude and Mathieu Ngudjolo Chui), others still in ICC custody (like Ali Muhammad Abd-Al Rahman of CAR, Mokom Gawaka, Mahamat Said) while others remain atlarge (Saif Al-Islam Gaddafi, Ahmad Harun, Abdallah Banda, Barasa, Pau Gicheru and Philip Bett).⁷⁹

Sanctions

The purpose of the ICC is to prevent individuals responsible for the most serious crimes of concern to the international community from escaping justice. The crimes to which the Statute applies are the crime of genocide; war crimes; crimes against humanity and aggression.

Once the parties have presented their evidence, the Prosecution and the Defence are invited to make their closing statements. The Defence always has the opportunity to speak last. The judges may order reparations to victims, including restitution, compensation and rehabilitation. To this end, they may make an order directly against a convicted person. After hearing the victims and the witnesses called to testify by the Prosecution and the Defence and considering the evidence, the judges decide whether the accused person is guilty or not guilty. The sentence is pronounced in public and, wherever possible, in the presence of the accused, and victims or their legal representatives, if they have taken part in the proceedings.⁸⁰

The judges may impose a prison sentence, to which may be added a fine or forfeiture of the proceeds, property and assets derived directly or indirectly from the crime committed. The Court cannot impose a death sentence. The maximum sentence is 30 years. However, in extreme cases, the Court may impose a term of life imprisonment. Convicted persons serve their prison sentences in a State

⁷⁵*The Prosecutor v. Ahmad Al Faqi Mahdi* – ICC – 01/12-01/15

⁷⁶<https://en.m.wikipedia.org/wiki/international-criminal-court-investigation-in-mali> Accessed: 13/07/2023. See also Article 8(b)(ix), Rome Statute of the ICC, 1998

⁷⁷ https://www.icc-cpi.int/cases?f%5B0%5D=accused_states_cases%3A358 Accessed: 13/07/2023

⁷⁸ *Ibid.*

⁷⁹ https://www.icc-cpi.int/cases?f%5B0%5D=accused_states_cases%3A329 Accessed: 13/07/2023

⁸⁰ <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> Accessed: 14/07/2023

designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons. The conditions of imprisonment are governed by the laws of the State of enforcement and must be consistent with widely accepted international treaty standards governing the treatment of prisoners. Such conditions may not be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.⁸¹

The ICC has punished a number of perpetrators among whom are Thomas Lubanga Dyilo who was sentenced to 14 years imprisonment for war crimes of conscription of children into the armed force; Al-Mahdi who was sentenced to 9 years imprisonment for war crimes; and Germain Katanga sentenced to 12 years imprisonment for one count of crimes against humanity and four counts of war crimes.

Outreach and Other Activities of the ICC

In contrast to the ad hoc criminal tribunals, the International Criminal Court (ICC) is a permanent institution with a multiple and diverse range of constituents from states parties to stakeholders and interested parties in ‘situation’ countries to the general public. In fulfilling its mandate to end impunity for ‘the most serious crimes of concern to the international community as a whole’ and to ‘guarantee lasting respect for and the enforcement of international justice’, the Court must ensure that it informs, updates and engages with its constituents. In this respect, the Court has already underscored the integral importance of external communications in stating that ‘external communications, public information and outreach are critical to delivering public and transparent justice, securing necessary support for the Court, and ensuring the effective impact of the Court’.⁸²

In October 2005, the IBA started a new ICC Monitoring and Outreach Programme funded by the MacArthur Foundation. On the monitoring side, the IBA has a representative in The Hague who monitors the work and proceedings of the ICC, focusing in particular on issues affecting the fair trial rights of the accused. The outreach component to the Programme aims to deepen understanding of the place of the ICC both within the broader landscape of international justice and particular contexts. In this respect, the IBA works in partnership with bar associations, lawyers and civil society organisations in key countries including India, Sudan, and Uganda; with bar associations on the role of lawyers in advancing ratification and implementation of the Rome Statute; and holds sessions on the ICC at regional and international IBA conferences.⁸³

The Court uses the term ‘external communications’ to encompass the following:

- external relations: ‘contacts with governments, international organisations and other major actors’;
- public information: ‘efforts to disseminate messages about the Court to wide, diffuse audiences’; and
- outreach: ‘a process of establishing a sustainable, two-way communication between the Court and communities affected by situations that are subject to investigations and proceedings’.⁸⁴

The Victims and Witnesses Unit of the Registry is responsible for informing victims and witnesses of ‘their rights under the Statute and the Rules’, and for ‘ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests’. In the contexts in which the ICC operates, a large number of individuals and communities may define themselves as victims. In this respect, the Court must conduct an extensive and diverse outreach campaign in order to make the right to participate before the ICC effective for two reasons. First, in order to exercise the

⁸¹ *Ibid.*

⁸² International Bar Association. 2006. “ICC Monitoring and Outreach Programme: First Outreach Report”. An International Bar Association Human rights Report. P.1

⁸³ *Ibid.*

⁸⁴ *Ibid.*p.3

right to participate, victims must be aware of the existence of that right. In this respect, the United Nations' Set of Principles to Combat Impunity, and the Basic Principles on Reparations, are instructive. Principle 33 of the Set of Principles to Combat Impunity directs the 'widest possible publicity' of 'reparation procedures', and Principle 12(a) of the Basic Principles on Reparations requires the dissemination of information of 'all available remedies for gross violations of international human rights law and serious violations of international humanitarian law'. In this regard, outreach programmes play a crucial role in ensuring that society as a whole understands and has access to information on the proceedings before the ICC, particularly given the Court's location in The Hague.⁸⁵

The outreach programme has the following objectives:

- To provide accurate and comprehensive information to affected communities regarding the Court's role and activities;
- To promote greater understanding of the Court's role during the various stages of proceedings with a view to increasing support among the population for their conduct;
- To foster greater participation of local communities in the activities of the Court;
- To respond to the concerns and expectations expressed in general by affected communities and by particular groups within these communities;
- To counter misinformation;
- To promote access to and understanding of judicial proceedings among affected communities.⁸⁶

The above analyses show that the ICC has been instrumental in the fight against impunity for the most serious crimes of international concern through its investigations, prosecutions, sanctions, outreach and other activities. The question that begs for an answer is if these activities have possible deterrent effects on international crimes looking at the purpose of punishment in criminal law.

Prevention and Deterrence of International Crimes by the ICC

Deterrence is the theory that criminal penalties do not just punish violators, but also discourage other people from committing similar offenses. Many people point to the need to deter criminal actions after a high-profile incident in which an offender is seen to have received a light sentence. Some argue that a tougher sentence would have prevented the tragedy and can prevent a similar tragedy from taking place in the future.⁸⁷

To deter would-be criminals by using scientific evidence about human behavior and perceptions about the costs, risks and rewards of crime, the US department of Justice⁸⁸ highlights five things about deterrence;

- a) The certainty of being caught is a vastly more powerful deterrence than the punishment. Research shows clearly that the chance of being caught is a vastly more effective deterrence than even draconian punishment.
- b) Sending an individual convicted of a crime to prison isn't a very effective way to deter crime. Prisons are good for punishing criminals and keeping them off the street, but prison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the

⁸⁵ *Ibid.* pp.6,7

⁸⁶ Assembly of States Parties. 2006. "Strategic Plan for Outreach of the International Criminal Court". Fifth Session, The Hague.p.5

⁸⁷ Ben, J. 2019. "Do Criminal Laws Deter Crimes? Deterrence Theory in Criminal Justice Policy: a Primer". Minnesota House Research Department.p.2

⁸⁸ U.S Department of Justice. 2016. "Five Things about Deterrence". National Institute of Justice. P.1

opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment.

- c) Police deter crime by increasing the perception that criminals will be caught and punished. The police deter crimes when they do things that strengthen a criminal's perception of the certainty of being caught. Strategies that use the police as "sentinels," such as hot spots policing, are particularly effective. A criminal's behavior is more likely to be influenced by seeing a police officer with handcuffs and a radio than by a new law increasing penalties.
- d) Increasing the severity of punishment does little to deter crime. Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not "chasten" individuals convicted of crimes, and prisons may exacerbate recidivism.
- e) There is no proof that the death penalty deters criminals. According to the National Academy of Sciences, "Research on the deterrent effect of capital punishment is uninformative about whether capital punishment increases, decreases, or has no effect on homicide rates."

The US Department of Justice's article on "Five Things about Deterrence" summarizes a large body of research related to deterrence of crime into five points. Two of the five things relate to the impact of sentencing on deterrence. "Sending an individual convicted of a crime to prison isn't a very effective way to deter crime" and "Increasing the severity of punishment does little to deter crime." Those are simple assertions, but the issues of punishment and deterrence are far complex.⁸⁹

It is important to note that while the assertion in the original "Five Things" focused only on the impact of sentencing on deterring the commission of future crimes, a prison sentence serves two primary purposes: punishment and incapacitation. Those two purposes combined are a linchpin of United States sentencing policy, and those who oversee sentencing or are involved in the development of sentencing policy should always keep that in mind.⁹⁰

There is an important distinction between deterrence and incapacitation. Individuals behind bars cannot commit additional crime; this is incarceration as incapacitation. Before someone commits a crime, he or she may fear incarceration and thus refrain from committing future crimes; this is incarceration as deterrence.⁹¹

"Sending an individual convicted of a crime to prison isn't a very effective way to deter crime." Prison is an important option for incapacitating and punishing those who commit crimes, but the data show long prison sentences do little to deter people from committing future crimes. Viewing the findings of research on severity effects in their totality, there is evidence suggesting that short sentences may have a deterrent effect.

However, a consistent finding is that increases in already lengthy sentences produce at best a very modest deterrent effect.⁹² A very small fraction of individuals who commit crimes, about 2 to 5 percent are responsible for 50 percent or more of crimes. Locking up these individuals when they are young and early in their criminal careers could be an effective strategy to preventing crime if they can be identified. It is important to recognize that many of these individuals who offend at higher rates

⁸⁹ *Ibid.* p.2

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

may already be incarcerated because they put themselves at risk of apprehension so much more frequently than individuals who offend at lower rates.⁹³

The day-to-day work of individuals employed in law enforcement, corrections, and other parts of the criminal-justice system involves identifying, capturing, prosecuting, sentencing, and incarcerating offenders. Perhaps the central function of these activities, however, is deterring individuals from participating in illegal activities in the first place. Deterrence is important not only because it results in lower crime but also because, relative to incapacitation, it is cheap. Offenders who are deterred from committing crimes in the first place do not have to be identified, captured, prosecuted, sentenced, or incarcerated. For this reason, assessing the degree to which potential offenders are deterred by either carrots (better employment opportunities) or sticks (more intensive policing or harsher sanctions) is a first-order policy issue.⁹⁴

There are three core concepts embedded in theories of deterrence; that individuals respond to changes in the certainty, severity, and celerity (or immediacy) of punishment. Interestingly, in the criminological tradition, deterrence is often characterized as being either general or specific; with general deterrence referring to the idea that individuals respond to the threat of punishment and specific deterrence referring to the idea that individuals are responsive to the actual experience of punishment.⁹⁵

Certainty applies to the likelihood of being caught. The threat of a severe punishment is not effective if there is no possibility of ever being caught.

Celerity applies to the speed of a consequence. A punishment imposed immediately after an offense is more effective than one that is imposed years after the offense.

Severity of punishment is a necessary component since a rational person might commit a crime that brings a benefit even if punishment is swift and sure when the punishment is insignificant. In addition, the punishment serves as an example to others in society so that everyone is aware that a certain action is unacceptable.⁹⁶

Generally speaking, there are two mechanisms through which criminal justice policy reduces crime: deterrence and incapacitation. When by virtue of a policy change individuals elect not to engage in crime they otherwise would have in the absence of the change, we speak of the policy deterring crime. On the other hand, a policy change may also take offenders out of circulation as, for example, with pretrial detention or incarceration, preventing crime by incapacitating individuals. The incapacitation effect can be thought of as the mechanical response of crime to changes in criminal justice inputs. While deterrence can arise in response to any policy that changes the costs or benefits of offending, incapacitation arises only when the probability of capture or the expected length of detention increases.⁹⁷ Neutralization as the Foremost Purpose of an International Criminal Court
The debate on the rationale for punishment of human rights violations derives from the general purposes of criminal punishment. However, the discussions about punishment of human rights violations tend to focus on retribution and deterrence, leaving aside other purposes of punishment and, specifically, of judicial human rights mechanisms. The debate has tended to produce a polarization between partisans of retribution and partisans of deterrence. Victims are usually assumed to be partisans of retribution; similarly theorists considered to be idealistic or fundamentalist form part of this current.

⁹³ *Ibid.*

⁹⁴ Aaron, C and Justin, M. 2017. "Criminal Deterrence: A Review of the Literature". *Journal of Economic Literature*. Vol.55. Issue. 1.p.5

⁹⁵ *Ibid.* p.6

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* p.12

On the other hand, governmental sectors and pragmatically oriented theorists are frequently identified as partisans of deterrence.⁹⁸ Neutralization is the action by which the perpetrator is deprived of the power to commit more violations. Accomplishment of the neutralization purpose can be reached through means such as: the isolation, the arrest, or the elimination (when justified) of the perpetrator. In the context of an international judicial mechanism, there is no possibility of achieving retribution or deterrence without first stopping the violations⁹⁹

Deterrence can also be a dangerous illusion if it leads us to assume that no more violations will be committed after the actual establishment of an international criminal court. Or if it leads us to assume that most heinous crimes that humanity has known so far will not be repeated, because of the deterrent effect of such a court. Unfortunately, such an effect is not attainable. No legal system can ensure the elimination of criminal activity. On the contrary, the existence of criminal legal systems is related to the conviction that crimes will continue to take place and will need to be dealt with, not to the expectation of the disappearance of criminal activity. Obviously, under certain conditions of effectiveness, a criminal system will achieve some level of general deterrence; the prospect of punishment does deter some crime. A legal system does not guarantee absolute deterrence; prospective criminal activity will not be obviated by the system itself. Criminal legal systems are maintained precisely because of the need to punish criminals, who will continue to disrespect others' rights despite the existence of sanctions. The existence of the system responds to the continued need to protect individuals' rights and to provide redress to victims of violations. Therefore, by definition and due to its nature, the level of deterrence of every criminal system is limited.¹⁰⁰

Retribution is a legitimate purpose. Persons whose rights have been violated by criminal actions have an undeniable right to truth, to justice, and to reparation, as has been clearly stated by the set of principles against impunity currently under discussion by the United Nations' Commission on Human Rights. Additionally, retribution can serve as a reliable guide to orient the purpose of neutralization. Victims usually know, better than anyone, the identities of the actual perpetrators. Their particular awareness, based on their own suffering, is a very useful aid in identifying and acting against violators. In this light, by increasing neutralizing actions that have a retributive effect, the purpose of preventing or deterring future violations can also be achieved. If retribution and deterrence are seen in this order, they will not generate conflicting interests but rather be complementary in nature.¹⁰¹

It must be realized that the Court (the ICC) cannot have a total deterrence of heinous crimes and human rights violations. This however, does not mean that the court does not have a general deterrent effect on violations. The court can be considered a mechanism to restrain and suppress grave violations rather than expect it to carry out a total deterrence that national courts have failed to accomplish. Deterrence can be partial since crimes cannot completely be eliminated.

Thus, recent trends have revealed that the ICC can play a great role in deterring international crimes especially with the arrest warrant issued against President Putin and Belova. This sends a warning signal to great nations that the hand of international justice is long enough to reach them. Notwithstanding the relevance of the ICC and the possible deterrent effect it has on international crimes, a number of factors have hindered the Court's ability to deter these crimes as will be seen in the subsequent paragraphs.

⁹⁸ Gustavo, G. 2000. "Deterrence: A Difficult Challenge for the International Criminal Court". The Helen Kellogg Institute for International Studies. Working Paper No. 275.p.2

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* p.5

¹⁰¹ *Ibid.* p.7

Factors Hindering the Court's Ability to Deter International Crimes

1) Lack of Jurisdiction over Non-State Parties

While the Rome statute was the culmination of decades of sustained efforts by the international community to create a centralized criminal court, its serious jurisdictional limitations have been widely acknowledged. As Professor Nsereko concluded in an evaluation of the court's jurisdiction;

“Article 12(2) of the statute provides that before the court can exercise jurisdiction over the alleged conduct, there must be a nexus between such conduct and the state where the conduct was committed or the state of the accused person's nationality”.¹⁰² Either of these states must be a party to the statute. The only way the court can exercise jurisdiction where these states are not parties to the statute is by either of them making a declaration under article 12(3) accepting the jurisdiction of the court with respect to the crime in question”.¹⁰³ The devastating consequences of these limitations to the ICC's potential to deter and prosecute international crimes were noted by professor Nsereko;

“The court lacks jurisdiction wherewithal to track down and try perpetrators of heinous crimes irrespective of their nationality and the place where they committed the crimes. This is a particularly severe handicap for the court. It will not be able to try dictators whose countries for obvious reasons may not accede to the statute. These dictators will be able to roam the globe assured that the hand of international justice will not be long enough to reach them”.¹⁰⁴

Under the ICC statute, the ICC has jurisdiction over nationals of non-parties in three situations;¹⁰⁵

- a) The ICC may prosecute nationals of non-parties in situations referred to the ICC by the UNSC.¹⁰⁶ This was seen in the cases of Sudan and Libya.
- b) Non-party nationals are subject to ICC's jurisdiction when they have committed a crime on the territory of a state that is a party to the ICC statute or have otherwise accepted the jurisdiction of the court with respect to that crime.¹⁰⁷ It is well-known that under article 12 of the Rome statute, the ICC can exercise its jurisdiction over the crime on the territory of the state party. However, article 12 must be read in conjunction with articles 16¹⁰⁸ and 98.¹⁰⁹
- c) Jurisdiction may be exercised over nationals of non-party where the non-party has consented to the exercise of jurisdiction with respect to a particular crime. In either of the first two circumstances, the consent of the state of nationality is not a prerequisite to the exercise of jurisdiction.¹¹⁰ The case of Ukraine is illustrative.

On 17 March 2023, Pre-Trial Chamber II of the International Criminal Court (ICC) issued arrest warrants for Vladimir Putin and Maria Lvova-Belova. Putin is the President of the Russian Federation and Lvova-Belova is the Commissioner for Children's Rights in the Office of the President. The crimes alleged concern deportation and transfer of children as war crimes. The ICC has jurisdiction over

¹⁰² A. Hays, Butler, *op.cit.*, footnote 38.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Dapo Akande, “ The Jurisdiction of the ICC over Nationals of Non-Parties : Legal Basis and Limits”, *Journal of International Criminal Justice*, 2003.p.1

¹⁰⁶ Article 13(b), Rome Statute of the ICC, 1998

¹⁰⁷ Article 12(2) and (3), Rome statute of the ICC, 1998

¹⁰⁸ No investigation or prosecution may be commenced or proceeded with under this statute for a period of 12 months after the SC in a Resolution adopted under Chapter VII of the UN charter, has requested the court to that effect : That request may be renewed by the council under the same conditions.

¹⁰⁹ The court may not proceed with a request for the surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third party, unless the court can first obtain the cooperation of that third state for the waiver of the immunity.

¹¹⁰ Article 12(3), Rome Statute of the ICC, 1998

crimes committed on the territory of Ukraine on the basis of Ukraine's declaration pursuant to Article 12(3) of the Rome Statute. The arrest warrants concern crimes alleged to have been committed on the territory of Ukraine at least from 24 February 2022. These are the war crimes of (i) unlawful deportation of population under Article 8(2)(a)(vii) of the Rome Statute and (ii) the unlawful transfer of population under Article 8(2)(b)(viii) of the Rome Statute. The ICC's press release indicates that the warrants focus on crimes alleged to have been committed against children.¹¹¹

It is clear from the above that without the SC's referral or acceptance of jurisdiction by a non-state party, the ICC cannot intervene in non-party states. This is a serious impediment to achieving its purpose set out in the preamble of the Rome statute. This explains why the court has been unable to intervene in Syria because two permanent members of the SC (Russia and China) vouched that the SC will not refer this case to the ICC, thus protecting Syria. Also, the Court could not intervene in Russia since Russia is not a party to the Rome Statute. This was only made possible with Ukraine's acceptance of the Court's jurisdiction which enabled the Court to issue arrest warrants against President Putin and Belova for war crimes. It is a serious limitation and creates a loophole for perpetrators to roam the globe knowing that the hand of international justice is not long enough to reach them. This also opens doors to impunity of core crimes and hinders the court from maintaining peace and security. Thus, its lack of jurisdiction over non-State parties hinders its deterrent effect as perpetrators in such States can roam the globe knowing that the hand of international justice is not long enough to reach them especially where the SC fails to refer or where proposals for referrals are vetoed.

2) Lack of Universal Jurisdiction

While the Rome Statute was the culmination of decades of sustained efforts by the international community to create a centralized criminal court, its serious jurisdictional limitations have been widely acknowledged. The devastating consequences of these limitations to the ICC's potential to deter and prosecute international crimes were noted by Professor Nsereko:

"The court lacks universal jurisdiction wherewithal to track down and try perpetrators of heinous crimes irrespective of their nationality and the place where they committed the crimes. This is a particularly severe handicap for the court. It will not be able to try dictators whose countries for obvious reasons, may not accede to the statute. These dictators will be able to roam the globe assured that the arm of international justice will not be long enough to reach them".¹¹²

Given this statutory gap, there has been renewed interest in the doctrine of universal jurisdiction to permit domestic legal systems to prosecute serious humanitarian crimes in the absence of international jurisdiction.¹¹³ The Common Law origins of the Universal jurisdiction doctrine can be traced to efforts of the international community in the middle ages to effectively police piracy on the high seas, which posed a very serious threat to international commerce and navigation.¹¹⁴

According Cedric Ryngaert, in his article titled "The International Criminal Court and Universal Jurisdiction", universal jurisdiction is understood as the exercise of jurisdiction over a crime by either

¹¹¹ <https://www.ejiltalk.org/the-icc-arrest-warrants-against-vladimir-putin-and-maria-lvova-belova-an-outline-of-issues/>
Accessed: 2/08/2023

¹¹² A. Hays, Butler, *op.cit.*, footnote 38.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*p.2

the ICC or a state in the absence of a territorial, personal, or other nexus to the crime. It is jurisdiction that is based on the heinous nature of the crime.¹¹⁵

As is known, the ICC does not have universal jurisdiction at least not in the strict sense of the word. Stating that the ICC does not have universal jurisdiction is stating that the ICC cannot exercise jurisdiction over whoever committed the crimes, or wherever the crimes may have been committed.¹¹⁶ If the court had truly jurisdiction, it would be able to deal with crimes that are committed in any part of the world, irrespective of whether the territorial state or the state of nationality of the offender has ratified the statute, or whether the SC has referred the situation to the court. Under the Rome statute, the court does not have such jurisdiction over international crimes. It would therefore make sense to expand the jurisdictional basis of the Rome Statute so as to include the universality principle. There are strong legal arguments in favour of a grant of universal jurisdiction to the ICC.¹¹⁷

The fact that the ICC has not been granted universal jurisdiction exercisable *proprio motu* has been criticized on the basis that it will leave some offences beyond its power to prosecute. The question has been, if the drafters of the Rome Statute were necessarily wrong in deciding not to grant the court such jurisdiction.¹¹⁸ Olympia Bekou concluded that to have given the court universal jurisdiction would have been lawful under current International Law and would have provided a welcome reaffirmation of the concept. Such jurisdiction would be difficult, if not impossible for the court to use, given that the court has to operate in a world of sovereign states, not all of whom are sympathetic to it, the drafters' choice was a prudent one.¹¹⁹ Though different individuals hold different views as far as granting universal jurisdiction to the ICC is concern, recent trends have revealed that for the court to be effective in deterring international crimes hence maintaining peace and security, there is need for universal jurisdiction to be granted to the Court.

3) Failure of the Security Council to Refer Cases of Violation by Non-State Parties

Through their presence at the SC, a few states have the power to decide which situation will face the court's scrutiny. Through veto power, the P5 have the possibility to decide that a situation will not be subject to the mechanisms of international justice. Practice so far has shown that the P5 have chosen to refer to the court situations which did not trouble them, and have completely ignored others, allowing crimes to be perpetrated with impunity. This led to general pessimism as to the court's capabilities.¹²⁰

A number of situations that might have been referred by the Council to the ICC have not been, often because the state concerned has veto wielding allies amongst the P5 council members. Situations involving Chechnya, Gaza or Burma, for example, would never be referred to the ICC as a result of strong allegiances held by P5 members. A UN panel of Experts concluded that up to 40.000 civilians were killed at the conclusion of the conflict between the government of Sri Lanka and Tamil Rebels during the period 2008 – 2009, with war crimes probably having been committed by both sides to the

¹¹⁵ Cedric Ryngaert, "The International Criminal Court and Universal Jurisdiction", *Leuven Centre for Global Governance Studies, Working Paper* No. 46, 2010,p.3 Also available on <https://ghum.kuleuven.be/new-series-the-international-criminal-court-and-universal-jurisdiction/> last accessed: 02/08/2023

¹¹⁶ *Ibid.*p.4

¹¹⁷ *Ibid.*pp.4,5

¹¹⁸ Olympia Bekou, "The International Criminal Court and Universal Jurisdiction : A closed Encounter ?", *International and Comparative Law Quarterly*, 2007.p.1

¹¹⁹ *Ibid.*

¹²⁰ Amella Couture, "The Politics of International Justice: The Security Council's Impact on the Independence, Effectiveness and Legitimacy of the International Criminal Court", *McGill Center For Human Rights and Legal Pluralism*, Vol. 3, 2015.p.15

conflict. There has been no effort at the council to make an ICC referral, despite the continuing failure of the government to launch an adequate domestic investigation.¹²¹

A particularly clear example is the council's failure to even consider a referral of the situation in Syria to the ICC, despite factual and procedural preconditions at least as pronounced as those that existed in Darfur and Libya. Since March 2011, thousands of largely peaceful protestors have been killed by Syrian security forces, with many more being detained and tortured. A special session of the UN Human Rights (HRC) in April 2011 condemned "the use of lethal violence against peaceful protesters by the Syrian authorities" and asked the Office of the High Commissioner for Human Rights (OHCHR) to send an investigatory mission. Based on the report of the OHCHR mission, the High Commissioner in her briefing to the SC encouraged the Council to refer the situation in Syria to the ICC. States drafting a SC resolution on Syria originally proposed a reference 'noting' the recommendation of an ICC referral, but even this was removed from the resolution tabled at the SC and vetoed by Russia and China in October 2011.¹²²

Despite this overwhelming factual and procedural pre-condition for referral, this remained politically impossible at the SC as a result of veto powers. A second draft SC resolution condemning gross violations in Syria, also vetoed by Russia and China on February 2012, omitted any reference to a possible ICC referral as well.¹²³ Russia has in the past expressed objections to involving the ICC, as far back as January 15, 2013, describing efforts to seek a referral as "ill – timed and counter-productive". The Russian - UN Ambassador, Vitaly Churkin, told the media that Russia's position had not changed and that the bid to involve the court was, in Russia's view, not a 'good idea'.¹²⁴ Russians still held on to this view by vetoing the decision to refer the situation in Syria to the ICC during the SC conference April 2017.¹²⁵

With Russia and China vetoing a UN SC resolution to refer the situation in Syria to the ICC, it is time once more to look for other avenues. The ICC Prosecutor, Fatou Bensouda, lent her voice in support of accountability for crimes in Syria but acknowledging that without a referral the court is powerless.¹²⁶

This is a severe handicap for the Court. Where the SC fails to refer a case of violation by non-state parties, the Court is helpless. The recent case of Russian war on Ukraine is also illustrative. The case could never be referred to the ICC because Russia is a permanent member of the SC with veto power. The Court could never have had jurisdiction over the crimes committed by Russia in Ukraine if Ukraine didn't accept ICC jurisdiction. It is clear from the foregoing that there is need for a reformation of the SC and its veto system for the ICC to effectively play a role in the deterrence of international crimes and hence maintain peace and security

4) Lack of Police Force and Cooperation by States

Article 9 of the Rome statute is dedicated to matters of international cooperation and judicial assistance and this is clearly stated in article 86. Without its own police force or enforcement mechanism, the ICC is dependent on the cooperation of states parties in the investigation and prosecution of crimes under the jurisdiction of the court. Under article 87(7) of the Rome statute, failure to comply with a request for cooperation authorizes the ICC to make a finding of non-compliance and to refer the matter

¹²¹ Lawrence ,M. 2012. " The United Nations Security Council and the International Criminal Court: Towards a more principled Relationship". Friedrich Ebert Stiftung. p.3

¹²² *Ibid.*

¹²³ *Ibid.*p.12

¹²⁴ www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court. last accessed: 2/08/2023

¹²⁵ www.cnn.com/news last accessed:2/08/2023

¹²⁶ www.opendemocracy.net/opensecurity/luke-moffett/syria-and-international-criminal-court-justic-denied. last accessed: 2/08/2023

to the ASP or to the SC, if the SC had referred the situation being investigated or prosecuted to the court for further action.¹²⁷

In all of its activities, the ICC relies on the international cooperation from states. State parties are obligated to cooperate with the court in its investigations and prosecutions. More specifically, the court may request states parties to assist in the arrest and surrender of persons to the court. Other examples of state cooperation include enforcing the orders and judgments of the ICC such as seizing and forfeiting proceeds of crime, protecting victims and witnesses and allowing the Prosecutor to conduct investigations on the territory of a state. For example, on 17 March 2006, Thomas Lubanga Dyilo was arrested by the Congolese authorities and transferred to the ICC custody after a warrant was issued by the court for his arrest.¹²⁸ Late 2014, the ICC Prosecutor, Fatou Bensouda met with the CAR's Minister for Justice with responsibility for Judicial Reform and Human Rights and the Attorney General in order to discuss the issue of CAR's cooperation with the court, particularly in relation to the investigation opened on 24 September 2014.¹²⁹ Therefore, the success of the ICC almost exclusively relies upon the cooperation of states parties

Member states are required to cooperate with the ICC in its investigation and prosecutions. The ICC may request the arrest and surrender of an individual to the ICC. Hence, when the ICC decides to indict an individual, it may issue a request to a member state or states, specifying the manner in which the member state is expected to cooperate. It will then cooperate with the member state in order to transfer the individual from that state to the ICC which is located in The Hague, Netherlands. If a member state fails to cooperate, however, the Rome statute is largely silent on the repercussions.¹³⁰

While the ICC member states are required to cooperate with the ICC in its investigations and prosecutions under article 98 of the Rome Statute, there are circumstances in which ICC member states are either immune or excused from cooperation.¹³¹ Under article 98(1), member states are not permitted to cooperate with the ICC if the member state has an international obligation or contract that conflict with its duties under the Rome Statute in regards to the "state or diplomatic immunity of a person or property of a third state". Under article 98(2), the member state also does not have to cooperate if it has a binding international agreement with another state and cooperation would cause the member state to breach that agreement.¹³²

Where states fail to cooperate, the ICC is powerless. This can be seen in the case of the Sudanese President Omar Al- Bashir and Russia's President Vladimir Putin.

Of particular relevance is the *Al-Bashir case* before the Court, in which the Pre-trial Chambers and the Appeals Chamber have jointly issued eight decisions ruling that certain states party had violated their obligations under the Statute when they refused to arrest and surrender Al-Bashir to the Court, including Chad, Malawi, Congo, Djibouti, Uganda, South Africa and Jordan.¹³³

The International Criminal Court (ICC) has issued an arrest warrant for Russian President Vladimir Putin, accusing him of responsibility for the war crime of illegal deportation of children from Ukraine.

¹²⁷ Kenyans for Peace, Truth and Justice, "All Bark, No Bite ? : State Cooperation and the International Criminal Court", *Unpublished*, 2014.p.2 Also available on <http://kptj.africog.org/all-bark-no-bite-state-cooperation-and-the-international-criminal-court/> last accessed: 02/08/2023

¹²⁸ *Ibid*

¹²⁹ *Ibid*.pp.2,3

¹³⁰ Gwen P. Barnes, ' The International Criminal Court's Ineffective Enforcement Mechanisms : The Indictment of President Omar Al Bashir', *Fordham International Law Journal*, Vol. 34, 2011.pp.1593-1595

¹³¹ *Ibid*.p.1597.

¹³² *Ibid*; Article 98(2), Rome Statute of the ICC, 1998, explaining that a member state may not be requested to 'act inconsistently with its obligations under International Law.

¹³³ <https://www.ejiltalk.org/do-states-party-to-international-criminal-court-statute-have-the-obligation-to-arrest-vladimir-putin/> Accessed: 02/08/2023

In its first warrant involving Ukraine, the ICC called for Putin's arrest on suspicion of unlawful deportation of children and unlawful transfer of people from the territory of Ukraine to the Russian Federation. The ICC, which has no powers to enforce its own warrants, also issued an arrest warrant for Maria Alekseyevna Lvova-Belova, the Russian Commissioner for children's rights. Russia, which is not a party to the court, said the move was meaningless. Moscow has repeatedly denied accusations that its forces have committed atrocities since it launched a full-scale invasion on its neighbour in February 2022.¹³⁴ According to the statute, all state parties have the legal obligation to cooperate fully with the court. This includes the obligation to arrest a person in respect to arrest warrants issued.¹³⁵

Putin faces arrest if he sets foot in any of the 123 signatory states to the statute. Of these, 33 are African states. The issue could come to a head in August (22nd – 24th) when South Africa is set to host the 15th summit of the Brazil, Russia, India, China and South Africa (BRICS) bloc in Durban. As the head of a member state, Putin has been invited to attend. But as a member of the court, South Africa is obliged under Article 86 of the ICC statute and domestic law to cooperate fully by arresting the Russian president. This is not the first time the country has faced such a dilemma. In 2015 Sudanese president Omar Al Bashir visited the country to attend a summit of African Union Heads of state. In terms of South Africa's ICC obligations, it was obliged to arrest Al Bashir, who had been indicted for violations of international humanitarian law and human rights law in Sudan's Darfur region. The government, then under the presidency of Jacob Zuma, refused to arrest him, citing immunity from prosecution for sitting heads of state under international law.¹³⁶

The arrest warrant for Putin has put President Cyril Ramaphosa's government between a rock and a hard place. Complying with its domestic and international obligations by executing the arrest warrant would alienate Russia. This would have bilateral consequences. The country is still considered a friend by the ruling African National Congress based on the Soviet Union's support during the struggle against apartheid as well as ramifications within the BRICS, given Moscow's strong ties with Beijing. It is not unreasonable to argue that Ramaphosa's government would want to tread carefully to avoid any such tensions.¹³⁷

The second Russia–Africa Summit was held at the Expo Forum in St. Petersburg on 27 and 28 July 2023, following its postponement, having been originally scheduled for October 2022 at the African Union headquarters in Addis Ababa. Attended by 49 delegations, 17 Heads of state participated in the summit, with 43 previously attending in the first summit in 2019.¹³⁸ This is an indication that these states are not willing to cooperate with the ICC to enable the arrest of President Putin and Belova coupled with the threat of withdrawal from the Court by some African States backed by the African Union.

The success of the ICC is determined by the level of cooperation it receives from states. Having no police force, military or territory of its own, the ICC relies on state parties to, among other things, arrest individuals and surrender them to the court, collect evidence and serve documents in their respective territories. Without this assistance, the ICC will encounter difficulty conducting its proceedings. The Rome statute of the ICC recognizes the importance of state cooperation to the effective operation of the ICC. The duty to cooperate with the ICC imposed on state parties by the

¹³⁴ <https://www.aljazeera.com/news/2023/3/17/all-you-need-to-know-about-the-iccs-arrest-warrant-for-putin> Accessed: 02/08/2023

¹³⁵ <https://www.aljazeera.com/news/2023/3/17/qa-what-the-icc-arrest-warrants-mean-for-russias-putin> Accessed: 02/08/2023

¹³⁶ <https://theconversation.com/icc-arrest-warrant-for-vladimir-putin-a-king-size-dilemma-for-south-africa-202528>
Accessed: 02/08/2023

¹³⁷ *Ibid.*

¹³⁸ <https://summitafrica.ru/en/> Accessed: 02/08/2023

Rome statute is twofold: a general commitment to cooperate and an obligation to amend their domestic laws to permit cooperation with the court.¹³⁹

It is clear from the above that the ICC is powerless without States cooperation and the existence of these hindering factors is also an impediment to the actual discharge of its functions. Without a police force of its own, the Court cannot effect arrests without member States. Many perpetrators are at large including Vladimir Putin and Belova. This is a serious handicap for the Court to actually perform its functions to maintain peace and hence prevent the occurrence of these crimes. This is especially so as African states form a majority of signatories of the Rome Statute. The threat by some African States to withdraw from the Court backed by the AU is a serious impediment as they are not willing to cooperate with the ICC.

Theoretical Analysis

This research is based on the theory of Deterrence. The classical theory of deterrence developed from the works of three Philosophers; Thomas Hobbes (1651), Cesare Beccaria (1764) and Jeremy Bentham (1789). They believed that if punishment is severe, certain and swift (celerity), a rational individual will weigh potential gains and losses before engaging in illegal activities and will be discouraged from breaking the law if the loss is greater than the gain.¹⁴⁰

Severity of punishment is believed to be one of the key elements implemented by Criminal Law to encourage citizens to obey the law. Certainty of being caught and the punishment imply that the sanction is more likely to be implemented against the offender if the crime is committed. Further, it has been proposed that the punishment must be swift (Celerity) in order to deter the crime. Classical deterrence theory consists of these three components; Severity, Certainty and Celerity of the punishment.¹⁴¹ Severity has been measured by length of prison sentence and certainty by detection rates or arrest rates. Celerity as a component has rarely been empirically tested, yet Policymakers commonly assume that access to speedy justice is crucial both for reducing crime and satisfying the interest of victims.¹⁴²

This study is based on the deterrence theory which works with these three key components; certainty, severity and celerity. According to this study, the certainty of perpetrators of international crimes being caught and punished will enable the ICC to effectively deter these crimes. This can only be so with a Standing Police force to effect arrests and with the cooperation of States. This will solve of the problem of culprits being at large and will deter the commission of these crimes.

More severe punishments and imprisonment terms by the ICC will equally deter the commission of these crimes. More severe punishments can be introduced through the amendment of the Rome Statute.

The swiftness of investigations, prosecutions and punishments by the ICC will help deter the commission of these crimes. One of the criticisms against the Court is the delay in justice. Thus, the common saying, “Justice delayed is justice denied”. The Court will be more effective in deterring international criminality if investigations, prosecutions and sanctions are carried out swiftly upon the commission of these offences. This will send a warning signal to prospective perpetrators and will help deter the commission of these crimes. In all these, the cooperation of States is relevant.

2.0 METHODOLOGY

¹³⁹ Valerie Oosterveld et al., “The Cooperation of States with the International Criminal Court”, *Fordham International Law Journal*, Vol. 25, 2001.p.767

¹⁴⁰ Juste, A et al. (2022). “ Classical Deterrence Theory Revisited: An Empirical Analysis of Police Force Areas in England and Wales”. Available at : <https://journals.sagepub.com/doi/10.1177/14773708211072415> Accessed: 8/08/2023

¹⁴¹ *Ibid*

¹⁴² *Ibid*.

The methodology adopted in this research is the qualitative research method appropriate in Law, that is, doctrinal because attention is paid to theory as opposed to practice. Data is generated from content analyses of primary sources like Statutes, Case law and secondary sources like textbooks, journals and internet. Analyses are made from findings and recommendations follow.

3.0 FINDINGS

Findings reveal that the Court can actually have a deterrent effect on international crimes though total deterrence is unrealistic since crimes can't completely be eliminated.

Also, the Court has not been very effective in deterring and preventing international criminality due to the hindering factors especially the lack of cooperation from States and lack of universal jurisdiction.

Early investigations, arrests and prosecutions will help prevent the commission of these crimes.

4.0 CONCLUSION AND RECOMMENDATIONS

Conclusion

Since its entry into force, the ICC has carried out a number investigations, prosecutions and sanctions coupled with other activities fulfilling the purpose of its creation as enshrined in the preamble of the Rome Statute. Many have criticized the Court for its inability to put an end to impunity and hence deter the commission of these serious crimes. But recent trends have revealed that, the ICC can play a great role in deterring these crimes if the hindering factors are alleviated. The opening of investigations in Afghanistan against the United States and the current arrest warrants against President Vladimir Putin and Belova for war crimes have sent a warning signal to great nations that the hand of international justice is long enough to reach them. Truth be spoken, the Court cannot have a complete deterrent effect. This however does not mean that the Court does not have a general deterrent effect on violations. It can be considered a mechanism to restrain and suppress grave violations rather than expect it to carry out a total deterrence that national courts have failed to accomplish. Deterrence can be partial since crimes cannot completely be eliminated.

Recommendations

From the above, a number of recommendations can be made which can help the Court to be more effective in prosecuting, punishing and preventing international criminality;

- a) The ICC can setup Truth and Reconciliation Commissions to reconcile societies and prevent reignitement of wars. This will not only help in the maintenance of peace momentarily but will prevent future reoccurrence of wars.
- b) The Court can also encourage peacekeeping and peace building activities. This will help restore peace and prevent future violations.
- c) For the Court to effectively deter and prevent international crimes, there is need for an amendment of the Rome Statute to enable the Court exercise jurisdiction over non-state parties and hence universal jurisdiction. This will send a warning signal to States which for obvious reasons failed to ratify the Rome Statute thinking that the hand of international justice will not be long enough to reach them.
- d) The presence of police deters. To solve the issue of effecting arrests and perpetrators being at large, there is need for a Standby Police force with universal jurisdiction to effect arrests. This may be costly but will help deter the commission of international crimes since perpetrators will understand there is certainty of being caught.
- e) Imposition of harsher sanctions may also have a deterrent effect.
- f) The ICC can cooperate with States to deter these crimes at the national level. The Court can sensitize states through their outreach programs on deterrence. The population can be educated

to fight addictions, poverty, corruption, encourage respect for human rights, address mental illnesses and other root causes of these heinous crimes.

- g) The referral system by the SC should be uplifted and replaced with universal jurisdiction since the SC in most cases have failed to refer cases of violation to the Court. In the same light, the majority voting system should replace the veto system at the UNSC. This will help to eliminate the bias caused by the veto system and enable the ICC to investigate and prosecute these offences.
- h) P5 member States involve in gross human rights violations should be suspended and replaced. This will send a warning signal to SC member states and will help deter heinous crimes.

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Conflict of Interest

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REFERENCES

- Abramovaite, Juste., et al., “ Classical Deterrence Theory Revisited: An Empirical Analysis of Police Force Areas in England and Wales”, 2022.
- Akande, Dapo., “The Jurisdiction of the ICC over Nationals of Non-Parties : Legal Basis and Limits”, *Journal of International Criminal Justice*, 2003.
- Askins, Kelly., “Crimes within the Jurisdiction of the International Criminal Court”, *Criminal Law Forum*, 1999.
- Assembly of States Parties., “Strategic Plan for Outreach of the International Criminal Court”, Fifth Session, The Hague, 2006.
- Badagard, Lovisa and Klamberg, Mark., “ The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting situations and cases at the International Criminal Court”, *Georgetown Journal of International Law*, Vol. 48, 2017.
- Bakibinga, David., “Prosecutorial Discretion and Independence of the ICC Prosecutor: Concerns and Challenges”, *Revisita Academica Oscola Superior do Ministerio Publico do Ceara*, 2018.
- Barnes, Gwen., “The International Criminal Court’s Ineffective Enforcement Mechanisms : The Indictment of President Omar Al Bashir”, *Fordham International Law Journal*, Vol. 34, 2011.
- Baros, Miroslav., “ The Establishment of the International Criminal Court: Institutionalizing Expedience?”, *Hertfordshire Law Journal*, 2003.
- Bekou, Olympia., “The International Criminal Court and Universal Jurisdiction : A closed Encounter ?”, *International and Comparative Law Quarterly*, 2007.
- Butler, Hays., “The Doctrine of Universal Jurisdiction: A Review of the Literature”, *Criminal Law Forum*, 2000.
- Chalfin, Aaron and McCrary, Justin., “ Criminal Deterrence: A Review of the Literature”, *Journal of Economic Literature*. Vol.55. Issue. 1, 2017.
- Clarke, Kamari., *Fictions of Justice*, (Cambridge : University Press, 2009).
- Amella Couture, Amella., “The Politics of International Justice: The Security Council’s Impact on the Independence, Effectiveness and Legitimacy of the International Criminal Court”, *McGill Center For Human Rights and Legal Pluralism*, Vol. 3, 2015.
- Cryer, Robert et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed., (Cambridge: University press, 2010).
- Ellis, Mark., “The International Criminal Court and Its Implications for Domestic Law and National Capacity Building”, *Florida Journal of International Law*, 2002.
- Gallon, Gustavo., “Deterrence: A Difficult Challenge for the International Criminal Court”, The Helen Kellogg Institute for International Studies. Working Paper No. 275, 2000.
- Gladius, Marlies., *The International Criminal Court*, (New York: Routledge, 2006).
- Global Justice Center., “ The International Criminal Court Investigations into the situation in Bangladesh/Myanmar”, *FactSheet*, 2020.
- Hoile, David., *Justice Denied :The Reality of the International Criminal Court*, (London : The African Research Centre, 2014).
- International Bar Association., “ICC Monitoring and Outreach Programme: First Outreach Report”, *An International Bar Association Human rights Report*, 2006.

- Johnson, Ben., “Do Criminal Laws Deter Crimes? Deterrence Theory in Criminal Justice Policy: a Primer”, Minnesota House Research Department, 2019.
- Kenya for Peace, Truth and Justice., “All Bark, No Bite ? : State Cooperation and the International Criminal Court”, *Unpublished*, 2014
- Laucci, Cyril., *The Annotated Digest of the International Criminal Court*, (Netherlands: Martinus Nijhoff Publishers, 2007).
- Human Rights watch., “The International Criminal Court: How Non-Governmental Organisations can contribute to the Prosecution of War Criminals”, Human Rights Watch. 2004.
- International Refugee Rights Initiative., “In the Interest of Justice? Prospects and Challenges for International Justice in Africa”, 2008.
- Kittichaisaree, Kriangsak., *International Criminal Law*, (Oxford: University press, 2003).
- Majzub, Diba., “Peace or Justice? Amnesties and the International Criminal Court”, *Melbourne Journal of International Law*, 2002.
- Mariniello, Triestino., “**Prosecutor v. Thomas Lubanga Dyilo** : The first judgment of the International Criminal Court’s Trial Chamber”, *International Human Rights Law Review*, 2012.
- McGoldrick, Dominic et al (eds)., *The Permanent International Criminal Court*, (Oxford: Hart Publishing, 2004).
- Moss, Lawrence., “The United Nations Security Council and the International Criminal Court: Towards a more principled Relationship”. Friedrich Ebert Stiftung. 2012.
- Oosterveld, Valerie et al., “The Cooperation of States with the International Criminal Court”, *Fordham International Law Journal*, Vol. 25, 2001.
- Raimondo, O. Fabian., *General Principles of Law in the Decisions of International Criminal Court and Tribunals*, (Leiden: Martinus Nijhoff Publishers, 2008) .
- Ryngaert, Cedric., “The International Criminal Court and Universal Jurisdiction”, *Leuven Centre for Global Governance Studies, Working Paper No. 46*, 2010.
- U.S Department of Justice., “Five Things about Deterrence”. National Institute of Justice, 2016.
- Van der Vyver, Johan D., “Prosecuting the President of Sudan: A Dispute between the African Union and the International Criminal Court”, 2011
- Waddell, Nicholas and Clark, Phil., “Courting Conflict? Justice, Peace and the ICC in Africa”, *Royal African Society*, 2008.
- Wouters, Jan and Chan, Kenneth., “Policies, Not Politics: The Pursuit of Justice in Prosecutorial Strategy at the International Criminal Court”, *Leuven Centre for Global Governance Studies*, 2012.
- <https://www.icc-cpi.int/sites/default/files/ICCAAtAGlanceEng.pdf> Accessed: 11/07/2023
- <https://www.icc-cpi.int/about/presidency> Accessed: 11/07/2023
- <https://www.icc-cpi.int/sites/default/files/Publications/otpENG.pdf> Accessed: 11/07/2023
- <https://www.icc-cpi.int/situations-under-investigations> Accessed: 11/07/2023
- <https://www.aba-icc.org/about-the-icc/structure-of-the-icc/> Accessed: 11/07/2023
- <https://www.icc-cpi.int/situations/ukraine> Accessed: 13/07/2023
- <https://www.icc-cpi.int/venezuela-i> Accessed: 13/07/2023

<https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/> Accessed: 13/07/2023

<https://www.icc-cpi.int/afghanistan> Accessed: 13/07/2023

https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf Accessed: 13/07/2023

<https://www.icc-cpi.int/cases> Accessed: 13/07/2023

<http://www.refugee-rights.org/2008/in-the-interest-of-justice-propects-and-challenges-for-international-justice-in-africa/> Accessed: 13/07/2023

<https://www.icc-cpi.int/pages/record.aspx?uri=266175> Accessed: 13/07/2023

<https://www.icc-cpi.int/drc/ntaganda> Accessed: 13/07/2023

<https://www.icc-cpi.int/drc/katanga> Accessed: 13/07/2023

<https://www.icc-cpi.int/mali> Accessed: 13/07/2023

https://www.icc-cpi.int/cases?f%5B0%5D=accused_states_cases%3A358 Accessed: 13/07/2023

<https://www.ejiltalk.org/the-icc-arrest-warrants-against-vladimir-putin-and-maria-lvova-belova-an-outline-of-issues/> Accessed: 2/08/2023

<https://ghum.kuleuven.be/new-series-the-international-criminal-court-and-universal-jurisdiction/> last accessed: 02/08/2023

www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court. last accessed: 2/08/2023

www.cnn.com/news last accessed: 2/08/2023

www.opendemocracy.net/opensecurity/luke-moffett/syria-and-international-criminal-court-justice-denied. last accessed: 2/08/2023

<http://kptj.africog.org/all-bark-no-bite-state-cooperation-and-the-international-criminal-court/> last accessed: 02/08/2023

<https://www.ejiltalk.org/do-states-party-to-international-criminal-court-statute-have-the-obligation-to-arrest-vladimir-putin/> Accessed: 02/08/2023

<https://www.aljazeera.com/news/2023/3/17/all-you-need-to-know-about-the-iccs-arrest-warrant-for-putin> Accessed: 02/08/2023

<https://www.aljazeera.com/news/2023/3/17/qa-what-the-icc-arrest-warrants-mean-for-russias-putin> Accessed: 02/08/2023

<https://theconversation.com/icc-arrest-warrant-for-vladimir-putin-a-king-size-dilemma-for-south-africa-202528> Accessed: 02/08/2023

<https://summitafrica.ru/en/> Accessed: 02/08/2023

<https://journals.sagepub.com/doi/10.1177/14773708211072415> Accessed: 8/08/2023

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